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## Privacy Law in the New Millennium: A Tribute to Richard C. Turkington

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## FOREWORD

PRIVACY LAW IN THE NEW MILLENNIUM:  
A TRIBUTE TO RICHARD C. TURKINGTON

GREGORY P. MAGARIAN\*

AT least since Louis Brandeis and Samuel Warren's seminal 1890 article "The Right to Privacy,"<sup>1</sup> the idea of privacy has sparked some of the most significant and contentious debates in American law. Over the past three decades, Richard Turkington focused his formidable intellect on enriching those debates. Dick's untimely passing in 2004 deprived those of us who knew and worked with him of a treasured friend and a brilliant colleague. The broader legal profession lost a visionary. Probably more than any other scholar of his generation, Dick was responsible for expanding and deepening our understanding of the essential, sometimes elusive, idea of privacy in the legal domain. His omnivorous mind reached across disciplines and doctrines to generate unprecedented insights about why human beings care so much about privacy, in what circumstances legal relationships and privacy concerns affect one another, and how courts and policymakers should think about the interplay of privacy interests and competing societal concerns. In light of Dick's towering influence in the privacy field, his colleagues at the Villanova University School of Law decided that the school could honor his memory most appropriately by convening a stellar group of scholars to explore how the law of privacy will develop in the decades to come.

Among the primary challenges of privacy as a subject of legal scholarship are measuring its reach and discerning the connections it makes among seemingly disparate subjects. In their pathbreaking case book *Privacy Law*,<sup>2</sup> Dick and his coauthor, Symposium contributor Anita Allen, answered those challenges by articulating a sophisticated taxonomy of privacy doctrine. Privacy, they explained, "has informational, physical,

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1. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* (2d ed. 2002).

proprietary and decisional meanings.”<sup>3</sup> From that platform, they proceeded through an exhaustive survey of privacy doctrines in diverse areas of private and public law. In an imperfect echo of their approach, this Symposium consists of three panels, each focused on a doctrinal area in which privacy issues loom especially large: law and medicine; constitutional law, with particular emphasis on the decisional autonomy of individuals and families; and information technology.

Another defining challenge of privacy scholarship is the need to grapple with hard cases. Should the interest of gay and lesbian couples in marriage overcome the political community’s desire to close the boundaries of “traditional” marriage? Does the danger of spreading AIDS justify revealing the HIV-positive status of a person who is concealing his condition while remaining sexually active? Does the danger of terrorism justify the government’s compilation of data on our telephone calls? Each of the Symposium participants foregrounds the difficulty of the issues privacy raises in his or her field in order to deepen our understanding of those issues.

The medical sphere, perhaps more than any other area of routine human activity, is fraught with privacy concerns, as patients must place their bodily integrity in the hands of caregivers and institutions that both need to gather sensitive personal information and stand in a strong position to abuse it. The three articles from the Symposium’s medical privacy panel emphasize different practical problems policymakers face in balancing the complementary but often contradictory interests in using medical information to benefit society and preserving patient privacy.

Ellen Wright Clayton examines medical researchers’ creation of biobanks—databases that combine patient data with DNA studies—which help them understand genetic factors in disease.<sup>4</sup> Technology has enabled this potentially beneficial practice, but Dr. Clayton notes its potential downside in privacy terms. Describing the regulatory landscape, she explains that neither the “Common Rule” that requires informed consent from human research subjects nor the authorization requirements of federal medical privacy regulations constrain the use of clinical data in biobanks. Nonetheless, and despite biobanks’ capacity to serve the public good, many institutions voluntarily seek informed consent and impose oversight on uses of patient data, a phenomenon Dr. Clayton attributes primarily to concerns about adverse public perception.

Barry Furrow emphasizes the value of a practice that usually prompts suspicion from privacy advocates: data mining.<sup>5</sup> He explains that, particularly in the hospital setting, collection and analysis of information about treatment decisions and results provides a distinctly useful basis for uncov-

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3. *Id.* at 25.

4. See Ellen Wright Clayton, *Patients and Biobanks*, 51 VILL. L. REV. 793 (2006).

5. See Barry R. Furrow, *Data Mining and Substandard Medical Practice: The Difference Between Privacy, Secrets and Hidden Defects*, 51 VILL. L. REV. 803 (2006).

ering hidden information about ineffective caregivers and for generating ideas to improve care. Data mining, for example, can reveal when hospitals have hired or retained personnel whose patients suffer complications at unusual rates. Of course, the information in question implicates patient privacy interests of the first order. Professor Furrow, however, emphasizes that institutions often deploy privacy concerns to shield their failings, resulting in the protection of secrets and undetected patterns of conduct whose revelation would help patients. Constrained by safeguards that take patient privacy considerations into account, the compilation and study of hospitals' data on treatment of patients can directly advance patients' critical interest in receiving safe and effective medical care.

Radhika Rao refocuses our attention on the dangers of technologically enabled medical data collection, but with a fresh and challenging take on how information can threaten privacy interests.<sup>6</sup> Ordinarily, she reminds us, scholars see tension between privacy and equality values. In the context of genetic data collection, however, the two interests converge. Employers and other interested parties have increasingly sought to use ever-more sophisticated means of genetic testing to identify medical risks in individuals and to use the genetic information as a basis for treating people differently. This practice, Professor Rao contends, undermines both individual privacy and the societal interest in equal treatment of individuals. Accordingly, she proposes that we construct and maintain a "veil of genetic ignorance" to protect everyone from the adverse consequences that might befall any of us based on discovery of our genetic characteristics. Her proposal rests on the premise that genetic traits are both too complex to be reliable and too intrinsic to be legitimate as grounds for differential treatment of individuals.

The sense of privacy that embodies the human right to make autonomous decisions has dominated and complicated the past four decades' developments in constitutional rights. Advocates and activists have drawn familiar battle lines: political liberals and believers in constitutional evolution favor expansions in constitutional privacy protection, while political and jurisprudential conservatives find few if any privacy guarantees in the Constitution. Looking to the future, however, all three participants in the Symposium's constitutional privacy panel identify ways in which the changing shape and growing complexity of constitutional privacy issues are causing those familiar lines to blur or cross.

Anita Allen considers the constitutional and social implications of legal rules that mandate a species of privacy: sexual modesty.<sup>7</sup> Although our constitutional norms increasingly favor personal autonomy, we accept legal rules that restrict or prohibit public nudity, lewd public behavior, and

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6. See Radhika Rao, *A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality*, 51 VILL. L. REV. 827 (2006).

7. See Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841 (2006).

sexually explicit public performances. Closely examining Supreme Court opinions that have upheld nude dancing restrictions, Professor Allen reveals the Court's justifications as a combination of abject legal moralism and thinly substantiated assertions about harmful secondary effects. While acknowledging the societal force of justifications for mandatory sexual modesty, Professor Allen cites women's consent to recent broadcasts of a mastectomy and a birth as illustrating the value of opportunities for sexual immodesty. She finds value in sexual modesty mandates that curb degrading displays of sexuality, but she cautions against modesty rules that effectively limit women's social roles and personal autonomy.

David Meyer confronts the age-old distinction between acts and omissions in the cutting-edge context of debates about whether constitutional principles protect gays' and lesbians' right to marry.<sup>8</sup> Constitutional protections of family privacy traditionally entail government noninterference with family decisions. Most commentators, therefore, presume that constitutional arguments for formal state recognition of gay marriage or the right to adopt a child must overcome that negative rights paradigm. In contrast, Professor Meyer inverts the paradigm. He begins with the proposition that the Supreme Court's decision in *Lawrence v. Texas*<sup>9</sup> protects all family relationships, including nontraditional ones, from destructive state interference. He then builds a persuasive case that forbidding marriage or adoption does not amount to mere nonrecognition but in fact constitutes destructive interference with intimate family decisions. By this account, courts may invoke the Constitution to protect gay marriage and adoption—potentially subject, of course, to the countervailing force of sufficiently weighty government interests—without incongruously imposing affirmative obligations on the state.

Mark Rahdert undertakes a major assessment of the Supreme Court's privacy jurisprudence during the tenure of the late Chief Justice William Rehnquist.<sup>10</sup> The privacy doctrine that the generally conservative Rehnquist Court inherited from its predecessors exposed divisions in conservative priorities. On one hand, conservatives broadly mistrusted the jurisprudential innovations of *Griswold v. Connecticut*<sup>11</sup> and especially *Roe v. Wade*,<sup>12</sup> and the Rehnquist Court's most conservative Justices welcomed opportunities to attack the underpinnings of those decisions. On the other hand, both social and small government conservatives sympathized with some privacy protections, particularly of family autonomy. Professor Rahdert situates Chief Justice Rehnquist and the Court's other recent departure, Justice Sandra Day O'Connor, at the center of this conservative

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8. See David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891 (2006).

9. 539 U.S. 558 (2003).

10. See Mark C. Rahdert, *In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies from the Rehnquist Court*, 51 VILL. L. REV. 859 (2006).

11. 381 U.S. 479 (1965).

12. 410 U.S. 113 (1973).

tension over privacy issues. Examining both Justices' contributions to privacy doctrine, he critiques the Rehnquist Court's failure to achieve a principled conservative account of constitutional privacy, and he suggests ways in which the new Court, under the leadership of Chief Justice John Roberts and with the addition of Justice Samuel Alito, might extend and refine Chief Justice Rehnquist's and Justice O'Connor's contributions to privacy law.

Profound and rapid developments in information technology during the Internet era have accelerated longstanding concerns about the threats that public and private institutions pose to personal privacy when they employ technology to gather information about individuals. Both of the Symposium's articles on information technology counsel that technological complexity and privacy concerns compel a thorough, pragmatic assessment of the interests at stake in deployment of information systems.

Gaia Bernstein casts a backward glance at the recent development of commercial information collection over the Internet with an eye toward socially desirable assessment of privacy considerations in future technological innovations.<sup>13</sup> Noting the frequent tension between calls for unimpeded development of promising technologies and regulatory protection of technology interests, she redirects the debate toward a pragmatic examination of when "social shaping" to protect privacy interests has a chance to be effective. She examines the development to date of data collection in Internet commerce and explains how several elements of the Internet's architecture have combined to entrench "commercial non-privacy norms" to a degree that renders future privacy protection efforts unlikely to succeed. Professor Bernstein posits this experience as an important illustration of the importance of timing, where technological features of information systems limit windows of opportunity for privacy protection efforts. She concludes that decisionmakers interested in protecting privacy in new online environments should identify privacy concerns early and move proactively to incorporate privacy concerns into initial design decisions.

Peter Swire addresses the calls heard since the 2001 terrorist attacks for greater sharing of information about terrorist threats among nations, law enforcement and intelligence agencies, and other entities charged with safeguarding national security.<sup>14</sup> Acknowledging the forceful impetus behind these renewed calls for information sharing, he proposes a set of due diligence inquiries for policymakers to apply in assessing information sharing proposals. What is the likelihood that the proposed sharing of information will aid enemies in undermining security? Will the proposal actually advance security, and will it do so in a cost-effective manner? Is

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13. See Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921 (2006).

14. See Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 VILL. L. REV. 951 (2006).

the proposed program merely cosmetic? Does the proposal imprudently alter longstanding practices? Does it take account of past abuses of power and incorporate checks to avert repetition of those abuses? Is it discriminatory or unfair? Does it unwittingly exacerbate security concerns? How would the proposal affect the interests of allies and other stakeholders? Would it seriously undermine privacy interests in particular? Would it likely give rise to bad publicity that would undermine the policy? Rather than wielding these questions to undermine specific policy proposals, Professor Swire offers them as a mechanism for conducting effective policy debates and making wise decisions.

A striking common element in all of the Symposium contributions is their acknowledgment of the difficult choices that privacy issues place before judges and policymakers. A legal landscape in which technologies, identities, and societal priorities seem to shift and evolve on a daily basis cannot abide platitudes about the need to be left alone, or about the necessity of sacrificing some measure of privacy in order to make society safer or more efficient. Dick Turkington, who finally had to navigate the harshest ambiguities of personal privacy in his brave battle against cancer, would have especially valued these articles' insistence on looking beyond easy answers. In the unfortunately brief time I had the privilege of knowing Dick, one of his qualities that most deeply impressed me was his ability to balance strongly held normative commitments with an unflinching openness to ideas that challenged and opposed his own beliefs. Dick was the kind of intellectual that every law professor should strive to be, a genuinely creative thinker who took on a dizzying variety of issues and thought about each one from the ground up. Scholars who want to understand and influence the ongoing evolution of privacy law will need to emulate the combination of enthusiasm and rigor that Dick brought to his work. The articles in this Symposium make worthy contributions to the field he helped define.