CLAIMING PERSONAL SPACE IN A GLOBALIZED WORLD: CONTEXTUAL AND PARADIGM SHIFTS IN THE DELIMITATION OF THE RIGHT TO PRIVACY [1]

Ryan Hartzell C. Balisacan [2]

I. PREFACE

It was A.F. Westin, writing in his monumental work *Privacy and Freedom*[3], who first introduced the notion of an individual's zone of privacy (or the "core self") as a central inner circle surrounded by a series of larger concentric circles. In this innermost "sanctuary" is sheltered the individual's "ultimate secrets – those hopes, fears, and prayers that are beyond sharing with anyone unless the individual comes under such stress that he [or she] must put out these ultimate secrets to secure emotional relief"[4]. Indeed, echoing the prevailing social consensus of his times, Westin depicted a picture of privacy almost akin to a sacrosanct temple within whose walls the holy of holies take repose, and from outside which no one but the most worthy can even dare approach.

Little must Westin have realized that the graceful circles of his scholarly mind would one day be distorted by the intrusive yet invisible and intangible forces of an increasingly global legal order. The images that Westin evoked have come under the relentless assault of blips and signals traveling in a makeshift universe called cybernetic space and paying homage to such legal imperatives like Moore's

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[2] Vice Chair of the Editorial Board, PHILIPPINE LAW JOURNAL, Editorial Term 2006-07 and Editorial Term 2007-08; Research Associate, Institute of Human Rights, University of the Philippines Law Center; B.A. Political Science, *cum laude*, College of Social Sciences and Philosophy, University of the Philippines Diliman (2005); Juris Doctor, College of Law, University of the Philippines Diliman (2009 expected).

[3] A. F. Westin, PRIVACY AND FREEDOM 33 (1967).

[4] *Ibid.*

Law and Gilder's Law[5]. Suddenly, the "inner circle" that is the individual's private space has been breached by many other circles that blur, obfuscate, and overlap with the former's well-defined boundaries. In the present context, privacy, the "most valued right[6]", the "beginning of all freedoms[7]", is merely a shadow of what it once was.

This paper is an attempt to explain how traditional conceptions of the right to privacy have evolved through time by virtue of the confluence of factors that served to progressively limit the extent and scope of this valued right. Such factors, as would be expounded on later, are the concomitant and resultant effects of the new world order – an era of technological globalization[8], the coming into being of an information civilization[9], and the dematerialization of hitherto tangible barriers[10]. Taking off from the premise that *traditional privacy rights has become largely divergent with contemporary privacy rights because of the progressive manner by which the former's extent and scope have been delimited*, this paper will put forth the following propositions:

1. That the delimitation of the right to privacy has undergone a *contextual* shift from the contained, *domestic* context of old to the diffused, *information civilization* context of today;

2. That the delimitation of the right to privacy has undergone a *paradigm* shift; whereas before, the delimitation of privacy rights is undertaken amidst an arena of contending *ideas*[11], now, such delimitation would have to take into account *material* factors[12] alongside ideas that have metamorphosed in consonance with the globalized order[13]. The paradigm shift, for the purposes of this study, shall be referred to as the shift from the *idealist* to the *constructivist* paradigm[14].

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[5] Moore's Law refers to the doubling of information processing capacity of computers every 18 months and Gilder's Law refers to the tripling of the Internet's network bandwidth every 12 months. *See* V. Mayer-Schönberger, *The International Lawyer in Times of Cyberspace* in J. Drolshammer and M. Pfeifer (eds) THE INTERNATIONALIZATION OF THE PRACTICE OF LAW 401 (2001).

[6] Olmstead v. U.S., 277 U.S. 438, 478-479; 48 S.Ct. 813; 96 L. Ed. 944; 66 A.L.R. 376 (1928)

[7] *Ibid.*

[8] D. Archibugi and C. Pietrobelli, *The Globalisation of Technology and Its Implications to Developing Countries: Windows of Opportunity of Further Burden?* 70 TECHNOLOGICAL FORECASTING AND SOCIAL CHANGE 865 (2002).

[9] F. Rajaee, GLOBALIZATION ON TRIAL: THE HUMAN CONDITION AND THE INFORMATION CIVILIZATION 63 (2000).

[10] F. Romero, *Legal Challenges of Globalization*, 81 PHIL. L. J. (2006).

[11] *i.e.*, the right to privacy as against the interests of the state and the fundamental freedoms of the rest of society

[12] *i.e.*, geographical limits, the imperatives and limitations of technology

[13] *i.e.*, the pseudo-rules of multinational corporations, the interests of the community of states, the peculiar legal infrastructure of the international legal system

[14] The idealist paradigm presupposes that the confluence of ideational factors influences social outcomes. The constructivist paradigm, on the other hand, proposes that social outcomes

3. By way of conclusion, that the delimitation of the right to privacy should therefore undergo a *mechanism* shift. When privacy clashes with state interests or the interests of other members of civil society, a balance between the disputants is sought to be struck, and the extent of the right to privacy was expanded or delimited accordingly in the process. Given today's context, because the number of social actors has multiplied and the decision-making process has become more complicated (by virtue of additional factors that have to be taken into consideration) a balance between two competing claims is no longer possible. Instead, the conflicting values must be weighed by their respective merits and the ones to be sacrificed in favor of the others are those that the decision-maker deems comparatively more dispensable. This paper will later on refer to this proposed shift as the shift from the *equipoise* (balancing) mechanism to the *triage* mechanism.

The three foregoing themes would provide the analytical framework for this paper, and would seek to ultimately establish how the globalized order, in its complexity and pervasiveness, has succeeded to erode the fragile limits of the right to privacy in the recent past. In the end, this paper will identify potential avenues of reform and propose feasible guidelines for future plans of action. It is submitted that although the traditional conception of privacy may be deemed already unrecoverable in light of the permanent changes wrought by globalization, the international community can still take carefully measured steps in concert so that privacy as a social value can still be accorded as much respect as possible given the prevailing circumstances.

II. THE CONTEXTUAL SHIFT: DOMESTIC CONTEXT TO INFORMATION CIVILIZATION CONTEXT

A. CONCEPTUAL FOUNDATIONS OF PRIVACY

The concept of privacy traces its genesis from as far as back as the very first civilizations of man and woman[15]. However, its meaning even up to now has

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are products of the confluence of contending ideational and material factors in a state of interaction and mutual reinforcement. This author borrows from the survey of theoretical frameworks presented by Colin Hay that may be used in connection with the formulation of research methodologies in the political and other social sciences. *See* C. Hay, POLITICAL ANALYSIS (2002)

[15] A useful and comprehensive outline of the conceptions of privacy in the different ancient civilizations and different religious sects is provided by McWhirter and Bible. Noteworthy is their effort to trace the origins of privacy not only from the legal and historical point of view but from

remained rather intuitive and not concrete, such that it can be used loosely to refer to different ideas altogether. Even the landmark treatise on the right to privacy written by Warren and Brandeis (recognized as the progenitor of the concept of privacy in legal jurisprudence) can only offer general pronouncements like "the recognition of man's spiritual nature" and that "the right to life has come to mean the right to enjoy life - the right to be let alone"[16]. This problematique led Solove to remark in his work that privacy as a concept suffers from an "embarrassment of meanings[17]" and BeVier to write: "Privacy is a chameleon-like word, used denotatively to designate a wide range of wildly disparate interests... and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name"[18]. It is clear, however, that the sum of the vague notions of average persons would point to the common conception that the right to privacy is an assertion by the individual of his/ her inviolate personality[19]. The capacity to assert one's privacy is a function of his/ her ability to preserve a certain portion of him/herself as being constitutive of his/ her unique identity even while maintaining a steady stream of social interactions with the rest of the community.

Instead of trying to provide a concrete definition for the term, some scholars opted to instead shift focus to privacy's nature. In this regard, Slough writes about the dual aspect of disclosural privacy - that of context and extent. Citing the dissenting opinion by Justice Douglas in *Warden v. Hayden*[20], Slough writes that a dual aspect of privacy required that the individual should have the freedom to select for him[/her]self the time and circumstances when he [or she] will share his [or her] secrets with others and decide the extent of his [or her] sharing[21]. There is also a dual aspect in the protection of privacy - (1) protection that deals with interference by government with the citizen's right to privacy and (2) that which is directed not at government but against invasion by private individuals, groups, and organizations.

Further, there is a dual aspect in the functions of privacy. As explained by Schoeman, privacy can either perform a restrictive or liberative function. According to him, some forms of privacy norms "restrict access of others to an individual in a

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the point of view of philosophy as well. *See* D. McWhirter and J. Bible, PRIVACY AS A CONSTITUTIONAL RIGHT: SEX, DRUGS, AND THE RIGHT TO LIFE (1992).

[16] S. Warren and L. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193-220 (1890).

[17] D. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) quoting Kim Lane Scheppele, LEGAL SECRETS 184-85 (1988).

[18] L. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995).

[19] I. Cortes, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY 1 (1970).

[20] 387 U.S. 294, 323 (1967).

[21] M. C. Slough, PRIVACY, FREEDOM, AND RESPONSIBILITY 46 (1969). Schoeman, *infra.*, also provides a very illustrative example of the factors that would determine the time, circumstances, and extent of one's disclosure. According to him, the fact of the death of a family member is widely treated as a private matter that can be disclosed only if the person concerned is willing to share both the fact of death, and the vulnerability that comes with it, to another.

certain domain where the individual is accorded wide discretion concerning how to behave in this domain"[22]. This liberative function of privacy ensures that the individual can pursue his/ her endeavors free from any external interference. On the other hand, there are some privacy norms that restrict access of others to an individual, but where the behavior carried on is rigidly defined by social norms and affords little discretion[23]. In social behaviors regulated by such privacy norms, the invocation of privacy does not serve the purpose of self-expression and liberty of choice, but restricts the individual's behavior as a matter of social control. Schoeman adds, however, that both the restrictive and liberative privacy norms are reflections of the social structure and relate to the common practice of showing respect to other people[24]. Why, then, do individuals subscribe even to the restrictive aspects of privacy? The reason lies in psychosocial theory, which, as pointed out by Schoeman, dictates that an individual's utilitarian and rational instincts will always be tempered by the social context in which he/ she exists. Articulated rationality, or the ability to personally put forth a rational defense of a particular value, is not a captive of self-interest but influenced by social norms[25].

B. THE DOMESTIC CONTEXT

It is against this conceptual backdrop that the domestic context of traditional privacy rights may be explained. When Cooley coined the term "right to privacy" in 1888[26] and when Warren and Brandeis elucidated on the concept with their *Harvard Law Review* article two years later[27], society as we know it today was very much different. For one, the Westphalian political and legal order was very much in place, and so the "international arena" was nothing more than a vague abstraction composed of a community of sovereign nations which are, in themselves and in relation to others, supreme and without equal[28]. The individual's political life, therefore, solely revolves around his/ her relationship with his/ her domestic government. In terms of his/ her civil life, he/ she is in close and oftentimes exclusive contact solely with the members of the civil society of the immediate locality and domestic sphere. The tapestry of social and political interactions during that time was not so intricate, so much so that the assertion of privacy rights, taking into consideration the prevailing social conditions, became a matter between the individual, the state, and the rest of civil society – the only predominant social actors in the domestic context. It is therefore hardly surprising

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22 F. Schoeman, PRIVACY AND SOCIAL FREEDOM 15 (1992).
23 *Ibid.*
24 *Ibid.* at 16
25 *Ibid.* at 64.
26 COOLEY ON TORTS 29 (1888, 2nd ed.)
27 *supra* note 14.
28 S. Krasner, *Compromising Westphalia*, 20 INTERNATIONAL SECURITY 115 (1995).

that the monumental Warren and Brandeis article was instigated by the authors' condemnation of an American press that has been "overstepping in every direction the obvious bounds of propriety and of decency"[29]. It also comes as no surprise that the formulation of Prosser of the derivative causes of action based on the right to privacy focused on tort[30], which is an action for damages by virtue of an alleged personal injury suffered by an individual.

Clearly, privacy rights as they used to be could be situated in the context of a domestic polity that is politically and territorially contained. The paucity of social actors against which the individual's right to privacy may be asserted largely shaped the traditional notion of what privacy is - an individual's leverage against an intrusive government and an equally intrusive public. In this context where individualism is paramount, the assertion of privacy between the state and the individual and between individuals *inter se* constitutes a tacit subscription to societal unitarianism[31]. Indeed, in such a setup, it would be relatively easy to germinate the seeds of an individual-centric right and the context in which it will flourish will be facilitative of its rapid growth and development. This is precisely what transpired. Until the vestiges of a new international world order first came to light, the right to privacy would occupy a hallowed niche in every domestic values system.

C. THE INFORMATION CIVILIZATION CONTEXT

Although the limits of privacy were still very much intact in 1928, a member of the United States Supreme Court had occasion to pronounce a foreshadowing of things to come. Dissenting from the majority in *Olmstead v. United States*[32], Justice Brandeis admonished that the purpose of the invocation of the right to privacy will not be subserved if government intrusions will be sustained on the ground that they do not fit squarely into the strict provisions of the law regarding

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[29] Warren and Brandeis, *supra* note 14.

[30] Prosser identified the following as the harmful activities that are based on violations of the right to privacy:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness (W. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 {1960}).

[31] This author posits that unitarianism signifies the primacy of the integral part as compared to the whole, and the preference for independence rather than interdependence. I. Cortes, *supra* note 17 cites Nizer who actually went so far as to say that the right to privacy is essentially anti-social. *See* Nizer, *The Right to Privacy: A Half Century's Development*, MICH. L. REV. 528 (1965).

[32] 277 U.S. 438, 478-479 (1928).

permissible searches and seizures. His dissent was in light of the majority's holding that wiretapping is not considered violative of a person's privacy because speech cannot be seized and a search cannot be conducted if the place where the signals of the wiretap were being received is far removed form the defendant's house.

This call for a broader and more elastic application of the laws regarding the permissible actions of the state against the private lives of individuals was echoed by Justice Murphy, also dissenting in the case of *Goldman v. United States*[33]. Justice Murphy's opinion underlined the need for judicial construction to take into account the advances being made in the field of technology. For Justice Murphy, only such flexibility in rule-application can permit the laws to continuously "serve the needs and manners of the succeeding generation"[34].

These words would prove to be prophetic[35]. In a matter of years, the manifestations of an international world order were gradually seen, and humanity entered the phase of globalization. With the dawning of this new age, however, came consequent implications on privacy rights.

Globalization is often described as a phenomenon that results in the facilitation of human endeavors between individuals from all over the world, especially in areas that have been traditionally located within the domestic national context and are regarded as the "key institutional domains of social power"[36]. Modelski, however, offers a more accurate description when he wrote that globalization is the *process* by which a number of historical world societies were brought together into one global system[37]. The difference in the definition lies in the fact that Nodelski's emphasizes that globalization is a process – a progression of interconnected and interrelated events – rather than an instantaneous or temporary occurrence[38]. This is important because, as the argument of this paper is that the limits of privacy have been gradually eroded by the effects of globalization, it must be established that the transformation of traditional notions of privacy also underwent a process, in consonance with that of globalization.

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[33] 316 U.S. 129, 141 (1941).

[34] *Ibid.*

[35] In fact in a 1989 case, the United States Supreme Court applied a "heightened sensitivity" standard in that the intervention of technology may give way for a closer scrutiny by the Court of a state measure's privacy impact. Said the Court: "Plainly there is a vast difference between the public records that might be found after a diligent search of court house files, county archives, and local police stations throughout the country and a computerized summary located in a single clearing-house of information". *Department of Justice v. Reporters' Committee*, 489 U. S. 749, 762-63 (1989)

[36] These domains are those of the economic, political and legal domains. *See* M. Mann, 1 THE SOURCES OF SOCIAL POWER (1986) and A. Giddens, THE CONSEQUENCES OF MODERNITY (1990).

[37] G. Modelski, PRINCIPLES OF WORLD POLITICS (1972).

[38] A. McGrew, *Global Legal Interaction and Prsent-Day Patterns of Globalization* in V. Gessner and C. Budak (eds), EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW (1998).

The impact of globalization on existing social systems and structures are legion. Because of the increased interaction across transnational borders, traditional practices which used to be confined territorially are now being undertaken not only extra-territorially but more often multi-jurisdictionally. Rajaee provides a comprehensive survey of the effects of the globalized order in the different aspects of human life[39]. For example, Rajaee explains that the coming together of nations in one arena may effect tensions and other sources of friction that may eventually lead to the "clash of civilizations" that Samuel Huntington once wrote about[40]. In the economic arena, on the other hand, the production process becomes an international enterprise, with capitalists free to locate a production stage in any part of the globe that has a comparative advantage in terms of cost and output efficiency[41]. The blurring of cultural lines is also a concomitant effect of globalization, and it operates to dismantle the myth of objectivity while promoting the notion of subjectivity in terms of relative value systems and normative conduct[42].

Clearly, the globalization process is not a mere ripple in the tide of human history but a deluge the extent and magnitude of which not too many scholars have accurately forecasted. However, amidst the multi-faceted revolutions instigated by globalization, only one stands out as having a direct bearing on the individual's right to privacy – the creation of an information civilization.

The term information civilization was coined by Rajaee in her insightful book, *Globalization on Trial: The Human Condition and the Information Civilization*[43]. The characterization of this civilization was, however, antedated Rajaee's book, as Bell back in 1979 already predicted the coming of an age where information would be both the end and the means of social intercourse. Bell wrote:

> The new information society has three main features: (1) it involves the change from a commodity-producing to a service society (2) it concentrates on codification of theoretical knowledge for innovation in technology, (3) it creates a new intellectual technology which serves as a key tool of systems analysis and decision theory. When knowledge becomes involved in some systemic form in the applied transformation of resources, then one can say that knowledge, not labor, is the source of value. In this

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[39] Rajaee *supra* note 7 at 20-32.

[40] S. Huntignton, *The Clash of Civilizations*, 73 FOREIGN AFFAIRS 22-49 (1993).

[41] R. O'Brien, GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY (1992).

[42] A caveat is in order however, because despite the increased interaction of the peoples of the world, the problematique of intercultural communication brought about by language and other similar barriers still remain in place. *See* M. Featherstone, GLOBAL CULTURE: AN INTRODUCTION (1990).

[43] Rajaee *supra* note 7 at 63-93.

> new society, knowledge is the main commodity exchanged in the marketplace[44].

Bell's description, in itself, already consists of an accurate description of what the globalized world of today has actually become – an information society[45]. The use of the term "civilization" by Rajaee, however, is a significant addition to Bell's thesis because, as explained by Rajaee, a civilization is not just a mere functional grouping of individuals (as what a "society" connotes) but a convergence of such individuals along with their respective political, economic, social, and cultural values. The "information" in the information civilization, then, is not just a mode of production or a means of interaction but a pervasive and common factor infused in the "universality of the civilizational milieu" – that is, the convergence of political power, economic wealth, cultural values, and even memories[46]. This pervasive character of information in the contemporary context is the defining factor of the present-day limits of privacy.

An illustrative example of the interface between the trends of the information civilization context and the right to privacy can be shown in the work of Miller. In his book, Miller writes about developments that relate to modern-day concern for privacy, and these are: (1) massive record-keeping, (2) decision-making by dossier, unrestricted transfer of information from one context to another, and (4) surveillance conduct at one level or another[47]. Miller notes that, as more and more of the world's transactions are increasingly being fuelled by the quality and quantity of the information available, the mere process of procuring and safekeeping data has placed an undue burden on the solitude and seclusion (ergo privacy) of individuals[48]. The volume of the data being collected at the gate keeping stage of almost every transaction progressively diminishes the community's conception of what constitutes private space[49]. On the one hand, this development ensures that individuals today are given more opportunity to participate in the now-expanded public space, where they can satisfy "vaguely felt needs for higher purpose and meaning"[50]. On the other hand, it may also lead individuals to withdraw from such public space for fear of unwarranted intrusion, from the state,

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[44] D. Bell, *The Social Framework of the Information Society* in Dertozos, M. L. and J. Mosesin (eds), THE COMPUTER AGE: A TWENTY- YEAR REVIEW 163-211 (1979).

[45] *See also* Y. Masuda, MANAGING IN THE INFORMATION SOCIETY: RELEASING SYNERGY JAPANESE STYLE (1990)

[46] Rajaee, *supra* note 7 at 73.

[47] A. Miller, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 40 (1971).

[48] R. Hixson, PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT 183 (1987).

[49] Miller, *supra* note 44 at 180.

[50] A. Hirschman, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION 126 (1982).

or private individuals/ entities, or both (or in some cases, the intrusion may even come from unknown sources).

The contrast could not have been any starker. Whereas the individual asserting privacy rights at the time of Warren and Brandeis, Prosser, even of the *Olmstead* and *Goldman* cases had to contend only with either government or another private individual, had to litigate only within the domestic boundaries of his state, and had to merely assert a widely-shared belief in being entitled, as a matter of right, to a personal private space, the situation in the information civilization is markedly different. Today, privacy rights are limited by the context in which they must be asserted; and that context dictates the facility or complexity with which such rights may be asserted or protected. One must necessarily take into account the variegated configurations of actions brought about by the multiplicity of actors and the expansion of the locus of the dispute – both being consequences of a globalized world. As to actors, the disputants may be national states, foreign states, local individuals, foreign individuals, corporate entities and their numerous multinational counterparts, non-state actors like private international organizations, etc. As to the locus of the dispute, the invasion of privacy may occur within the immediate locality or halfway around the world – the length and breadth of the continuum is almost unimaginable. Most importantly, asserting privacy rights in this day and age may not be as effortless as in decades ago, because one must necessarily clash with a worldview and tendency increasingly being shared by many peoples around the world – a worldview for which the assertion of the self and the rejection of the others is anathema to the prevailing order.

III. THE PARADIGM SHIFT: IDEALIST PARADIGM TO CONSTRUCTIVIST PARADIGM

Another point of comparison in determining the extent to which privacy rights have become more and more limited is the respective paradigms used by the domestic context and the information civilization context in protecting privacy. These paradigms are the frameworks utilized by dispute-resolution entities in cases where privacy rights are being asserted against other conflicting social values. It is submitted that the process of resolving such conflicts operates as a mode of delimitation of privacy rights because such procedure ultimately delineates the extent, as well as the limits, of privacy vis-à-vis other values. By pointing out the shift in the paradigms used in the domestic and in the information civilization contexts, it will be established that contemporary privacy rights has been limited further by a paradigm that accommodates more values to be taken into account alongside the interests of privacy.

A. THE IDEALIST PARADIGM

The domestic context adheres to an idealist paradigm. Under this framework, outcomes are created by the confluence and conflict of ideational or intangible factors. As can be gleaned from the writings of scholars at that time, the ideals of privacy has to contend only with the conflicting ideals of the only other actors in the social arena - government and its ideals of "compelling state interests", and other members of the civil society and their ideals of "equally fundamental freedoms".

The times when the right to privacy is not recognized as an enforceable right have long been gone[51]. Since the *Pavesich*[52] ruling which derived the right to privacy from natural law and on the persuasive effect of the Warren and Brandeis article, Courts have ceased to ask whether there was a right to privacy or not, and simply went on to answer to what extent the right to privacy can be legally asserted. In some cases, it was a mere act of interpreting statutory provisions expressly provided like in the Philippines[53]. In most cases, the extent and limits of privacy are determined jurisprudentially.

The extent of the right to privacy has been outlined through years of domestic and foreign jurisprudence[54]. It has been established that an individual has a right to retain private communication and disallow others from publicizing it[55]; to prohibit others from publicizing personal artistic creations[56]. The right to privacy encompasses not only the right to prevent inaccurate portrayal of private life but to prevent its being depicted at all[57]. The Warren and Brandeis article introduced the concept of "privacy as control", which means having control over the type of

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[51] In *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902) the New York Court denied any claim to a right to privacy, ruling that recognizing such right would result not only in a vast amount of litigation but litigation bordering on the absurd.

[52] *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101 (1905).

[53] The Philippine Constitution grants express protection to the privacy of correspondence and communication (Art. 3, Sec. 1 (5)) and the Civil Code provides for Human Relations Torts under Articles 26 and 32, as well as liabilities imposed for the violation of privacy in the publication of letters and other private communication in Article 723.

[54] A notable deviation is the Warren and Brandeis article which, though not a court decision, assumes a very persuasive effect. According to Warren and Brandeis, the matters of which publication should be repressed are those which concern the private life, habits acts and relations of an individual, and have no legitimate connection with his fitness for a public office.

[55] *Pope v. Curl*, 2 Atk. 342 (1741) as cited in I. Cortes, *supra* note 17 at 19.

[56] *Prince Albert v. Strange*, 41 Eng. Rep. (21 Chancery) 1171 (1894) as cited in I. Cortes, *supra* note 17 at 20.

[57] Slough, *supra* note 19 at 31.

personal information that is disseminated to others[58]. The right to privacy also refers to the right of an individual to preserve no less than his/ her identity and individuality, as opposed to the damage contemplated in ordinary tort laws[59]. Lastly, privacy is necessary in order to nurture relationships with different people and so therefore also has a relational interest[60].

The limits to the right to privacy, on the other hand, have also been the subject of decisional rule-making. A lawful order of the court directing the surrender of documents, even though purportedly private, cannot yield to an invocation of the right to privacy[61]. Public figures should also expect that their recourse to the right to privacy argument has been limited by their deliberate act of thrusting themselves into public scrutiny[62]. Further, the public interest in obtaining information becomes dominant over the individual's desire for privacy[63]. Public safety and order[64] are also standard exceptions in laws that were primarily enacted to protect privacy[65]. In the Philippines, the law against Wire Tapping provides that such a practice may be deemed legal when authorized by the Court and when the crime being investigated is a crime against national security[66]; the law also does not prohibit law enforcers from using information gathered through wire tapping as leads as long as they are not used as the sole basis for prosecution[67]. Bank records

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[58] In Warren and Brandeis *supra* note 14 at 193: "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others." This notion of "privacy as control" has been upheld in Canadian cases like in *British Columbia Securities v. Branch*, 2 S.C.R. 3 (Can. 1995); *R. v. Mills*, 3 S.C.R. 668 (Can. 1990); *Hunter v. Southam*, Inc., 2 S.C.R. 145 (Can. 1984), as cited in J. Teh, *Privacy Wars in Cyberspace: An Examination of the Legal and Business Tensions in Information Privacy*, 4 YALE SYMP. ON L. & TECH. 1 (2002).

[59] E. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser* 39 N.Y.U. L REV 962 (1964).

[60] J. Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323 (1975); H. Nissenbaum, *Protecting Privacy In An Information Age: The Problem of Privacy in Public*, 17 Law and Phil. 559 (1998), cited in J. Teh *supra* note 55.

[61] *Material Distribution Inc. v. Natividad*, 84 Phil. 127 (1949).

[62] *Sidis v. F-R Pub. Corp.*, 113 F. 2d 806 (1940).

[63] The Warren and Brandeis article admonishes that the right to privacy "should not prohibit any publication of a matter which was of general or public interest so as not to run afoul of first amendment freedoms"

[64] Sloan's formulation of the level of public interest required as just such as to "justify the sacrifice of privacy" is a vague standard. Although it puts premium on decision-making on a case-to-case basis, such a process is obviously vulnerable to abuse and does not engender predictability and uniformity in the law. *See* I. Sloan, LAW OF PRIVACY RIGHTS IN A TECHNOLOGICAL SOCIETY 32 (1986).

[65] Article III, Sec. 1 (5) of the Constitution of the Philippines reads: "The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise".

[66] Rep. Act No. 4200, Sec. 3.

[67] *Ibid.* Sec.4.

have been held to be owned by the bank and not the customer, and so there must be no expectation of privacy in the processing of such data[68].

In the idealist paradigm, the contending ideals are privacy, the interests of the state, and the equally fundamental freedoms of other members of the civil society (notably the freedom of the press and the public's right to information). This paradigm is both simple and complex at the same time – simple because the decision-maker merely has to weigh the merits of the conflicting claims in the abstract, and therefore he/ she is not constrained by any limiting extraneous factors other than the preponderance of one argument over another; complex because the standards for pronouncing judgments based on abstract ideas are elusive, and therefore the decision-maker can only have limited recourse to precedents and must rely heavily on the peculiar circumstances of every case. However, in terms of limiting the right to privacy, this paradigm is more advantageous because, given the context, it subjects the right to privacy to the limiting effects of at least only two conflicting values – those of the state and those of the rest of civil society. In the following section, it will be demonstrated how the shift in context, and the corresponding shift in paradigm, has made it more arduous to assert privacy rights.

B. THE CONSTRUCTIVIST PARADIGM

The underlying proposition of the constructivist paradigm is that ideational factors (like the ideals discussed in the previous section) cannot alone determine social outcomes. Instead, they interact and come into conflict with material or tangible factors; both of them may reinforce or temper each other or cancel each other out, and the end result will be the social outcome[69]. This paradigm became relevant in the advent of globalization in terms of the contemporary limits of privacy rights because of its ability to accommodate factors other than the ideational. The presence of such hitherto extraneous factors, and the resultant paradigm shift undertaken to accommodate them, represents the single most effective means by which contemporary privacy rights have largely been eroded. In this section, the right to privacy will be pitted against the ideational and material factors that have come into being as a consequence of a globalized world.

1. Ideational factors

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[68] *United States v. Miller*, 425 U.S. 435.

[69] Hay, *supra* note 12. For an application of the constructivist paradigm to international relations analysis, *see* E. Adler, Seizing the Middle Ground: Constructivism in World Politics, 3 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 319-363 (1997).

a. State interests.

The interests of the state at the domestic level are still very much intact, and they can still operate to limit an individual's right to privacy if legislation to that effect were to be passed. However, in light of a globalized order, state interests become increasingly subject to the influence of foreign external actors[70] such that the individual has to contend not only with domestic but with international pressure as well, with regard to the protection of his/ her privacy. It is contended, however, that the interests of a state in particular and states as a collective are still very much defined by the statutes that they enact locally and the multilateral agreements that they ratify internationally. In the subject of international information privacy, the field of inquiry is very fertile in this regard.

Transborder data flow refers to the ingress and egress of private information from a country of origin to a country of destination as part of a legitimate transaction[71]. It has assumed a place of particular interest in the international arena because of its far-reaching implications to state relations and the growing clamor for privacy rights protection[72]. To date, the centerpiece of international information privacy is the European Union Directive 95/46 which sets up standards for secure transborder data flow between EU member states and to non-EU countries[73]. Under the directive, the extent of privacy accorded to the individual from whom the personal data was gathered is broad, i.e., (1) sensitive data will not be transmitted without express consent (2) data cannot be used for a second purpose not related to the primary purpose for which the data was gathered (3) the subjects of the data enjoy the right of access, right of correction, and right of information. The only limits imposed are when there is express consent, contract, public interests or legal claims, provisions of national law, and when it is for the vital interest of the subject[74].

Under the Directive, then, the individual is seemingly assured of higher standards of information privacy. However, the complication arises when the Directive is applied to third countries. This is because the Directive's standards include, among others, an equivalence of information protection regimes in third

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[70] McGrew, *supra* note 36 at 333.

[71] R. Cain, *Global Privacy Concerns and Regulation: Is the United States a World Apart?*, 16 INT'L. REV. LAW COMP. & TECH. 23-34 (2002).

[72] W. Chik, *The Lion, the Dragon and the Wardrobe Guarding the Doorway to Information and Communications Privacy on the Internet: A Comparative Case Study of Hong Kong and Singapore – Two Differing Asian Approaches*, 14 INT'L. J. LAW & INFO. TECH. 47-100 (2005).

[73] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L 281) 31

[74] P. Blume, *Transborder Data Flow: Is There a Solution in Sight?*, 8 INT'L J. LAW & INFO. TECH. 65 (2000).

countries as a condition for transborder data flow transactions[75]. Although the rule admits of some exceptions, experience has it that very few countries were able to comply with such standards because they were simply too stringent[76]. Others, like the United States which subscribe to a rule of self-regulated data flow control, succeeded in negotiating for a "safe harbor" status as a compromise between absolute compliance and absolute non-conformity[77].

The lesson that may be derived from the current stand-off between the United States and EU is that international initiatives can only go so far in the face of a dissenting state and in the context of a globalized world that still does not have a formal structure of international governance[78]. This is an important lesson in the struggle for the protection of privacy rights because it shows that the extent and limits of such rights are not so much embodied in legal documents as realized in actual state practice[79].

b. Fundamental freedoms.

An individual's interest to protect and assert his/ her privacy is limited to a certain extent when taken into consideration other equally fundamental freedoms that should be accorded to other individuals. This issue has been tackled way back in 1976 when the Organization for Economic Cooperation and Development juxtaposed the human right to privacy protection against the sovereign right of state to regulate the flow of data across international borders and the human right to access to information, even those that need to be transmitted across borders[80]. This is in addition to traditional fundamental freedoms being claimed by other actors against the right to privacy of the others (e.g., the public's right to information, the freedom of expression, and the freedom of the press), only this time, the field has been expanded considerably to include the rest of the world. In such a setting, asserting one's privacy rights has indeed become more challenging, to such an extent that the difficulty in asserting it may amount to a diminution of the already constricted personal space that one enjoys today.

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[75] G. Shaffer, *Extraterritoriality in a Globalizing World: Regulation of Data Privacy*, 97 AM. SOC'Y INT'L L. PROC. 314 (2003).

[76] J. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717 (2001)

[77] R. Moshell, *And Then There was One: The Outlook for a Self-regulatory United States Amidst a Global Trend Toward Comprehensive Data Protection*, 37 TEX. TECH L. REV. 357 (2005).

[78] F. Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT'L L. 807 (2005).

[79] A more comprehensive analysis of the dynamics of the EU Directive and the US self-regulatory model is provided by G. Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of US Privacy Standards*, 25 YALE J. INT'L LAW 1-88 (2000).

[80] G. Garzon and E. Villarino, *Information and Privacy Protection in Transborder Data Flows: The Rights Involved*, in OECD, POLICY ISSUES IN DATA PROTECTION AND PRIVACY: CONCEPTS AND PERSPECTIVES (1976).

c. Rules of the free market paradigm.

Lessig was the pioneering scholar who wrote about the "codes" that govern cyberspace transactions. According to him, the rules that cyberspace guests go by in their dealings with one another are designed not by democratic institutions but by profit-driven commercial companies who use the tools with which the vast majority of users access the Internet[81]. Given this constraint, the individual is a priori bound by terms of reference that may be disadvantageous to him/ her but nonetheless have to be accepted in exchange of the value of the cyberspace transaction. This free market paradigm rule – of profit-driven entities willing to ask for onerous trade-offs because they know the value of their offer as to the vendee – compels the individual to give up as much privacy as he/ she can afford given the relative importance to her of access to the transactional platform controlled by corporate "codes".

Also relevant along these lines are privacy concerns in the field of electronic commerce. In this arena, privacy may be limited not so much because of state regulation and unwarranted intrusion by extraneous elements (like spyware, hackers etc.) but by the corporate entities themselves. As the gate keepers in the cyberspace market, they are empowered to draft the "rules of the game[82]" and the individual is placed in a position where he/ she must match the value of the transactional object with a roughly equivalent measure of his/ her privacy[83]. Most of the time, the surrender of privacy takes the form of unobtrusive and seemingly harmless information solicitation that the corporate entity will then use as a marketing and sales tool[84], and the measure of privacy surrendered acts as the currency with which the transaction was consummated[85]. The question, however, is

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[81] L. Lessig, CODE: AND OTHER LAWS IN CYBERSPACE (1999).

[82] Rajaee, *supra* note 7.

[83] L. Edwards clarifies: "consumers are simply prepared to sacrifice privacy on-line to embrace the correlative advantages but this choice is uninformed and does not prevent fears about privacy impacting on consumer confidence in e-commerce." *See* L. Edwards, *Consumer Privacy, Online Business and the Internet: Looking for Privacy in All the Wrong Places*, 11 INT'L J.L. & INFO. TECH. 226 (2003).

[84] H. Anderson, *The Privacy Gambit: Toward A Game Theoretic Approach to International Data Protection*, 9 VAND. J. ENT. & TECH. L. 1 (2006).

[85] Anderson, *supra*, offers an interesting thesis that in the information age (or information civilization, as in this paper), privacy – since it also embodies information that is personal to the owner – can assume a negotiable character and can thus be used as currency in the undertaking of transactions using the information technology infrastructure as a platform. By way of example, Anderson writes: "Consumers routinely provide personal financial data to financial services companies in exchange for credit... Customers of consumer products companies provide their e-mail addresses in exchange for notification of a merchant's sales and special offers. Registered users of e-commerce sites such as Amazon.com register as a prerequisite to the company's collecting the type of purchase history data that makes product recommendations possible. Even outside the consumer context, individuals often provide personal data regarding previous

not whether the surrender of privacy was unreasonably onerous but whether the surrender was warranted in the first place. This trend, when not reversed, would slowly but surely operate to compel virtual vendees to surrender more and more of their personal selves until the critical mass of consumer trust can no longer be achieved and a substantial chunk of electronic commerce will collapse[86].

2. Material factors

a. Imperatives of technology[87].

One of the imperatives of technology is that it is in a constant state of progression. The technology available today makes it possible for information to be accessed and utilized with ease and dispatch. But as Sloan observed, the continued propagation of information through the platform of technology only operates to enhance the technology so that it will be able to generate more information and continue to improve its performance anew[88]. This cycle of continuous progression of technological innovation operates as a constraint on an individual's privacy because the intrusive technology that may be defended against one day may prove to be unbeatable the next. Once a technology that seriously impairs individual privacy comes into being, absent stringent legal restraints, it will inevitably be diffused in the world community in some form or another. Although the Internet is already becoming a locus for various conflicts involving privacy rights[89], it has never been contemplated to be wiped out of existence. Its continued currency is almost inevitable and its progression is almost irreversible, so much so that privacy rights, and not the Internet technology, bears the pressure of adjustment and accommodation.

Another imperative of technology is that it subsists in areas where it is most needed; and in contemporary times, management and governance remain the toughest challenges to human relations. The technology that would most likely be

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employment (including salary and performance data), in exchange for an opportunity for new employment... "

[86] An instructive article about the interrelation between privacy and commercial interest is provided in L. Edwards, *Reconstructing Consumer Privacy Protection Online: A Modest Proposal*, 18 INT'L REV. L. COMP. & TECH. 313-344 (2004)

[87] Noteworthy is the definition given by Ellul, thus: "technology is the totality of methods rationally arrived at and having absolute efficiency in every field of human activity.", and Hunter who said "technology is nit just used, it is lived" *see* J. Ellul, THE TECHNOLOGICAL SOCIETY (1964) and O.J. Hunter, *Technological Literacy*, 32 EDUCATIONAL TECHNOLOGY 25-31 (1992).

[88] Sloan, *supra* note 61 at 10.

[89] P. Lansing and M. Halter, *Internet Advertising and Right to Privacy Issues*, 80 U. DET. MERCY L. REV. 181 (2003).

developed with the greatest speed is that which is related to social control and corporate governance - areas in which the individual is a permanent subject. Vigilance against intrusive technology must always be exercised to protect the individual's privacy, especially with regard to sensitive issues like transborder data flows for the purpose of criminal profiling[90], medical information[91], and banking transactions[92]. As an example, physical surveillance at almost all levels of human life has ceased to become a figment of the imagination. Indeed, Westin's account classifies the levels of physical surveillance available to the state which include surveillance of physical acts, speech, and personal records[93]. The technology that Westin described in detail back in 1967 has progressed a hundred fold with the advent of integrated circuits and miniaturized devices. Renenger also explores another fascinating figment of the technological revolution - the Global Positioning System, but nonetheless warns of the detrimental effects of such technology to the privacy of its subjects; this is in light of the fact that, if Warren and Brandeis's four-fold classification would be used, the tort resulting from a GPS-sponsored privacy intrusion may not amount to an actionable wrong[94].

b. Constraints of technology.

Sloan points to the modern personal computer[95] as the exemplar both of technology's best and its worst. While it is capable of storing and manipulating enormous amounts of data within a short time, it can also be easily manipulated at will by any adept operator[96]. The privacy of individuals whose private information were procured stands to be compromised because of the constraints in the

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[90] H. Hallett, *The Police and Transborder Data Flows*, in OECD, POLICY ISSUES IN DATA PROTECTION AND PRIVACY: CONCEPTS AND PERSPECTIVES (1976).

[91] J. Blum, *The Role of Law in Global E-Health: A Tool for Development and Equity in a Digitally Divided World*, 46 ST. LOUIS U. L.J. 85 (2002); A. Westin, *Transborder Flows of Personal Health Data: A Problem Whose Time Has Not Yet Come*, in OECD, POLICY ISSUES IN DATA PROTECTION AND PRIVACY: CONCEPTS AND PERSPECTIVES (1976).

[92] G. Stromberg, *International Message Transfers Between Banks*; C. Read, *Banking and the Regulation of Data Flows*, in OECD, POLICY ISSUES IN DATA PROTECTION AND PRIVACY: CONCEPTS AND PERSPECTIVES (1976)

[93] Westin, *supra* note 1 at 69-80.

[94] A. Renenger, *Satellite Tracking and the Right to Privacy*, 53 HASTINGS L.J. 549 (2002)., also *see* K. Edmundson, *Global Positioning System Implants: Must Consumer Privacy be Lost In Order For People to be Found?*, 38 IND. L. REV. 207 (2005).

[95] Hixson, *supra* calls the computer a "not-so-elegant threat" and admonishes that "privacy as solitude and seclusion, or the right to be let alone, or to be free of surveillance and intrusion - all traditional concepts - have given way in a large measure to the fear of informational invasion of privacy.

[96] *Ibid.* at 24.

technology of computers, and the lack of sufficient technology to design a fool-proof system of information procurement and storage[97].

c. Multiplication of actors.

One of the primary effects of a globalized world is that the social interactions that were once confined to small localities can now be undertaken by many actors simultaneously across geographic boundaries[98]. Whereas before, privacy need only be asserted as against the state and as against other members of civil society, today the multiplication of forums of interaction also meant the exponential increase in the number of social actors with whom relationships may be established and against whom the individual's standards and demands as regards privacy must be asserted[99]. This material factor poses a serious challenge to the promotion of an individual's privacy and can only be feasibly addressed, given the enormous constraints, by an international conglomeration of individuals similarly situated or a state-sponsored regulatory mechanism that will promote privacy rights on their behalf. And this is not to mention the converse of the problem – the collapse of formerly multiple actors into one – which also poses a serious challenge to privacy rights assertion. Mayer-Schönberger points to the phenomenon of "convergence" where an Internet user is, by definition, not just a recipient, but also an author, a producer, and a distributor of information[100]. This adds to the cacophony of legal confusions because the individual would be hard-pressed imputing liability on a person depending on what capacity he/ she violated the individual's privacy rights.

The constructivist paradigm is a useful tool in graphically illustrating the marked changes that have transpired during the past decades in terms of the limitations of the right to privacy. Acknowledgment of the fact that the right to privacy is subject to the limiting effects of new agents brought about by globalization would be facilitative of the creation of new avenues of intervention for and on behalf of the individual and instructive as to the loci of conflicting values in which the right to privacy must be asserted.

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[97] Miller also points out that the greatest threat posed by a computer system is that it may be used as a medium to deprive the individual of control over the outward flow of his/ her personal information. *See* A. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091 (1969).

[98] Rajaee, *supra* note 7 at 59.

[99] Rajaee enumerates some of the new social actors in a global arena which used to be the exclusive province only of the sovereign states: governmental and non-governmental international institutions, private corporations and their foreign counterparts, foreign individuals, and the global mass media. *Ibid.*

[100] Mayer-Schönberger, *supra* note 3 at 401.

IV. CONCLUSION

It is, however, not enough to treat a subject of inquiry by way merely of taxonomy, or of classifying and describing. While this paper has accomplished the task of laying down the factual backdrop that explains the historical evolution of the limits of privacy up until the contemporary period, it will nonetheless advance a two-fold proposal with a view to preserving the revered niche reserved by society for the right to privacy.

For the long term, the evolution of international rules and, ultimately, norms, governing the conduct of states which have a direct bearing on privacy rights must be sustained. The EU Directive has provided for a suitable standard; although there would definitely be much debate as to whether the instrument is unduly restrictive, it being a matter of policy, the proper forum for discussion is during state-level negotiations. Suffice it to submit that the prevailing systems and structures of the globalized order would have a very difficult time accommodating an international plan of action that is based on anything less than virtual uniformity. Resort to being islets of self-regulation amidst a growing mass of multilateral efforts would, this author believes, ultimately be counter-productive. For this, the imperatives of technology would be very instructive: a technology that facilitates a particular human endeavor, once conceived and executed, will somehow be diffused to the greater public in one form or another. The effort initiated by the European Union, subject to amicable negotiations and compromises, will prove to be such an inevitable and irreversible creature – not because of its merits *per se* – but because it is the only existing paradigm of action to date that is fairly compatible and consistent with the contextual reality of a globalized world order.

For the short term, however, while the rules and norms are in various stages of incubation, it would be helpful for the various applicable dispute-resolution entities[101] to shift from the equipoise mechanism to the triage mechanism. The traditional equipoise approach of "balancing interests" is no longer consistent and compatible with the exigencies of a globalized world. As what this paper has established earlier, the factors that operate to limit the extent of the right to privacy have become legion as a logical consequence of globalization. The

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[101] The "dispute-resolution entities" in the domestic context are primarily the courts of law and, secondarily, the individual him/ herself in the process of self-regulation. In the information civilization context, however, these entities have come to become courts of law, arbitration and mediation bodies, informal mechanisms, and others performing similar functions. The goal of a dispute resolution entity is to arbitrate between two (or, in the present context, two or more) conflicting values, one of which is the right to privacy, to determine whether there has been an unwarranted intrusion. In any case, the decision of a dispute-resolution entity will either expand or constrict the extent and limits of the right to privacy.

equipoise model is therefore no longer adequate to account for all these nascent externalities that, whether susceptible of being parties to a dispute or not, limit the extent of privacy rights nonetheless. It is proposed instead that the triage[102] model be applied, in which, upon consideration of all relevant ideational and material factors, the adjudication on the alleged violation of the right to privacy will be rendered based on what values must be prioritized in terms of protection and what values can be forgone for their relative dispensability.

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[102] L. Sager, *Constitutional Triage*, 81 COLUM. L. REV. 707-719 (1981). This article is a review of the book "Judicial Review and the National Political Processes" by Jesse Choper. "Triage" as applied in the article refers to the judicial restraint to channel expenditures where it counts most, i.e., in cases involving the protection of individual rights.