Cookies, The Constitution, and The Common Law: A Framework for the Right of Privacy on The Internet

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> *That the individual shall have the full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.*
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> —Samuel D. Warren and Louis D. Brandeis[1]

As in Warren and Brandeis' day, the time has come again for the common law to grow to meet the demands of a new economy and an enlightened citizen. The information age has created new flows of personal information that endanger our well-ordered society.[2] Personal information about your salary, your neighbors, your credit history, your hobbies, your social security number, the numbers of most of your major bank accounts and the name of your family dog can all be found online for a price, some even for free.[3] The public has called on Congress to eliminate many of these practices.[4]

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[1] Samuel D. Warren and Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

[2] Jeffrey Rosen, *The Eroded Self*, N.Y. TIMES MAGAZINE, April, 30, 2000. http://www.nytimes.com/library/magazine/home/20000430mag-internetprivacy.html; Tarver v. Smith, 402 U.S. 1000, 91 S.Ct. 2175, 29 L.Ed.2d 166 (1971)("The ability of the government and private agencies to gather, retain, and catalogue information on anyone for their unfettered uses raises problems concerning the privacy and dignity of individuals.")(Douglas, J., dissenting from denial of petition for certiorari); Wiseman v. Mass., 398 U.S. 960, 90 S.Ct. 2165, 26 L.Ed.2d 546 (1970)("At the same time it must be recognized that the individual's concern with privacy is the key to the dignity which is the promise of civilized society.")(Harlan, J., dissenting from denial of petition for certiorari).

[3] CHARLES J. SYKES, THE END OF PRIVACY, 3-4 (1999).

At present, the competing interests in the privacy debate have prevented comprehensive legislation from passing.[5] But the public does not have to wait for Congress to act. A right of privacy already exists within the common law, reinforced by the United States Constitution, that will create a workable solution to the privacy dilemma.

Solving the privacy debate is a task that the common law is particularly well-suited for because it can adapt to changing views and perspectives without requiring new legislation or regulations.[6] The common law application of privacy can withstand U.S. Constitutional challenge because the right of privacy exists within the U.S. Constitution.[7]

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[4] Steve Lohr, *Survey Shows Few Trust Promises on Online Privacy*, N.Y. TIMES, Apr. 17, 2000, cites an Odyssey study that found that 82% of the population agreed that government should regulate how online companies use personal information.

[5] Declan McCullagh, *Regulating Privacy: At What Cost?*, WIRED NEWS, September 19, 2000, http://www.wired.com/news/print/0,1294,38878,00.html. David McGuire, *Tech Lobbyists Prepare to Wade Into Privacy Debate*, NEWSBYTES, January 12, 2001, http://www.newsbytes.com/news/01/160417.html. David McGuire, *US Chamber Vows to Fight Privacy Legislation*, NEWSBYTES, January 9, 2001, http://www.newsbytes.com/news/01/160268.html. Carrie Kirby, *Spotlight on Privacy*, SAN FRANCISCO CHRONICLE, January 29, 2001, http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/01/29/BU144697.DTL.

[6] Judicial interpretation of statutory and constitutional principles is a time tested tradition that has proven an effective means for the maintenance of a free society. As the Supreme Court stated in *Weems v. U.S.*, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910), "Legislation, both statutory and constitutional, is enacted,…from an experience of evils…its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken….[A] principle, to be vital, must be capable of wider application than the mischief which gave it birth." Statutory creation, on the other hand, has proven to be a lengthy and convoluted process. For instance, in 1996, Congress passed the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (1996). The law gave Congress three years to act on health information privacy. 42 U.S.C.A. § 1320d-2. If Congress failed to pass health privacy legislation within three years, then the job fell to the Department of Health and Human Services (DHHS) to issue regulations by August 21, 1999. Of course, Congress failed to enact subsequent legislation and the DHHS issued proposed regulations in November of 1999. The DHHS received 52,000 comments on the proposed regulations which took it until late December of 2000 to sift through and issue final regulations. These regulations were again opened up for comments in February 2001 and received another 24,000 comments. In whatever form these regulations finally take, they will, undoubtedly, be subject to court challenge. Hence, it has already taken over five years and hundreds of lobbyists to obtain regulations for health privacy based on a statute and current technology that has long since ceased to be at the cutting edge.

[7] "I do not believe that the First Amendment precludes effective protection of the right of privacy….There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy…" Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967)(Fortas, J., dissenting). *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579, 100 S.Ct.

The U.S. Constitution provides the framework for a common law right to privacy that can be applied to the use of the Internet in modern times.

This article will discuss the advances in technology that have drawn focus to the issue of the public's right to privacy. In many instances, the U.S. Constitution has been recognized to contain the basis for a citizen's right to privacy that will add significant force to one's common law right to privacy. Tracing the development of the right to privacy in various contexts of the law, this article will demonstrate that a common law right to information privacy exists with sufficient definition for the modern court to use and provides a framework for understanding that right. Finally, this article will examine what the right of information privacy should look like as judicially created or statutorily enacted.

A. COOKIES AND WHAT YOU HAD FOR LUNCH

The Internet has become a vast global medium of interconnected computers that allow any person to access a wealth of information and services.[8] The Internet has often been described as a "network of networks"[9] and "a unique and wholly new medium of worldwide communication."[10] In order to understand how a legal framework would apply, it is useful to understand how the technology works. Each separate component of the Internet, such as a computer, router, or network, must have a unique numeric

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2814, 2828, 65 L.E.2d 973 (1980)("…[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.")

[8] Reno v. ACLU, 521 U.S. 844, 849, 117 S.Ct. 2329, 2334 (1997).

[9] *Id.*

[10] *Id.* at 850.

"address." A unique identifier is required to enable one connected computer or network to identify and send information to another connected computer or network.[11] A system of protocol was developed to designate these numbers, which are known as Internet Protocol addresses or "IP addresses."[12] The Internet is actually a conglomeration of many different types of fora, including electronic mail, mail exploders, newsgroups, and chat rooms, all being transacted simultaneously. The most well-known method of communication over the Internet is the World Wide Web or, more simply, the "Web."[13]

The Web is comprised of billions of separate "websites" that, when requested, display information provided by particular individuals and organizations to a particular person anywhere in the world.[14] In order for an individual to view a website, the individual must request that the computer "hosting" the website deliver the content of the website to the individual's computer.[15] Following the request, the "host" computer of the website "serves" back the files, images, and text that make up the website and that information is reassembled on the user's computer screen using a web browser.[16] The entire process takes only a few milliseconds and, to the user, occurs seamlessly.

One problem with the system is that the IP address of the user's computer may, and usually will, change from day-to-day, session-to-session.[17] Hence, the host computer cannot recognize that the user has previously visited the website without some

[11] National A-1 Advertising, Inc. v. Network Solutions, Inc., 121 F.Supp.2d 156, 159 (D.N.H. 2000).
[12] Island Online, Inc. v. Network Solutions, Inc., 119 F.Supp.2d 289, 292 (2000).
[13] National A-1 Advertising, Inc., 121 F.Supp.2d at 163.
[14] American Libraries Ass'n v. Pataki, 969 F.Supp. 160, 166 (S.D.N.Y. 1997).
[15] National A-1 Advertising, Inc., 121 F.Supp.2d at 163.
[16] *Id.* at 164.
[17] However, the advent of new technology, is again challenging this notion. Cable modem subscribers and most DSL subscribers have static IP addresses. This is because they do not ever have the need to disconnect from the Internet. As long as the connection to the Internet is not severed, the assignment of IP address will be, for all intensive purposes, permanent. Currently, however, this technology is not widely enough used for others to rely on a computer having a static IP address.

independent identifier that is stored with the user's computer.[18] In order to enable website personalization and shopping-cart features, Netscape, in even its earliest browser software, developed "cookies."[19] Rumored to be a reference to the trail of crumbs left by Hansel and Gretel or possibly a term carried over from the early days of computer file-sharing,[20] the cookie is a small text file that is deposited on a user's hard drive. When the user returns to a previously visited website that has left a cookie on the user's computer, the cookie is read by the remote computer server and the user can be recognized.[21] Cookies allow companies to personalize their website to match your interests or remember your name and password. In addition, cookies allow persons to maintain the information in online forms while they are entering the data.[22]

With every advance in technology, there are often unintended consequences. Businesses discovered that they could use cookies to collect and aggregate information about their users.[23] This was the intended use of cookies.[24] Advertising companies went further and developed the use of cookie technology as a means to gather information

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[18] This is known as creating a "persistent client state" session. D. Kristol and L. Montulli, *HTTP State Management Mechanism*, RFC2109 (February 1997), at http://www.cis.ohio-state.edu/htbin/rfc/rfc2109.html.

[19] NETSCAPE, PERSISTENT CLIENT STATE HTTP COOKIES: PRELIMINARY SPECIFICATION, at http://www.netscape.com/newsref/std/cookie_spec.html.

[20] LINGUIST LIST 9.309, *cookies*, at http://www.linguistlist.org/issues/9/9-309.html; THE JARGON FILE. Version 4.2.3, *cookie* (last updated Nov 23, 2000.) at http://www.tuxedo.org/~esr/jargon/html/entry/cookie.html.
"Cookie" was a term used in the early days of computer file sharing to denote a transferred file that contained no data. The apparent reference is to an edible cookie that has no nutritional value, but takes up space. While this is more likely the origin, others claim that the term cookie came from the story of Hansel and Gretal where they leave bread crumbs behind them in order to mark their path. Similarly, cookies leave a trail on your computer of where you have been on the Internet.

[21] Kristol and Montulli, *supra* note 18.

[22] VICTOR MAYER-SCHONBERGER, THE COOKIE CONCEPT, at http://www.cookiecentral.com/c_concept.htm.

[23] Susannah Fox, *Trust and Privacy Online: Why Americans Want to Rewrite the Rules*, PEW INTERNET AND AMERICAN LIFE PROJECT REPORT 8 (August 20, 2000) http://www.pewinternet.org/reports/toc.asp?Report=19.

[24] Kristol and Montulli, *supra* note 18.

about users across time and across disparate and unrelated websites.[25] By gathering this information, advertising companies can specifically target advertising to groups of people most likely interested in a particular product.[26] An advertising company can use any single point of entry, any website, email message, Microsoft document, or software program, to set a cookie to a user's computer that can then be read across other websites that interact with the advertiser's web server.[27] Because an advertiser's cookie is set when the user is visiting another entity's website, it is often referred to as a "third-party cookie."

Unfortunately, this tracking of a user's web activity often occurs without any notice to the user.[28] In fact, one recent survey found that only 23 percent of new users knew what a cookie was. Of users that had been online for more than three years, only 60 percent knew what a cookie was. Yet, 90 percent of Internet users who shop online are being tracked by cookies.[29] The web transaction of information happens seamlessly as a user surfs the web.[30] In some cases, the user does not even see an advertisement on the webpage, but is still tagged with a third-party cookie.[31] Because the computer's interaction with the advertiser's server is not seen by the user, there is little chance that the user would be aware of the transaction without the website giving some indication of

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[25] FEDERAL TRADE COMMISSION, ONLINE PROFILING: A REPORT TO CONGRESS 5 (June 2000).
[26] *Id.* at 9.
[27] *Id.* at 11.
[28] *Id.* at 10-11; MICHIGAN DEP'T OF ATTORNEY GENERAL, NOTICE OF INTENDED ACTION AGAINST DOUBLECLICK ¶ 5-8 (February 17, 2000) http://www.ag.state.mi.us/cp/Highlights%20&%20Updates/dbleclck.pdf (hereinafter DOUBLECLICK NIA).
[29] Fox, *supra* note 23, at 8.
[30] DOUBLECLICK NIA, *supra* note 28, at § II.
[31] This situation occurs when a third-party places a 1x1 pixel picture or gif, commonly referred to as a "web bug," in the web page that causes the user's browser to interact with the third party server and allows the placement of a cookie. *See* MICHIGAN DEP'T OF ATTORNEY GENERAL, NOTICE OF INTENDED ACTION AGAINST PROCRIT.COM ¶ 8 (June 12, 2000) http://www.ag.state.mi.us/cp/Highlights%20&%20Updates/nia_612_1.pdf (hereinafter PROCRIT.COM NIA).

the third party presence. In a Federal Trade Commission survey of a random sample of the busiest websites, 57 percent allowed third parties to set cookies. Only 22 percent of those that allowed third party cookies actually mentioned that fact in their privacy policy.[32] Hence, users have little opportunity to receive notice of where their information is going.

Most information collected using cookies is anonymous because the user's computer does not convey any personally identifiable information about the user to the third party in the process. However, if a user submits personal information to a website, then the third party can begin to create a personally identifiable profile of the user.[33] Further, the information can be combined with off-line data to establish a complete profile that is available for sale to anyone with the money to purchase it.[34] One privacy expert estimates that each third party cookie could represent approximately 300 pages of single spaced information about the user.[35] This ability to connect consumer behaviors with the actual person is what causes the greatest concern to the public. As the Supreme Court has stated, "Although disclosure of…personal information constitutes only a de minimis invasion of privacy when the identities of the [individuals] are unknown, the invasion of privacy becomes significant when the personal information is linked to particular [individuals]."[36]

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[32] FEDERAL TRADE COMMISSION, *supra* note 25, at 11.
[33] *In re* Doubleclick Inc. Privacy Litigation, No. 00-Civ.-0641, slip. op. at 12-13 (S.D.N.Y. March 28, 2001) http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/01-03797.PDF.
[34] *Id.* at 15.
[35] *Hearings on Online Profiling Before the Senate Commerce Comm.*, 106th Cong. (June 13, 2000)(statement of Richard Smith, CIO of the Privacy Foundation) http://www.senate.gov/~commerce/hearings/0613smi.pdf.
[36] U.S. Dep't of State v. Ray, 502 U.S. 164, 176, 112 S.Ct. 541, 548, 116 L.Ed.2d 526 (1991).

The lightening rod for the privacy debate has surrounded the acquisition by a third party advertiser, Doubleclick, Inc., of an offline database of direct-mail catalog purchases, Abacus Direct.[37] After announcing the company's intent to combine offline information with online information and create personally identifiable profiles, Doubleclick was quick to retract after the state Attorneys General and others raised concerns about the possible merger of information.[38] Later the same year, the FTC and the state Attorneys General were all involved in the bankruptcy hearing of a failed dot-com company that sought to add its customer list to its menu of assets for sale.[39] While the sale of customer lists is not a new phenomenon, Toysmart.com had stated in its privacy policy that it would "never" share customer information with a third party.[40] The issue has only recently been resolved by Disney offering to pay for the destruction of the customer list.[41]

In addition to these headline stories, there have been many hearings in Congress and over 200 bills mentioning privacy introduced.[42] In the state legislatures, the number of privacy-related bills that have been introduced is quadruple that. Many have called for

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[37] Bob Tedeschi, *E-Commerce Report: Doubleclick Seeking Ways to Protect Users' Anonymity*, N.Y. TIMES, January 29, 2001, at http://www.nytimes.com/2001/01/29/technology/29ECOMMERCE.html.
[38] *Id.*; DOUBLECLICK NIA.
[39] Objection of States to the Public Sale of Debtor's Customer List, In re: TOYSMART.COM, LLC, No. 00-13995-CJK (Bankr. D. Mass. July 2000); FTC Announces Settlement With Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations, July 21, 2000, at http://www.ftc.gov/opa/2000/07/toysmart2.htm.
[40] Objection of States to the Public Sale of Debtor's Customer List, In re: TOYSMART.COM, LLC, No. 00-13995-CJK (Bankr. D. Mass. July 2000).
[41] Brian Krebs, *Mass. Judge Says Toysmart Can Destroy Customer List*, NEWSBYTES, January 30, 2001, http://www.newsbytes.com/news/01/161230.html.
[42] Patrick Ross, *Internet Bills Get Second Look in Congress*, CNET NEWS.COM, February 20, 2001, http://news.cnet.com/news/0-1005-202-4873228.html. Jennifer O'Neill, *Congress Navigates a Flood of Net Privacy Bills*, PCWORLD.COM, February 20, 2001, http://www.pcworld.com/news/article/0,aid,42002,00.asp.

increased government regulation of privacy on the Internet.[43] The public has stressed that privacy is near the top of its list of important issues facing the United States.[44] In the past, Congress has taken a step-by-step, sector-by-sector approach to encouraging better privacy protections.[45] Hence, American citizens enjoy a strong right of privacy in their video rental records, but a lesser right of privacy in their medical and financial records.[46] As a practical matter, however, the boundary-less Internet and its continually emerging architecture will not allow comprehensive detailed regulations to succeed over the long-term.[47] Congress' inability to enact comprehensive privacy legislation is clear from its history.[48] Further, sector-by-sector regulations leave many gaps and loopholes for information hungry businesses.[49] There is insufficient market motivation for companies to stop collecting information.[50]

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[43] Fox, *supra* note 23, at 8.; Susannah Fox, *Fear of Online Crime: Americans Support FBI Interception of Criminal Suspects' Email and News Laws to Protect Online Privacy*, PEW INTERNET AND AMERICAN LIFE PROJECT REPORT (April 2, 2001) http://www.pewinternet.org/reports/toc.asp?Report=32.

[44] Ronna Abramson, *New Net Study Has Positive Results*, THE STANDARD, October 25, 2000, http://www.thestandard.com/article/0,1902,19694,00.html.

[45] Currently enacted federal legislation includes: Cable Television Privacy Act of 1984, 47 USC § 551 (1994); Children's Online Privacy Protection Act (COPPA) of 1998, 15 USCA § 6501, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721-2725, as amended by Pub. L. 106-69, 113 Stat. 986 (1999); Financial Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act (GLB), 15 USCA § 6801, Pub. L. No. 106-102, 113 Stat. 1338 (1999), Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 U.S.C.A. § 1320d-2, Pub. L. 104-191, 110 Stat. 1936; Fair Credit Reporting Act (FCRA), 15 U.S.C.A. § 1601, *et seq.*; Videotape Privacy Protection Act (VPPA) of 1988, 18 USCA § 2710; Family Education Rights and Privacy Act (Buckley Amendment) of 1974, 20 U.S.C. § 1232g; Privacy Act of 1974, 5 U.S.C. § 552(a).

[46] The Videotape Privacy Protection Act does not allow disclosure of video rental records unless the company obtains the customer's consent (opt-in). Both the pending regulations issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Financial Modernization Act of 1999 (also known as the Gramm-Leach-Bliley Act or GLB) legislation allow disclosure of information on an opt-out basis. Thus, a customer must affirmatively state that he/she does not want personal information shared in order to prevent or stop its dissemination. In the case of GLB, there may not even be a right to opt-out if the information is being shared among affiliates. In the case of HIPAA, the right to opt-out only occurs after you have received some targeted marketing.

[47] David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 157 (1996).

[48] *See supra* note 6; Declan McCullagh and Ryan Sager, *Privacy Laws: Not Gonna Happen*, WIRED NEWS, March 2, 2001, http://www.wired.com/news/print/0,1294,42123,00.html.

[49] For instance, the Videotape Privacy Protection Act (VPPA), was enacted, essentially, to protect the video rental or purchase record of a consumer when a video is purchased or rented from a store. Current

Without legislative enactments, the public has relied on the courts and existing laws to preserve their right to privacy. Both the FTC and the state Attorneys General have attempted to use laws regarding deceptive trade practices as a means to force companies to disclose their information practices.[51] The effectiveness of these actions has been merely a flesh wound on the business practices of many companies and creates a disincentive to disclosure.[52] While these theories have not been directly tested in court, both the FTC and the state Attorneys General have called on Congress to enact legislation.[53]

The judiciary, while not a policy making branch of government, often exercises control over novel issues of law where fundamental rights are at stake.[54] With a Congress and Presidency largely locked in gridlock over the past few decades, the

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technology, however, allows a person to order videos that are delivered to the person's television instantaneously without any need for the physical "prerecorded video cassette tape" that is protected by the statute. 18 U.S.C. § 2710 (a)(4). It is arguable that the VPPA does not apply to the later situation by definition. Hence, technology will continue to defy the limits of definition created by statute.

[50] The bankruptcy of Toysmart.com is the clearest example demonstrating that companies have little incentive to protect consumer information, especially as creditors want to recover some value from dot.com companies.

[51] Michigan Attorney General initiatives can be found at http://www.ag.state.mi.us/cp/Highlights%20&%20Updates/Highlights%20and%20Updates.htm. For a list of FTC activities, see http://www.ftc.gov/privacy/index.html. *See also* Chris Oakes, *Michigan Warns Sites on Privacy*, WIRED NEWS, June 14, 2000, http://www.wired.com/news/print/0,1294,36967,00.html; Will Rodger, *Sites Targeted for Privacy Violations*, USA TODAY, June 13, 2000, http://www.usatoday.com/life/cyber/tech/cti085.htm.

[52] Under the Federal act enforced by the FTC, a company can only run afoul of the law if it misstates and misrepresents its privacy practices. Hence, either having no privacy policy or a very weak policy would seem to prevent the FTC from taking action. The Michigan Attorney General's office, however, has used its Consumer Protection Act, MICH. COMP. LAWS §§ 445.901 - 445.922, which covers "omissions" to force companies to disclose privacy practices. *See* MICHIGAN DEP'T OF ATTORNEY GENERAL, NOTICE OF INTENDED ACTION AGAINST STOCKPOINT.COM (June 12, 2000) http://www.ag.state.mi.us/cp/Highlights%20&%20Updates/nia_612_3.pdf.

[53] At present, all of the Michigan Dep't of Attorney General Notices of Intended Action and the FTC's enforcement actions have been resolved by settlement. The FTC called for legislation in its May 2000 report to Congress. FEDERAL TRADE COMMISSION, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE 36 (May 2000). The National Association of Attorneys General (NAAG) created a report calling for privacy legislation. NAAG, PRIVACY PRINCIPLES AND BACKGROUND (2001) http://www.naag.org/features/SubReport.cfm.

[54] William J. Fenrich, *Common Law Protection of Individual's Rights in Personal Information*, 65 FORDHAM L. REV. 951, 978-985 (1996).

judiciary has been forced, in the context of cases, to determine the course of social policy.[55] Fortunately, the judiciary does not decide policy-laden cases within a vacuum, but has the wisdom of many generations of legal scholars interpreting the basic rights of humankind.[56] Indeed, the doctrine of *stare decisis* requires that courts are obligated to rely on precedent to fashion changes in the common law.[57] Therefore, the judiciary must rely on its strong traditional recognition of privacy as a fundamental right innate in the concept of ordered liberty.[58]

B. THE U.S. CONSTITUTION: READING BETWEEN THE LINES

The "right" of privacy has been discussed in over 700 Supreme Court opinions since the founding of the United States and in many more lower court opinions over the same time. While the right of privacy has a long and tortured history of adjudication under the Fourth Amendment as against the government, there have been numerous opinions that have discussed privacy as a right fundamental to the nature of humankind. Modern scholars credit John Locke for setting forth the concept of human rights. He states that "it [government] ought to have the authority which reasonable men, living together in a community, considering the rational interests of each and all, might be

[55] In the most recent century, the Supreme Court has decide two very notable policy cases. The Court ordered the desegregation of schools in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) and established the legality of abortion in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).
[56] Warren and Brandeis, *supra* note 1, at 213, n. 40.
[57] "Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419-420, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983).
[58] Whalen v. Roe, 429 U.S. 589, 605, 97 S.Ct. 869, 879, 51 L.Ed.2d 64 (1977).

disposed to submit willingly. . . ."[59] Thomas Jefferson continued this argument in the Declaration of Independence by declaring that "all men. . . are endowed by their creator with certain inalienable rights; that among these are life, liberty & the pursuit of happiness."[60] As with most fundamental rights, the right of privacy has been developed and refined in court decisions over time.

Even from the dawn of creation, people have felt the need for privacy.[61] The Founding Fathers were very aware of the need for privacy during the drafting of the United States Constitution. Hence, the Constitutional Convention was completely closed to the outside world until a final document was achieved.[62] Every day, in court rooms around the country, juries meet and deliberate in private rooms to determine the fate of cases.[63] Several times each year, millions of Americans seek to cast their votes for the leadership of the government in the privacy of the voting booth.[64]

Scholars have long believed that the nature of humanity involves a sense of and a need for privacy.[65] People are much more conservative in their actions and speech when they feel they are being watched. An Orwellian future could result in political apathy as anyone could determine the outcome of an election based on a proper algorithm

[59] CARL BECKER, THE DECLARATION OF INDEPENDENCE 71 (1922).
[60] THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[61] "And he[Adam] said, 'I heard the sound of thee in the garden, and I was afraid, because I was naked; and I hid myself.' " *Genesis* 3:10.
[62] U.S. v. Nixon, 418 U.S. 683, 705, n. 15, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974)("There is nothing novel about government confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the Convention (internal citations omitted).")
[63] U.S. v. Olano, 507 U.S. 725, 726, 113 S.Ct. 1770, 1773, 123 L.Ed2d 508 (1993)("…the purpose of such privacy is to protect deliberations from improper influence.")
[64] State ex rel. Ellis v. Eaton, 143 Misc.2d 816, 541 N.Y.S.2d 287 (N.Y.Sup. Nov 22, 1988), *aff'd*, 154 A.D.2d 894, 546 N.Y.S.2d 987 (N.Y.A.D. 4 Dept. Oct 06, 1989).
[65] Rosen, *supra* note 2, at *12-13; CHARLES J. SYKES, THE END OF PRIVACY 7 (1999).

generated from the massed electronic personas of the populous.[66] Philosophical scholar Milan Kundera argues that freedom is impossible in a society that refuses to respect the fact that "we act different in private than in public." Kundera argues that privacy is part of a reality that he calls "the very ground of the life of the individual."[67] The California Supreme Court noted, "Privacy rights also have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure."[68]

With all of the demand for privacy and those that argue its fundamental nature to humankind, why is there no express mention of it in the Constitution? This is a question that will continue to ponder scholars for years to come. However, most of what we consider our fundamental freedoms were written in an age where privacy was not under attack. Distance and value made privacy possible. The Framers were aware of the need for privacy as against government. Hence, the Fourth Amendment was enacted to safeguard people in the privacy of their homes. However, the need for privacy as against private parties is a relatively recent phenomena.[69] With the growing demand, more

[66] "Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC. In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. The patrols did not matter, however. Only the Thought Police mattered." ORWELL, NINETEEN EIGHTY-FOUR 4 (1949).
[67] Rosen, *supra* note 2, at *13.
[68] Hill v. NCAA, 7 Cal.4th 1, 25, 865 P.2d 633, 647, 26 Cal.Rptr.2d 834, 849 (1994).
[69] In terms of the common law, a defined right of privacy has only existed since the late 1800's. The right to privacy did not exist in its current form until Warren and Brandeis seminal article on privacy. Warren and Brandeis, *supra* note 1, at 193.

recently enacted state constitutions have included an express right to privacy.[70] While an express right cannot be found in the federal Constitution, the U.S. Supreme Court has concluded in several cases that the concept of privacy is something embedded in the fine mesh of the Constitution and the Bill of Rights.[71] An analysis of these cases aids the development of the framework of the right of information privacy.[72]

Privacy was first discussed in a Supreme Court case in 1894.[73] In that case, several people were called to appear before the Interstate Commerce Commission to

[70] ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."); ARIZ. CONST. art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); HAWAII CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."); LA. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy…."; MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); S.C. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated…."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")

[71] "Although '(t)he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' " Carey v. Population Services Int'l, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977), *quoting*, Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). *See also* Griswold v. Conn., 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The Supreme Court has determined that the right of privacy is fundamental and that infringement on that right must be justified by a compelling state interest. Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

[72] This analysis of Supreme Court cases is not meant to suggest that the Bill of Rights through the Fourteenth Amendment can be applied against private entities in this instance, but merely to illustrate that privacy is a fundamental right and outline the scope of that right. Only as a fundamental right can the right of privacy be held up against the Bill of Rights and survive a balancing test against other fundamental rights such as the freedom of speech and association. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

[73] There are references to something akin to the right of privacy discussed in prior cases using different terms. For instance, the Supreme Court said in 1891, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own

answer questions and turn over certain books. Justice Harlan repeated the principle stated in *Boyd v. U.S.*,[74] ". . . –and it cannot be too often repeated, –that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of government and its employes [sic] of the sanctity of a man's home and the privacies of his life." Justice Harlan continued by quoting the opinion of Justice Field in *Re Pacific Ry. Comm'n*:[75]

> of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection of others. Without the enjoyment of this right, all others would lose their value (internal quotations omitted).[76]

The search for a fundamental right of privacy took a step backwards in 1922. Amidst the union struggles of the 1920's, a Missouri "forced-speech" law elicited this response from the Supreme Court, ". . .nor, we may add, does it [the Constitution] confer any right of privacy upon either persons or corporations."[77] This was quickly reversed in 1940 by the Court's opinion in *Thornhill v. Alabama*,[78] where the Court was determining whether a State could outlaw picketing as part of its police powers. The Court stated, without any explanation, that a right to privacy existed:

> The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life

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person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891).
[74] 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886).
[75] 32 F. 241, 250 (N.D. Cal. 1887).
[76] Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479, 14 S.Ct. 1125, 1134, 38 L.Ed. 1047 (1894).
[77] Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543, 42 S.Ct. 516, 522, 66 L.Ed. 1044 (1922).
[78] 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

> or property, or invasion of the *right of privacy*, or breach of the peace. . . (emphasis added).[79]

Justice Murphy, dissenting in a Fourth Amendment case, remarked that:

> Suffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right [of privacy]. Insistence on its retention does not mean that the person has anything to conceal, but means rather that the choice should be his as to what he wishes to reveal, saving only to the Government the right to seek out crime under a procedure with suitable safeguards for the protection of individual rights. . . .[80]

Justice Reed, dissenting in a case regarding the ability of organized labor to select its representatives states that the right of a member of the union to select its representation "adheres to his condition as an employee as a right of privacy does to a person."[81]

In the mid-1940's, the Supreme Court went on to better define the right of privacy under the Fourth Amendment against unreasonable searches and seizures by the government.[82] I will depart, here, from this line of jurisprudence except as it adds significantly to the more general right of privacy with the comment of Justice Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive right and the right most valued by civilized men.[83]

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[79] *Id.* at 105. *See also* Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940).
[80] Goldman v. U.S., 316 U.S. 129, 137, 62 S.Ct. 993, 997, 86 L.Ed. 1322 (1942).
[81] Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 315, 64 S.Ct. 95, 104, 88 L.Ed. 61(1943).
[82] Davis v. U.S., 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946); Feldman v. U.S., 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408 (1944).
[83] Olmstead v. U.S., 277 U.S. 438, 478-9, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928).

Justice Douglas began the consideration of privacy as a concept fundamental to freedom and liberty in 1952. In discussing the meaning of the term "liberty" in the Fifth Amendment, Justice Douglas said, "Liberty in the constitutional sense must mean more than freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."[84] Yet, Douglas realized the inherent limitations that a right of privacy must entail, "One who enters any public place sacrifices some of his privacy."[85] Several years later, Justice Douglas concluded that "The right of privacy most manifestly is not an absolute."[86] It is not, however, without definition, "This notion of privacy is not drawn from the blue. It emantes from the totality of the constitutional scheme under which we live."[87]

The right of privacy was extended to include associational privacy in 1958. The U.S. Supreme Court refused to allow the government to require the production of the names and addresses of members of the NAACP.[88] The court stated that "This court has recognized the vital relationship between freedom to associate and privacy in one's associations….Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association."[89]

The next significant step of the Supreme Court in the definition of the right of privacy was, undoubtedly, in the case of *Griswold v. Connecticut*.[90] A majority of the

[84] Public Utilities Comm. of D.C. v. Pollak, 343 U.S. 451, 467, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting).
[85] *Id.* at 468.
[86] Poe v. Ullman, 367 U.S. 497, 552, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961) (Douglas, J., dissenting).
[87] *Id.* at 521.
[88] NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).
[89] *Id.* at 462.
[90] 381 U.S. 479, 85 S.Ct. 1678, 14 L.E.2d 510 (1965).

Court found a right of privacy to exist, but took different approaches to divining the right of privacy from the U.S. Constitution. At issue in this case was a Connecticut law forbidding the use of contraceptives. Justice Douglas delivered the opinion of the Court finding that all Constitutional rights have guarantees that extend beyond the specific grant given in the Constitution, including the right of privacy, "the. . .cases suggest 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 (internal citations omitted)."[91] Justice Douglas goes on to cite the First Amendment's guarantee of freedom of association, the Third Amendment's prohibition against the quartering of soldiers against the wishes of the owner, the Fourth Amendment's prohibition on unreasonable searches and seizures, the Fifth Amendment's protection against self-incrimination, and the Ninth Amendment's reservation of non-enumerated rights to the people as parts of the overlapping right of privacy.[92] Finding a right of privacy to exist within the marital relationship, Justice Douglas concludes, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[93]

While agreeing that a right of marital privacy existed, Justice Goldberg concurred in the opinion on different grounds. Justice Goldberg, with the concurrence of Chief Justice Warren and Justice Brennan, found a right of privacy to exist in the concept of liberty, ". . . I do agree that the concept of liberty protects those personal rights that are

[91] *Id.* at 484.
[92] *Id.*
[93] *Id.* at 486.

fundamental, and is not confined to the specific terms of the Bill of Rights."[94] Justice Goldberg applied the Ninth Amendment through the Fourteenth Amendment's Due Process Clause to the statute and found it lacking.[95]

Justice Harlan entered a separate concurrence finding the Due Process Clause of the Fourteenth Amendment sufficient to reach the Court's conclusion. Harlan concludes that the enactment of the Connecticut statute violates basic values "implicit in the concept of ordered liberty."[96] Whether found in the penumbra of the Bill of Rights or in the concept of ordered liberty, the Supreme Court has continued to expand the ambiguous right of privacy into the areas of marriage, family, procreation, and bodily integrity.[97]

The case of *Roe v. Wade*, *Griswold's* most famous progeny, was decided explicitly under the Fourteenth Amendment Due Process Clause. The Court found that the concept of liberty included the right to personal privacy.[98] Several years later, the Court determined that the right of personal privacy includes, "the interest in

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[94] *Id.* (Goldberg, J., concurring).
[95] *Id.* at 499.
[96] *Id.* at 500 (Harlan, J., concurring), *quoting*, Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed 288 (1937).
[97] City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 426, 103 S.Ct. 2481, 2491, 76 L.Ed.2d 687 (1983) (abortion); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) (child raising); Zablocki v. Redhail, 434 U.S. 374, 383-385, 98 S.Ct. 673, 679-80, 54 L.Ed.2d 618 (1978) (marriage); Carey v. Population Services International, 431 U.S. 678, 684-685, 97 S.Ct. 2010, 2015-16, 52 L.Ed.2d 675 (1977) (contraception); Moore v. East Cleveland, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion) (right to determine family living arrangements); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639- 640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974) (pregnancy); Roe v. Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 453-454, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972); *Id.*, at 460, 463-465, 92 S.Ct., at 1041, 1043-44 (White, J., concurring in result) (contraception); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967)(marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942) (procreation); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944)(family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, (262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)(child rearing and education). Griswold v. Connecticut, *supra* (contraception); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)(abortion); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973)(abortion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976)(abortion).
[98] Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973).

independence in making certain kinds of important decisions."[99] Further, the Court recognized that, "The zone of privacy long has been held to encompass an 'individual interest in avoiding disclosure of personal matters.'"[100] However, the Court recognized that the "outer limits of this aspect of privacy have not been marked by the Court . . . ."[101] The Court, while not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks, has not determined the full scope of the liberty protected by the Fourteenth Amendment.[102]

Therefore, since a Constitutional right to privacy does exist without express enumeration, there must be some method of determining its extent and confines. As with the well-known cases of England that Brandeis and Warren discussed in 1890, there are ample similar resources for the courts to draw upon in this day and age. The development of the common law based on the principles of the U.S. Constitution is a time-tested process that has proven sufficient to define the rights, responsibilities, and priorities of the Constitution and the common-law. As Justice Goldberg noted in *Griswold*:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there). . . as to be ranked as fundamental' (internal citations omitted).[103]

[99] Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).
[100] Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 529, 110 S.Ct. 2972, 2987, 111 L.Ed.2d 405 (1990)(Blackmun, J., dissenting), *quoting*, Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).
[101] Carey v. Population Services Int'l, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977).
[102] Whalen v. Roe, 429 U.S. 589, 605, 97 S.Ct. 869, 879, 51 L.Ed.2d 64 (1977).
[103] 381 U.S. 479, 493, 85 S.Ct. 1678, 1686, 14 L.E.2d 510 (1965) (Goldberg, J., concurring).

C. THE COMMON LAW: GUIDELINES FOR JUDICIAL ACTION

> The [common law invasion of privacy] tort safeguards the interests of individuals in the maintenance of rules of civility. . . . [In everyday life we experience privacy] as an inherently normative set of social practices that constitute a way of life, our way of life.[104]

In an attempt to combat the growing loss of privacy due to such technological innovations as the photograph, Warren and Brandeis in 1890 argued that the common law should develop a right of privacy tort.[105] Warren and Brandeis used the definition of privacy given by Judge Cooley who first described the right to privacy as the right "to be left alone."[106] In 1989, the Supreme Court described the right to privacy as encompassing "the individual's control of information concerning his or her person."[107] A tortious act can generally be defined as an act or omission by one, without right, whereby someone receives injury in person, property, or reputation.[108] Warren and Brandeis' seminal article is often quoted as the basis for the common law tort of invasion of privacy.[109] Dean Prosser, the accomplished tort scholar, divided the Warren and Brandeis' tort into four separate categories[110] that he later added to the Restatement of Torts: (1) intrusion into seclusion,[111] (2) appropriation,[112] (3) publication of private

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[104] Hill v. NCAA, 7 Cal.4th 1, 25, 865 P.2d 633, 647, 26 Cal.Rptr.2d 834, 849 (1994), *quoting*, Post, *The Social Foundations of Privacy*, 77 CAL.L.REV. 957, 1008 (1989).
[105] Warren and Brandeis, *supra* note 1, at 205.
[106] T.M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888).
[107] U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).
[108] 74 Am.Jur.2d Torts § 1.
[109] Warren and Brandeis, *supra* note 1. This law review article is the most cited law review article ever published.
[110] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
[111] "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability for invasion of his privacy, if the intrusion would be highly offensive to the reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B.

facts,[113] and (4) false light.[114] The Restatement explains that the four privacy torts do not denote the limits of judicial recognition:

> These [Supreme Court decisions] and other references to the right of privacy, particularly as a protection against various types of governmental interference and the compilation of elaborate written or computerized dossiers, may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms. Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.[115]

The privacy torts have been judicially recognized or statutorily enacted in almost every state.[116] In addition, at least ten states have recently enshrined the right of privacy in their constitution.[117]

Prosser cites to the Michigan case of *De May v. Roberts*,[118] as the first American case to grant relief for an invasion of privacy.[119] In that case, a doctor brought along another man to the house of a woman giving birth. It was later discovered that the man was not another doctor or medical apprentice, but simply someone to help the doctor carry his bags. Without any disclosure of the nature of the doctor's assistant, the doctor

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[112] "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C.
[113] "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to the reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D.
[114] "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted with reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." RESTATEMENT (SECOND) OF TORTS § 652E.
[115] RESTATEMENT (SECOND) OF TORTS § 652A, comment (a).
[116] *Id.*
[117] *See supra* text accompanying note 70.
[118] 46 Mich. 160, 9 N.W. 146 (1881).
[119] Prosser, Torts (4th ed.), § 117, p. 802, fn. 2.

permitted the man to remain in the room during the entire birthing process. While social norms have changed, the court's conclusion still resounds today:

> It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity. . . . The plaintiff has a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation.[120]

A closer examination of three of the four privacy torts is useful in understanding the development of the invasion of privacy torts over time. In order to succeed in a claim based on the right to be free from intrusion into seclusion, the plaintiff must prove: "(1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; (3) the obtaining of information about that subject matter by defendant through some method objectionable to the reasonable man."[121] The latter threshold requirement is often determined to be equivalent to a standard that the invasion must be "highly offensive" to the reasonable person.[122] This tort is concerned not with the manner in which the information was disclosed, but the manner in which the information was collected.[123]

Focusing more on the commercial nature of information, a well-founded claim of misappropriation must be based on the following elements: (1) the defendant appropriated plaintiff's likeness or name for the value associated with it without the plaintiff's consent, (2) the appropriation was not for any newsworthy purpose, (3) the

[120] De May v. Roberts, 46 Mich. 160, 165-166, 9 N.W. 146, 148-149 (1881).
[121] Beaumont v. Brown, 65 Mich.App. 455, 237 N.W.2d 501, *rev'd on other grounds*, 401 Mich. 80, 257 N.W.2d 522 (1977).
[122] RESTATEMENT (SECOND) OF TORTS § 652B, 652D.
[123] Doe v. Mills, 212 Mich. App. 73, 88-89, 536 N.W.2d 824 (1995).

plaintiff can be identified by the publication, and (4) the defendant received some value.[124] While claims for misappropriation are often considered only a remedy for the famous, there is no requirement that the plaintiff be well-known.

Borrowing from some of the elements of the intrusion into seclusion tort, the plaintiff must allege the following elements in order to establish a claim for publication of embarrassing private facts: "(1) the disclosure of information, (2) that is highly offensive to a reasonable person, (3) that is of no legitimate concern to the public (internal citations omitted)."[125] In deciding cases involving the publication tort, courts generally focus on whether the information is a private fact and whether the information was published to a wide enough audience.[126] The Supreme Court has recognized that the ease of locating the information may effect its "private" nature:

> Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.[127]

The overlapping areas of these three torts, then, involve the offensive nature of the intrusion or disclosure, whether there is a legitimate reason for the disclosure, and whether the information is of a private nature. Any extension or new creation of the invasion of privacy torts should retain these essential elements. The exact nature of these elements depends on the competing interests involved in determining whether a person's fundamental right of privacy has been invaded.

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[124] 77 C.J.S. § 10(b); Dempsey v. Nat'l Enquirer, 702 F.Supp. 927 (D. Maine 1988).
[125] *Mills*, 212 Mich. App. at 80.
[126] RESTATEMENT (SECOND) OF TORTS § 652D, comment (a). Beaumont v. Brown, 401 Mich. 80, 112-114, 257 N.W.2d 522, 534-535 (1977).
[127] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764, 109 S.Ct. 1468, 1477, 103 L.Ed.2d 774 (1989).

D. THE INFORMATION PRIVACY TORT: EXTENDING THE COMMON LAW

Given the background provided by the traditional common law invasion of privacy torts, the creation of a new tort or the extension of an existing tort is not beyond the role of the judiciary or the legislature. In order to protect a person's right of privacy, the courts must fashion appropriate standards to govern the ability of a person to file a lawsuit for invasion of privacy. There are clearly limitations to a person's right of privacy that they willingly give up by existing in society.[128] As the comments suggest in the Restatement: "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part."[129] These limitations on the right of privacy should be based on the person's reasonable expectation of privacy, the basis for the transfer of the information, whether the information involves a legitimate matter of public concern, and whether the invasion of privacy is serious enough to warrant judicial intervention.

1. THE REASONABLE EXPECTATION OF PRIVACY

Warren and Brandeis argue convincingly that "the right [of privacy] is lost only when the author himself communicates his production to the public, -- in other words,

[128] AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999).
[129] RESTATEMENT (SECOND) OF TORTS, § 652D, Comments on clause (a).

publishes it."[130] The point at which a citizen's right is infringed is not at the point of disclosure by the person, but at the point where the information is used for something beyond the original purpose for which the information was given. Hence, an essential element of the information privacy tort must be based on the reasonable expectation of the person involved.

The right of privacy is, like all other rights, a culmination of what society deems socially important enough to protect against abuses.[131] As in the *De May* case, the law should seek to redress an invasion of the sanctity of a person's right to privacy through the court system.[132] At the same time, a reasonable person must expect a certain loss of privacy in order to live in a social world.[133] In order to strike the appropriate balance between the two, one must look to whether the person's expectation of privacy is reasonable.[134]

Especially in the Internet context, it is important to understand the balance of bargaining power between the citizen and the company. The citizen is only able to exert influence over the practices of a company by refusing to do business with that company. However, in order for a person to make this determination, he/she must have some knowledge about the privacy practices of the company. In almost every case, a person will be tagged with tracking cookies before he/she has any opportunity to examine a

[130] Warren and Brandeis, *supra* note 1, at 199-200.
[131] *See* discussion *supra* p. 11. "One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values." Doe v. McMillan, 412 U.S. 306, 327, 93 S.Ct. 2018, 2032, 36 L.Ed.2d 912 (1973)(Douglas, J., concurring).
[132] De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).
[133] RESTATEMENT (SECOND) OF TORTS § 652D, comment (c).
[134] The U.S. Supreme Court has recognized that a sliding scale of privacy expectation does exist: "And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling though Central Park, sure it is nothing like the interest in being free from unwanted expression in the confine of one's homes." Cohen v. California, 403 U.S. 15, 21-22, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971).

privacy policy or receives any notice of the tracking technology being employed. Hence, companies have a tremendous advantage over citizens in that the company does not have to release information about their privacy practices before the citizen is tagged. Further, as shown by the surveys noted previously, even more experienced users are ignorant concerning tracking technologies and any consumer controls available to them.

For instance, when people visit a website in order to purchase something, there is a reasonable expectation that they will interact with the website they are visiting.[135] Hence, a first-party website may use tracking technology, such as cookies or other means, to observe the person's interaction. When an item is selected, the company may reasonably require payment and is entitled to ask for the person's name, credit card number, and a certain amount of information necessary to guard against fraud. In order to deliver the item to the individual, the company must also acquire an address or some location to deliver the item. All of these items have been socially bargained for by the individual in order to purchase the item that he/she needs. A person's reasonable expectation of privacy has either been waived or defeated by their interaction with the website. The greater difficulty lies with the company's use of the information for other purposes.

The person who discloses information so that the company can process his/her order has a reasonable expectation that that same information will not be used for other purposes. In effect, the person has given implied consent to the company to use the information in order to perfect the sale of goods or services. However, the company must, in some manner, defeat the person's reasonable expectation of privacy in the

[135] DOUBLECLICK NIA, *supra* note 28, at ¶ 8.

information in order to share that information with another party for another purpose. This could be achieved through any number of currently available or future technologies. If the company seeks to use the information for other purposes, then it has an incentive to defeat the person's reasonable expectation of privacy or obtain his/her consent to the additional use of the information.

The difficulty then becomes determining the standard by which to judge a reasonable expectation of privacy. Is it reasonable to expect that your name and address will remain private if you consent to have your name and address published in a telephone book? Probably not. However, if you attempt to keep personally identifiable information private, then a reasonable person would have a higher expectation of privacy.[136] In each case, the court must examine whether the person has taken reasonable steps to protect certain information about themselves. For instance, while the disclosure of a person's name and address might not be actionable, the fact that that particular person also bought or sought information about a drug for the treatment of AIDS would be a violation of the person's reasonable expectation of privacy.[137]

Obviously, the entity that can best determine the importance of the maintenance of privacy of the information is the citizen. In order to make that conscious decision, the consumer needs to have sufficient information to be able to judge the consequences of their decision. Again, in the end, the company must simply defeat the person's reasonable expectation of privacy or obtain the person's express consent.

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[136] For instance, Justice Douglas believes that "customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts." California Bankers Assoc. v. Shultz, 416 U.S. 21, 81, 94 S.Ct. 1494, 1527, 39 L.Ed.2d 812 (1974)(Douglas, J., dissenting). Justice Marshall agreed and concluded, "The fact that one has disclosed private papers to the bank, for a limited purpose, within the context of the confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers." *Id.* at 95 (Marshall, J., dissenting).

[137] PROCRIT.COM NIA, *supra* note 31.

Thankfully, courts do not exist in a vacuum and have a multitude of resources available to give greater definition to the reasonable expectation of privacy. At a minimum, courts have a significant amount of experience interpreting a person's reasonable expectation of privacy under the Fourth Amendment's search and seizure clause. This line of cases alluded to earlier is full of determinations regarding invasions of the sanctity of the home and the person. However, while the Fourth Amendment may be a springboard that courts may build their decisions upon, it may not be the same limit to a person's reasonable expectation of privacy in the common law context.

The Privacy Working Group of the Information Infrastructure Task Force stated that:

> what counts as a reasonable expectation of privacy…is not limited by what counts as a reasonable expectation of privacy under the Fourth Amendment….In many instances, society has deemed it reasonable to protect privacy at levels higher than that required by the Fourth Amendment.[138]

In 1976, the federal court of appeals had already conceded this finding by stating that: "The constitutional right of privacy is not to be equated with the common law right recognized by state tort law."[139] The U.S. Supreme Court has made clear that

> The Fourth Amendment cannot be translated into a general constitutional "right of privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental intrusion. But the protection of a person's general right of privacy—his

[138] PRIVACY WORKING GROUP, INFORMATION POLICY COMMITTEE, INFORMATION INFRASTRUCTURE TASK FORCE, PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION, (June 6, 1995).
[139] McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir. 1976).

> right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.[140]

Further, there is good reason to suggest that the Fourth Amendment's static view regarding privacy should not be the standard of the common law right. Specifically, the common law right of privacy's reasonableness standard is much more fluid. People have a higher expectation of privacy in their medical information than in their rental of movies at the video store. This can be noted by the fact that you meet with the doctor in a private room versus your handing of your video rentals to the clerk in full view of others in line.[141] Similarly, as technology changes, new means of collecting information will emerge that require courts to balance the reasonable expectation of privacy anew.[142] The common law is particularly well-adapted to understanding these distinctions and determining, through the development of case law, the proper standards and expectations.

Critics of this extension of the common law will point to several cases that sought to assert the right of privacy and standards argued for here.[143] In regard to these four cases, it should be noted that none of them are decisions of the highest court in any jurisdiction.[144] *Shibley v. Time, Inc*. is the case that all three of the decisions rely upon.

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[140] Katz v. U.S., 389 U.S. 347, 350-351, 88 S.Ct. 507, 510-511, 19 L.Ed.2d 576 (1967).

[141] It is also important to note that the person's rentals at the video store are actually more protected by the law than the person's medical records. The Videotape Privacy Protection Act (VPPA), 18 USCA § 2710, prohibits the disclosure of video rental records without the person's express prior consent (an "opt-in" standard). The Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C.A. § 1320d-2, regulations allow the information to be disseminated and used to send marketing materials before a person can refuse to receive further marketing (an "opt-out" standard). *See also supra* text accompanying note 46.

[142] New technologies such as interactive television, geographically tracked cellular phones, and personal handheld devices are beginning to raise new questions about the scope of privacy that a consumer should enjoy.

[143] Dwyer v. American Express Co., 273 Ill.App.3d 742, 652 N.E.2d 1351, 210 Ill. Dec. 375 (1995); Weld v. CVS Pharmacy, No. 98-0897F, 1999 WL 494114 (Mass. Super. June 29, 1999); Shibley v. Time, Inc., 45 Ohio App.2d 69, 341 N.E.2d 337 (1975); Avrahami v. U.S. News & World Report, Inc., No. 95-1318, 1996 WL 1065557 (Va. Cir. Ct. June 13, 1996).

[144] Indeed, only two of the decisions are appellate court decisions.

[145] In that case, long before the advent of the commercial Internet, the court in 1975 focused on the fact that the Ohio legislature allowed the sale of the names and addresses of registrants of motor vehicles: "That defendants' activity does not constitute an invasion of privacy is indicated by the fact that the Ohio legislature has enacted R.C. 4503.26 permitting the sale of names and addresses of registrants of motor vehicles."[146]

While the sale of lists of motor vehicle registrants may have been commonplace at the time, the basic fact is no longer true. The Driver's Privacy Protection Act of 1994 (DPPA), as amended in 1999, creates an opt-in system for the dissemination of motor vehicle information for commercial purposes.[147] Further, the DPPA also regulates the resale and redisclosure by private persons of the information that is obtained from the State.[148] Therefore, a court can no longer rely on the alleged lack of privacy caused by the unbridled dissemination of personal information by state governments.

Further, the court relied on its conclusion that the right of privacy did not extend to the mailbox.[149] Of course, in 1975, the reference to the mailbox meant something entirely different than it does today in the context of electronic messaging. Companies could only send mail to you and could not collect information about what else was in your mailbox. Subsequent court decisions have relied heavily on the premises accepted by the *Shibley* court. These decisions must fall as well because the basic premises of the *Shibley* court are no longer accurate and do not account for new technologies.[150]

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[145] Shibley v. Time, Inc., 45 Ohio App.2d 69, 341 N.E.2d 337 (1975)
[146] *Id.* at 72.
[147] Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721-2725, as amended by Pub. L. 106-69, 113 Stat. 986 (1999); Reno v. Condon, 528 U.S. 141, 144, 120 S.Ct. 666, 669, 145 L.Ed.2d 587 (2000).
[148] *Condon*, 528 U.S. at 146.
[149] *Shibley*, 45 Ohio App.2d at 73.
[150] For a thorough discussion of these cases and their shortcomings, see William J. Fenrich, *Common Law Protection of Individual's Rights in Personal Information*, 65 FORDHAM L. REV. 951 (1996).

2. THE PURPOSE OF THE TRANSFER OF INFORMATION

The recognition of value by the defendant for the dissemination of information is something that the courts have already examined in the context of the appropriation tort. There are obvious reasons why the invasion of information privacy tort should only apply to certain uses of the information.[151] The tort should not be used to make illegal the sending of Christmas card lists to family members or phone calls to friends with someone's change in address. The intent of the tort is to stop tortfeasors from profiting from the sale of compilations of personally identifiable information to others without the consent of the person whose information is being conveyed.

Similarly, the tort should not apply where there is a legitimate societal need to protect the health and welfare of the community. As personal as the development of a contagious disease is, there are legitimate reasons to inform the public about its nature in order to prevent the illness from spreading. This is not to suggest, of course, that all personal information about the carrier of a contagious diseases needs to be shared with the general public. As in John Locke's hypothesis regarding the agreement of citizens to reasonable rules to be governed by, society must determine the proper scope of the information privacy tort. The best means to accomplish this goal is through the reasoned process of deciding actual cases without the interference of interest groups, lobbyists, and

[151] In the context of the Freedom of Information Act, the Supreme Court has agreed with the District of Columbia Circuit that whether disclosure of a list of names is a "significant or a de minimis threat depends upon the characteristics revealed by virtue of being on the particular list, and the consequences likely to ensue." U.S. Dep't of State v. Ray, 502 U.S. 164, 177, n. 12, 112 S.Ct. 541, 548, 116 L.Ed.2d 526 (1991), *quoting*, National Ass'n of Retired Fed. Employees v. Horner, 279 U.S.App.D.C. 27, 31, 879 F.2d 873, 877 (1989), *cert. denied*, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990).

re-election campaigns.[152] A carefully balanced and reasoned approach is necessary to balance the rights of the community against the right to informational privacy.

C. THE NATURE OF THE INFORMATION

Third, the information privacy tort should not apply to information that is a legitimate matter of public concern. As discussed above, there are occasions when a normally private person is thrust into the public light by surrounding circumstances.[153] There are also occasions when information regarding public officials or their actions is necessary to enlighten the public about the functioning of government or those running for election. As in the case of defamation, however, even public officials are entitled to maintain a certain level of privacy regarding the intimacies of their lives.[154]

The basis for this portion of the test is to allow the public dissemination of newsworthy events and protect the freedom of expression, while not allowing First Amendment freedoms to completely obliterate the right of privacy. In addressing this tension, the U.S. Supreme Court has stated, "In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."[155] In the balancing of First

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[152] William J. Fenrich, *Common Law Protection of Individual's Rights in Personal Information*, 65 FORDHAM L. REV. 951 (1996); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000).

[153] The Supreme Court's standard is set forth in the case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

[154] "[P]ublic officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." Nixon v. Administrator of General Services, 433 U.S. 425, 457, 97 S.Ct. 2777, 2797, 53 L.Ed.2d 867 (1977).

[155] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491, 95 S.Ct. 1029, 1044, 43 L.Ed.2d 328 (1975). Significantly, this case was decided on the more narrow question of whether an interest in privacy remains

Amendment rights and the right of privacy, there must be some allowance for truthful publication.[156] At the same time, the right of privacy, as a fundamental right, cannot be wholly subsumed within the First Amendment's prohibitions.[157] Even Warren and Brandeis recognized this limitation on the right of privacy.[158] Therefore, the information privacy tort should not be actionable against the publication or collection of information for newsworthy or legitimate matters of public concern.

D. THE SERIOUSNESS OF THE VIOLATION

In relaxing the highly offensive standard found in the prior common law invasion of privacy torts, the courts must ensure that the cases brought are not frivolous or *de minimus*. In order to invoke the power of the information privacy tort, the disclosure of information must be more than mere negligence. As with the other privacy torts, there is an element of intentionality that must be present. The minimum basis for invocation of the power of the court system is best left to be determined over time in case law.

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where the information already appears in the public record. The court found that it does not and that the publication of information already contained in the public record cannot violate the individual's right of privacy. However, the court backed away from this absolute view by suggesting that even information in the public record can retain a "practical obscurity" that transforms the public record into private information when the public record is compiled into a single database. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).

[156] "We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." Florida Star v. B.J.F., 491 U.S. 524, 541, 109 S.Ct. 2603, 2613, 105 L.Ed.2d 443 (1989).

[157] "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." Zacchini v. Scripps-Howard Boradcasting Co., 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), *quoting*, Kalven, *Privacy Tort Law Were Warren and Brandeis Wrong?*, 31 LAW & CONTEM. PROB. 326, 331 (1966).

[158] Warren and Brandeis, *supra* note 1, at 214-215.

An analogous situation is the Michigan Environmental Protection Act (MEPA) that seeks to develop a common law protection of the environment.[159] Over time, courts have begun to generalize the factors that must be present for a MEPA claim to survive summary disposition.[160] Similarly, in the informational privacy tort, the plaintiff must make some initial showing before the defendant is required to respond, using the familiar *McDonnell-Douglas*[161] framework used in litigating discrimination suits.

CONCLUSION

In conclusion, it is up to the courts and the legislatures of the several states to continue to redefine the privacy torts to embrace new technologies and the shifts in power between the citizen and the corporation in the collection and dissemination of information. The time is ripe to expand the current concepts of invasion of privacy. With the full backing of the United States Constitution, the fundamental right of privacy will flourish in its ability to protect a citizen's right only if given reinvigorated definition by the courts. While judicial creation is appropriate in most states, especially those that have judicially recognized the invasion of privacy torts, Appendix 1 is a sample statute that could be enacted to statutorily create an information privacy tort. The time has come again for society to redefine the need for greater privacy protections in the face of

[159] MICH. COMP. LAWS §§ 324.1701-1706 (2001).
[160] Kent Co. Rd. Comm. v. Hunting, 170 Mich. App. 222, 233; 428 N.W.2d 353 (1988), *citing*, City of Portage v. Kalamazoo Co. Rd. Comm., 136 Mich. App. 276, 279; 355 N.W.2d 913 (1984), *lv den*, 422 Mich. 883 (1985); Kimberly Hills Neighborhood Ass'n. v. Dion, 114 Mich. App. 495, 503; 320 N.W.2d 668 (1982), *lv den*, 417 Mich. 1045 (1983).
[161] McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

changing technology. It is only with the creation of safe "communities" on the Internet that businesses will flourish with the increased trust of citizens.

> *There is nothing inevitable about the erosion of privacy in cyberspace, just as there is nothing inevitable about its reconstruction. We have the ability to rebuild some of the private spaces that we have lost. What we need now is the will.*
>
> — Jeffrey Rosen[162]

[162] Rosen, *supra* note 2, at *17.

Michigan Transactional Information Privacy Act

An act to protect the transactional privacy and reasonable expectations of consumers to be free from invasions of privacy, allow greater protection by other laws, and create civil remedies and penalties for enforcement.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

"**445.925** Definitions.
Sec. 1. As used in this Act, (a) "Clear and Conspicuous" means a notice that is reasonably understandable and designed to call attention to the nature and significance of the information in the notice, similar to that required in 16 C.F.R. 313.3(b).
(b) "Express Consent" means affirmative consent by an Individual that specifically permits the Organization to disseminate Personally Identifiable Information to Third Parties beyond that which is reasonably necessary for the Transaction. Express Consent may not be presumed by an Individual's interaction with an Organization. Individuals between the ages of 14 and 18 may give valid and legal Express Consent for purposes of this statute only.
(c) "Implied Consent" means consent for an Organization to disseminate Personally Identifiable Information limited to that Personally Identifiable Information that a reasonable person would expect is reasonably necessary for the purpose of a Transaction.
(d) "Individual" means a natural person.
(e) "Organization" means a natural person, partnership, cooperative, association, private or public corporation, personal representative, receiver, trustee, assignee, or other legal entity with sufficient contacts with the State of Michigan to satisfy the Due Process clause of the 14th Amendment of the United States Constitution. Organization does not include any governmental entity or law enforcement personnel acting in an official capacity.
(f) "Personally Identifiable Information" means any information that specifically identifies an Individual or could reasonably be believed to be used to identify a specific Individual. This does not include Publicly Available Information.
(g) "Publicly Available Information" means any information that an Organization has a Reasonable Basis to believe is lawfully made available to the general public from:
- (i) Federal, State, and local government records;
- (ii) Widely distributed media; or
- (iii) Disclosures to the general public that are required to be made by Federal, State or local law.

(h) "Reasonable Basis" means that an Organization reasonably believes that the otherwise Personally Identifiable Information is lawfully made available to the general public and has taken steps to determine:
- (i) That the otherwise Personally Identifiable Information is of the type that is available to the general public; and
- (ii) Whether an Individual can direct that the otherwise Personally Identifiable Information not be made available to the general public and if so, that the Individual has not done so.

(i) "Third Party" means any Individual or Organization that is not directly involved in a Transaction between an Individual and an Organization. Third Party does not include any government entity or law enforcement personnel acting in an official capacity.
(j) "Transaction" means any occurrence where Personally Identifiable Information is provided to an Organization by an Individual.

445.926 Disclosure of Personally Identifiable Information.
Sec. 2. (a) It is unlawful for an Organization to attempt to obtain Personally Identifiable Information beyond that which is reasonably necessary to complete the Transaction unless the Organization informs the Individual of the Individual's rights under this Act and requests the Individual's Express Consent.
(b) It is unlawful for an Organization to disclose Personally Identifiable Information to a Third Party without the Implied Consent or Express Consent of the Individual that submitted the Personally Identifiable Information to the Organization as part of a Transaction.
(c) Express Consent may be obtained from an Individual if that Individual is informed of the following:

> Under Michigan law, you have the right to prevent your Personally Identifiable Information from being shared with Third Parties. By giving your consent, you are agreeing to allow your Personally Identifiable Information to be shared with Third Parties. If you agree to allow your Personal Information to be shared with other Third Parties, that consent will continue unless you revoke your consent. However, you have the right to revoke your consent whenever you choose.

The above disclosure must be Clear and Conspicuous as part of the Express Consent request.

445.927 Consent
Sec. 3 (a) Express Consent cannot be revoked:
(i) if it would serve to break a contract; or,
(ii) to the extent that the Organization has reasonably relied upon the Express Consent.

(b) Express Consent is not required if the disclosure of Personally Identifiable Information is:

(i) necessary to ensure the safety, health or welfare of the public;
(ii) necessary to aid in the enforcement of law;
(iii) for purposes of journalism, art, history, or literature;
(iv) necessary to ensure the welfare of the Individual;
(v) for purposes of family, personal, or household uses;
(vi) necessary for the enforcement of contractual rights; or,
(vii) specifically authorized by statute.

445.928 Burden of Proof.

Sec. 4. When the plaintiff in an action has made a prima facie showing that the conduct of the defendant violated this act, then the defendant has the burden of proof to rebut the prima facie showing by the submission of a preponderance of evidence to the contrary. Further, the defendant has the burden to prove the affirmative defense, if raised, that the Organization had a Reasonable Basis to believe that the information was Publicly Available Information.

445.929 Other Laws.

Sec. 5. (a) To the extent that other laws offer greater protections for the confidentiality of Personally Identifiable Information, those laws are not preempted by this Act.

(b) Nothing in this Act is intended to hinder, interfere, or prevent law enforcement officials from obtaining, or attempting to obtain, any information pursuant to federal, state, or local law, or other legal means, or to disclose the same in the execution of law enforcement duties.

(c) Nothing in this Act is intended to limit or enhance the availability of public records under the Freedom of Information Act.

445.930 Penalty; Enforcement.

Sec. 6. (a) If an Organization violates Section 2, any Individual may:

(i) bring an action for a temporary or permanent injunction;

(ii) bring a private civil action against an Organization to recover actual damages or damages in the amount of $5000.00 per violation, whichever is greater.

(b) The attorney general shall have the following powers to enforce this act:

(i) To bring an action for a temporary or permanent injunction in the manner provided in section 5 of the consumer protection act.

(ii) To accept an assurance of discontinuance in the manner provided in section 6 of the consumer protection act.

(iii) To apply for the issuance of subpoenas in the manner provided in sections 7 and 8 of the consumer protection act.

(iv) To bring a class action in the manner provided in section 10 of the consumer protection act."

Severability.

Sec. 7 If any portion of this Act is found illegal or unconstitutional by any court of law, then that portion of the Act shall be severed from the remaining portions.

Effective Date

Sec. 8 This Act shall be effective one year from its passage.