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Foreword to the Spring 1999 Edition

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{1} Law is the mirror of society. The increasing importance of cyberlaw as an area of legal specialization reflects the uncertainty and growing concern -- some might even say fear -- with which society has begun to view the issues arising as the physical and virtual worlds continue to merge.

{2} In this issue of the *Journal of Technology Law & Policy*, Mark Dearing writes on the problem of applying traditional rules of personal jurisdiction in cyberspace, Scott L. Olson discusses the dilemma of regulating on-line conduct -- specifically gambling, while articles by Suzanne M. Thompson and Rod Dixon outline some of the dangers to personal privacy created by cyberspace technologies. Underlying the themes of all four of these papers is perhaps the single most critical dilemma we must confront in foreseeing (for we may in the end be powerless to *decide*) the future of cyberspace and its effect on the legal system: accountability versus anonymity. Traditional notions of personal jurisdiction rely on being able to identify the party over whom jurisdiction is asserted; conduct, such as gambling, cannot be effectively regulated absent the ability to identify the party whose conduct is to be controlled; the level of protection accorded to personal privacy is, and always has been, a balancing act between society's interest in promoting freedom of personal expression and activity versus society's interest in protecting itself and its members from harm, with the latter goal predicated on identification.

{3} Think of the issue as a spectrum. At one end is total anonymity and thus total lack of accountability. At the other, total accountability and therefore total lack of anonymity. In the physical world it has been relatively easy to isolate discrete areas in which to apply standards located at varying points on the spectrum so that anonymity and accountability can co-exist. Anonymous political speech is protected as a Constitutional right; anonymous defamatory speech or infringement of intellectual property rights is not. Society insists on personal accountability for activities which violate its laws. Personal privacy is a socially recognized expectation, and considered legally reasonable in appropriate circumstances, but its protection is excepted once society's interests begin to outweigh those of the individual. The United States Supreme Court laid out this understanding in *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1524 (1995), where the Court said, "Anonymity is a shield from the tyranny of the majority," but also that, "The right to remain anonymous may be abused when it shields fraudulent conduct."

{4} Cyberspace presents us with a world in which it is much harder to draw lines around different types of conduct, one in which it is presently impossible to restrict the use of anonymity to certain specific contexts. To be sure, recent technological innovations, most notably Intel's insertion of unique serial numbers into its new Pentium III chip, and Microsoft's use of a "Globally Unique Identifier" in copies of its Windows software, as well as "clickstreaming" and other tracking technologies, suggest at least some possibility of enforcing personal accountability in cyberspace. However, it is unclear how effective such approaches could ultimately prove, given that every technological attempt to defeat anonymity on the Net to date has been relatively easily undone by a counter-technology aimed at preserving a "right" of anonymity.

{5} Thus it is uncertain how (or even *if*) we might transfer to cyberspace our real-world understanding that anonymity and personal accountability are *both* socially valuable. If it proves impossible to do so, how will our legal system evolve as cyberspace becomes the dominant arena for social and commercial interaction? Which of our customary legal paradigms will have to be modified or even abandoned? In a world which will incorporate innovation from day-to-day, if not hour-to-hour, how will the Common Law and its practitioners keep pace?

{6} These are some of the fundamental questions that cyberlawyers must consider, the background against which they must work, as we approach a new century, and perhaps a new age of law.

ENDNOTES

[*] *About the Author:* Robert L. Dunne is the Co-Director of the Center for Internet Studies at Yale University.

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