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Article 2

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Joshua Herman

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# IDENTIFYING PRIVACY: AN INTRODUCTION

*Joshua Herman\**

The 2004 *DePaul Law Review* Symposium set out to answer a seemingly straightforward question: How does the right to privacy affect who we are? The answers provided by the symposium participants illustrate the true complexity of that question. Perhaps even more important than the participants' answers were their approaches to addressing that question. Those varied approaches engaged distinct facets of the right to privacy, and the speakers each adopted unique angles when they considered how privacy impacts our lives. The approaches were diverse, not divergent, and they imbued the Symposium and this issue with a rich and complex texture.

Any study of the right to privacy must encompass a number of perspectives due to the complex, and even paradoxical, nature of that right. The right to privacy has long been subject to confusion, as Edward Bloustein's comments from over forty years ago indicate: "Remarkably enough, however, there remains to this day considerable confusion concerning the nature of the interest which the right to privacy is designed to protect."<sup>1</sup> It is a right that is not enumerated in the Constitution, yet, as the familiar "penumbra theory"<sup>2</sup> portrays, its fun-

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\* Law clerk to Judge James B. Moran, Northern District of Illinois; Symposium Editor, *DePaul Law Review* (2003–04). Credit is due to the many individuals who helped ensure that the 2004 *DePaul Law Review* Symposium: *Privacy and Identity: Constructing, Maintaining, and Protecting Privacy*, was a fruitful event. The Symposium would not have been possible without the participation of the excellent group of panelists. That group includes not only the authors of the following essays, but also: Professor Andrew Koppelman, Mr. Paul Smith, Professor Mary Becker, Dr. Amitai Etzioni, Professor Tracey Meares, and Mr. Cédric Laurant. Professor Stephen Siegel, Professor Donald Hermann, and Professor Katherine Strandburg were expert moderators. Professor Strandburg deserves special recognition for her assistance throughout the planning and production stages of this project. Also, Professor Michele Goodwin and Professor Stephan Landsman provided invaluable assistance. Finally, the able staff of the *DePaul Law Review* was and continues to be an important source of support in shepherding this project to fruition.

1. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962 (1964). See also DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 27 (2003) ("Over the past four decades, academics have defined privacy as a right of personhood, intimacy, secrecy, limited access to the self, and control over information. However, defining privacy has proven to be quite complicated, and many commentators have expressed great difficulty in defining precisely what privacy is.").

2. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

damental nature permeates that document, and affects all of our lives. Further, while we are able to rank empirically the relative invasiveness of privacy intrusions,<sup>3</sup> such categorization does not universally and permanently fix the meaning of privacy. A definition of the right to privacy resists broad generalizations because privacy is experienced at the most personal levels, a fact that requires an emphasis on individuals' subjective expectations of privacy. By presenting multiple conceptions of privacy and by contextualizing privacy in a variety of situations, the symposium participants achieved a holistic understanding of privacy.

The Symposium was structured to facilitate that understanding of privacy. Each of the three panels explored distinct, yet interrelated themes. For the first panel, "Privacy and Intimacy," *Lawrence v. Texas*<sup>4</sup> served as the springboard for discussion on how the right to privacy affects our intimate relationships. Panelists discussed spatial privacy, in the sense that intimate conduct often occurs behind closed doors, informational privacy with respect to the sharing and disclosing of personal and intimate information with others, and decisional privacy, which implicates the liberty interests and autonomy issues that were crucial factors in *Lawrence*. The second panel, "Privacy and Community," focused on how community norms and expectations often define and shape the identities of individuals who may sacrifice privacy for acceptance within the community. For the last panel, "Privacy and Liberty," panelists considered how surveillance technologies induce individuals to alter their behaviors and even identities. Each panel located and considered privacy in progressively broader contexts—from an individual's relationship with another individual, to an individual's relationship with a community, to an individual's relationship with a government. Still, despite the different contexts linking each panel, and the Articles gathered in this issue, are the overarching questions of how privacy, or the lack of it, affects who we are, how it shapes and manipulates our mannerisms, and impacts our behavior. Each Article collected in this symposium issue attempts to answer that question in its own way. What follows is a summary of those essays and some observations of the common threads that bind them together.

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3. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993).

4. 539 U.S. 558 (2003).

Professor Donald Hermann examines the cases cited in *Bowers v. Hardwick*<sup>5</sup> and contends that those cases support a right to non-procreational, sexual intimacy between consenting adults: "The Court consciously linked the right to choose an abortion to the liberty interest in intimate relationships, of which personal sexual intimacy must be a quintessential interest."<sup>6</sup> In *Lawrence*, argues Professor Hermann, the Court correctly upheld that right and reversed *Bowers*, which held to the contrary. In his *Poe v. Ullman*<sup>7</sup> dissent, Justice John Marshall Harlan first recognized that the right to sexual intimacy was a protected liberty interest but he also limited that right to the context of marital relations.<sup>8</sup> Professor Hermann observes that in *Eisenstadt v. Baird*<sup>9</sup> the Court severed the link between the right to sexual intimacy and the marital relationship by striking down a ban on the sale of contraceptives to unmarried people as unconstitutional.<sup>10</sup> But, as Professor Hermann notes, *Eisenstadt* applied an equal protection and not a due process analysis.<sup>11</sup> Still, other decisions link *Eisenstadt* to *Griswold* and extend the right to sexual intimacy from married couples to consenting adults. *Stanley v. Georgia*<sup>12</sup> focused on spatial privacy issues and *Roe v. Wade*<sup>13</sup> emphasized decisional privacy issues. Thus, decisional privacy protects the choice of consenting adults to be sexually intimate and spatial privacy secures their right to engage in such behavior in the privacy of their homes. Professor Hermann also cites *Carey v. Population Services International*<sup>14</sup> as further evidence that the Court recognizes a right to engage in non-procreational, sexual activity.<sup>15</sup> In light of those cases, continues Professor Hermann, the error of *Bowers* is apparent. Instead of speaking in terms of sexual intimacy, the Court improperly narrowed the issue to homosexual sodomy.<sup>16</sup> In contrast, in his *Bowers* dissent, Justice Harry Blackmun focused on the sexual intimacy and described its role as central to the family, community, and individual personality.<sup>17</sup> That rationale domi-

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5. 478 U.S. 186 (1986).

6. Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 934 (2005).

7. 367 U.S. 497 (1961).

8. Hermann, *supra* note 6, at 919.

9. 405 U.S. 438 (1972).

10. Hermann, *supra* note 6, at 923-24.

11. *Id.* at 924.

12. 394 U.S. 557 (1969).

13. 410 U.S. 113 (1973).

14. 431 U.S. 678 (1977).

15. Hermann, *supra* note 6, at 926.

16. *Id.* at 930.

17. *Id.* at 938-39.

nated the majority opinion in *Lawrence*, which also highlighted the error in *Bowers*'s undue focus on homosexual sodomy.

After discussing cases that led to *Lawrence*, Professor Hermann then turns to cases and issues that have followed in its wake. He analyzes *Williams v. Pryor*,<sup>18</sup> a case that involved an Alabama statute that regulated the sale of personal sexual devices. As Professor Hermann describes, *Williams* illustrates that even after *Lawrence*, courts are still unsure of the scope of protected sexual activity, and the resolution of what is covered depends on how each court decides to construe the issues presented. Narrowly construing the parameters of protected sexual conduct will rarely lead to decisions that protect an individual's course of conduct in the face of state regulations. In contrast, if courts evaluate the issues presented broadly, and emphasize protected liberty interests without codifying and focusing on specific acts, it is likely that they will find the conduct at issue to be protected. Thus, a narrow construction of the disputed right, which is the act claimed to be a protected right, will uphold a state statute regulating that right, while a broad description of a liberty interest will protect the rights included therein.

Professor Vincent Samar explores the debate over same-sex marriages versus civil unions that dominated the national stage not only before *Lawrence* was decided, but especially after that decision was announced.<sup>19</sup> After delving into that debate, Professor Samar concludes that civil unions are an inferior substitute for same-sex marriage due to three primary concerns.<sup>20</sup> First, he asserts, civil unions lack the same social meaning as marriage.<sup>21</sup> Second, equating civil unions and same-sex marriage ignores how society and culture impact and regulate the development of individual identities.<sup>22</sup> Third, withholding the opportunity to marry from same-sex couples denies them equality.<sup>23</sup> And as a result of that disparate treatment, Professor Samar argues, the message sent to same-sex couples is that they are inferior to opposite sex couples.<sup>24</sup> Thus, according to Professor Samar, instead of extending rights, civil unions inculcate disparate treatment

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18. *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002); *Williams v. Pryor*, 240 F.3d 949 (11th Cir. 2001); *Williams v. Pryor*, 41 F. Supp. 2d 1237 (N.D. Ala. 1999).

19. Vincent Samar, *Privacy and the Debate over Same-Sex Marriage Versus Unions*, 54 DEPAUL L. REV. 783 (2005).

20. *Id.* at 785.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

and ultimately deny same-sex couples dignity.<sup>25</sup> Professor Samar also observes that marriage confers legitimacy on couples' intimate decisions.<sup>26</sup> As a corollary, a same-sex couple's intimate decisions, which are essential to the development of an individual identity, will be deemed illegitimate so long as the opportunity to marry is withheld.<sup>27</sup> Professor Samar concludes by reminding us that the debate over civil unions versus same-sex marriage is, at its core, a debate over human equality,<sup>28</sup> and explicitly frames *Lawrence* as a seminal civil rights decision by linking it to *Brown v. Board of Education*.<sup>29</sup>

For his contribution,<sup>30</sup> Professor Lior Strahilevitz focuses on *Lawrence* through the lens of information privacy. He considers the impact that case will have on issues involving public sex, particularly those issues addressed in *Lovisi v. Slayton*.<sup>31</sup> Drawing on a harm principle that he sees in *Lawrence*, Professor Strahilevitz contends that states may regulate conduct that poses a sufficient aesthetic harm but they can no longer regulate perceived offenses to morality, which often lack tangible harms.<sup>32</sup>

25. Samar, *supra* note 19, at 789–90.

26. *Id.* at 793.

27. Just as the state's exclusion of individuals from benefits and rights that are made generally available will negatively impact those individuals' identities, the state's selective prosecution of those individuals will also harm their identities by criminalizing their intimate decisions. Professor Laurence Tribe makes this point in the context of anti-sodomy statutes:

Such a prohibition [of sodomy], whether or not cast in terms that expressly singled out same-sex relationships, operated to stigmatize those relationships in particular by reducing them to a forbidden sexual act. The result was to brand as less worthy than others those individuals who did no more than seek fulfillment as human beings by forming voluntary intimate relationships with others of the same sex. This stigmatization locked an entire segment of the population into a subordinate status and often forced such individuals either to transform or to suppress important dimensions of their identities in order to escape second-class treatment in the public realm.

Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1943 (2004).

28. Samar, *supra* note 19, at 800, 804.

29. 347 U.S. 483 (1954). Professor Tribe also links *Lawrence* to *Brown*: "For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America." Tribe, *supra* note 27, at 1895. Professor Tribe emphasizes *Lawrence*'s focus on dignity:

[T]he best we can do now is take the measure of *Lawrence* as a landmark in its own right by placing its logic in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution's elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity.

*Id.*; see also *id.* at 1945 ("But the most distinctive facet of *Lawrence* is surely the decision's focus on the right to dignity and equal respect for people involved in intimate relationships . . .").

30. Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671 (2005).

31. 539 F.2d 349 (4th Cir. 1976).

32. Strahilevitz, *supra* note 30, at 677.

Professor Strahilevitz begins his analysis by highlighting the two forms of privacy that he relies on in his essay: Informational privacy and decisional privacy. With respect to informational privacy, Professor Strahilevitz notes that the law rarely regulates an individual's choice to share his private information with others.<sup>33</sup> And as for decisional privacy, Professor Strahilevitz links it to the Due Process Clause of the Fourteenth Amendment and also the harm principle.<sup>34</sup> Then, turning to *Lawrence*, he explains why sex acts in the presence of another do not qualify as public sex due to informational privacy principles, specifically those that assert that one does not waive his reasonable expectation of privacy when he shares information with others.<sup>35</sup> Jeffrey Rosen made a similar observation when he linked information privacy and intimacy: "Privacy is necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for friendship, individuality, and even love."<sup>36</sup> Professor Tribe notes that human relations and interactions served a pivotal role in *Lawrence* when he stressed that "the Court left no doubt that it was protecting the equal liberty not of atomistic individuals torn from their social contexts, but of people as they relate to, and interact with, one another."<sup>37</sup>

Professor Strahilevitz also focuses on the fact that the sex acts in *Lawrence* occurred in the privacy of a home, which invokes spatial privacy,<sup>38</sup> and opines that the most accurate view of spatial privacy borrows from property law. The accepted definition of spatial privacy divides space into a public versus private binary that does not reflect the variety, and often hybrid nature, of public and private spaces.<sup>39</sup> Property law not only divides space into multiple settings, but also it factors in our expectations of each location. Resonating those multiple settings, Professor Strahilevitz discusses the different scenarios involving public sex and concentrates on the harms, or "negative externalities," if any, that are involved.<sup>40</sup> To make the case for public sex, Professor Strahilevitz first points to the weaknesses of existing

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33. *Id.* at 679.

34. *Id.* at 680-81.

35. *Id.* at 682-83.

36. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 11 (2000).

37. Tribe, *supra* note 27, at 1898.

38. Rosen also comments on the importance of spatial privacy in intimate relationships: "Behind the protective shield of privacy, two individuals can relax the boundaries of self and lose themselves in each other." ROSEN, *supra* note 36, at 215.

39. Strahilevitz, *supra* note 30, at 683-84.

40. *Id.* at 685-86.

arguments that attempt to support such conduct,<sup>41</sup> and then he posits that information privacy should protect the exchange of intimate information between three consenting adults and, therefore, public sex is worthy of the same protection that exists when only two people are involved.<sup>42</sup> For Professor Strahilevitz, consent always exists when information is shared in private, and in those situations that present no external harm, state regulation is inappropriate.<sup>43</sup>

Professor Linda McClain examines how individuals negotiate and reconcile their own identity development with cultural expectations and notions of group identity.<sup>44</sup> Anchoring her examination are two films, *Real Women Have Curves* and *Bend It Like Beckham*, both of which focus on adolescent girls coming-of-age in multicultural settings. In each film the protagonist strives to forge her individual identity and struggles to achieve autonomy, which Professor McClain describes as relational, in that one develops autonomy in the context of relationships.<sup>45</sup> The characters construct their own identities instead of obediently acquiescing to group and societal expectations and assuming the identities those expectations ascribe for them.<sup>46</sup> Professor McClain asserts that privacy allows the characters to explore their identities without succumbing to the pressures that exert force on them and attempt to derail their identity development.<sup>47</sup> That contention echoes Rosen's comment that "[p]rivacy protects a space for negotiating legitimately different views of the good life, freeing people from the constant burden of justifying their differences."<sup>48</sup> "Space" here signifies more than physical parameters, but that connotation is important, as seen in the films when the protagonists' mothers invade their privacy by making critical comments about the young women's bodies. It also signifies a mental space, in which one may imagine and even live her version of the good life, momentarily unencumbered by reality's attendant pressures and expectations. Significantly, both films end with the female protagonists leaving their families and departing for universities far from their homes.<sup>49</sup> Still, support from other family members plays an essential role and enables each charac-

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41. *Id.* at 693.

42. *Id.* at 694.

43. *Id.* at 699–700.

44. Linda C. McClain, *Bend It Like Beckham and Real Women Have Curves: Constructing Identity in Multicultural Coming-of-Age Stories*, 54 DEPAUL L. REV. 701, 704–06 (2005).

45. *Id.* at 702–03.

46. *Id.* at 706.

47. *Id.* at 704.

48. ROSEN, *supra* note 36, at 24.

49. McClain, *supra* note 44, at 728, 746–47.

ter to achieve her goals and fashion her identity.<sup>50</sup> Professor McClain shows that identity development in these contexts, which implicate universal themes,<sup>51</sup> is a process rife with negotiations that produce true individuals, unique in every way.<sup>52</sup>

In his Article<sup>53</sup> Professor Jonathan Kahn examines the relationship between privacy, individual identity, and dignity and focuses on two decisions, *Pavesich v. New England Life Insurance Co.*<sup>54</sup> and *Plessy v. Ferguson*.<sup>55</sup> By considering those cases in relation to each other, Professor Kahn concludes that *Plessy* is, at its heart, a decision about controlling identity and, further, there is an inherent racial component in the origins of the right to privacy.<sup>56</sup> Professor Kahn reminds us that the central underlying facet of *Plessy* involved defamation of reputation actions, which were suits brought by whites who were treated or identified as blacks. Thus, identity was central to *Plessy* and by allowing the states, through their agents (i.e., a train conductor), to determine who was white and who was black, the courts enabled the states to control identity by defining it and conditioning benefits on those determinations. While the physical bondage of slavery may have lapsed, the Jim Crow era, punctuated by *Plessy*, produced a destructive regime that enslaved identity and dignity.<sup>57</sup> Viewing *Pavesich* through *Plessy*, Professor Kahn contends that the former is not merely a case that allowed plaintiffs to sue for unauthorized commercial appropriation of one's image; instead it enabled whites to control their identities.<sup>58</sup> Professor Kahn observes that *Plessy* created a badge of servitude by refusing to empower blacks with control over their identities, and *Pavesich* did the exact opposite for whites.<sup>59</sup> Yet *Plessy* and Jim Crow regimes did not completely deny identity; rather, they provided an identity that was inferior and was entitled to fewer rights and benefits. Thus, it would seem that attention should be paid to the link between rights and identities. In this sense, strong similarities are present between Professor Kahn's Article and those written by Professors Hermann and Samar. In all three pieces, the authors observe that the withholding of rights diminishes the dignity of those

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50. *Id.* at 750.

51. *Id.* at 705.

52. *Id.* at 704.

53. Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755 (2005).

54. 50 S.E. 68 (Ga. 1905).

55. 163 U.S. 537 (1896).

56. Kahn, *supra* note 53, at 759.

57. *Id.* at 761, 765.

58. *Id.* at 781.

59. *Id.* at 759-60.

who cannot realize those rights because they are not in the benefited class. And when the state determines who is in that class, it is able to control both identity and the rights that are conditioned upon that identity.

Professor Christopher Slobogin focuses on another form of governmental regulation of privacy when he examines the government's use of subpoenas to obtain personal papers.<sup>60</sup> According to Professor Slobogin, the problem lies in the fact that the government can obtain "papers," including personal documents containing revealing information, without making a showing of probable cause—the burden required by the Fourth Amendment.<sup>61</sup> In an environment where the government has easy access to our personal documents, very little is exempt from the government's purview, which ultimately diminishes freedom.<sup>62</sup> Professor Slobogin's account of the history of subpoenas, and the Supreme Court's role in shaping that history, reveal that the justifications for relaxing the government's burden originally applied to corporate papers, but has been expanded to apply to personal papers as well.<sup>63</sup> Professor Slobogin is also critical of the rationales that are offered for the relaxed burden and concludes that those reasons fail to justify the government's ability to obtain personal records on a showing of relevance.<sup>64</sup>

Lee Tien is similarly concerned with the government's invasions of privacy, but, unlike Professor Slobogin, who focused on the government's conduct, Tien evaluates the rights that individuals have to protect their privacy.<sup>65</sup> Tien's primary concern is the scope of the right to take privacy precautions.<sup>66</sup> According to Tien, the Court recognized the right to take privacy precautions when it linked closing the telephone booth door with expecting privacy in *Katz v. United States*<sup>67</sup> and that we also practice this right on a daily basis, such as when we whisper so as not to be overheard by others. Tien concludes that we not only have the right to take privacy precautions, but also that we have the right to expect that the government will not interfere with

60. Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805 (2005).

61. *Id.* at 806–08.

62. ROSEN, *supra* note 36, at 29 ("If private papers could be seized, and our confidential communications with others could be exposed, people would take care not to record their confidences in the first place, and friendship, intimate disclosures, and even freedom of thought would be inhibited.")

63. Slobogin, *supra* note 60, at 810.

64. *Id.* at 829.

65. Lee Tien, *Doors, Envelopes, and Encryption: The Uncertain Role of Precautions in Fourth Amendment Law*, 54 DEPAUL L. REV. 873 (2005).

66. *Id.* at 875–76.

67. 389 U.S. 347 (1967).

those precautions.<sup>68</sup> Tien opines that the right to take privacy precautions is inherent in the right to privacy itself, as our expectations of privacy often depend on what we have done to protect that privacy.<sup>69</sup> Further, using crippled encryption and mandatory tappability as examples, Tien demonstrates that by regulating those precautions, the government manipulates our expectations of privacy.<sup>70</sup> The government is thus able to shape the contours of the right to privacy by regulating privacy precautions. But we need not look to detailed legislation that regulates complicated technologies to see Tien's point. In *Hiibel v. Sixth Judicial District Court of Nevada*, the Court upheld the application of a "stop and identify" statute over the petitioner's objections based on the Fourth and Fifth Amendments.<sup>71</sup> While the majority opinion concentrated on facilitating a police investigation and likened the factual setting to those present in vagrancy law cases, the dissent emphasized the importance of identity.<sup>72</sup> Thus, by authorizing police officers to compel citizens to disclose their identities, the Court has shaped our expectations of privacy. Tien concludes by advocating for transparency of all government regulations of privacy precautions and further, that those regulations must represent compelling interests.<sup>73</sup>

While Lee Tien focuses on how individuals protect their privacy, Professor Richard Warner analyzes situations in which individuals have the ability to exchange their personal information for increased market efficiency.<sup>74</sup> But Professor Warner also emphasizes that businesses that seek information from consumers must obtain consent from those consumers prior to gathering personal data.<sup>75</sup> Similar to Professor Strahilevitz's focus, Professor Warner concentrates on information privacy, and specifically, issues involving the disclosure of information and what that information says about an individual's

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68. Tien, *supra* note 65, at 875–76, 891.

69. *Id.* at 877–78. This observation adds much to the perspective that our subjective expectations of privacy have decreased as surveillance technology has become more sophisticated and prevalent. See ROSEN, *supra* note 36, at 60–61. That opinion is true, but it overlooks Lee Tien's point that privacy precaution technology also has developed at a rapid pace, and continues to do so at a speed that is perhaps on par with privacy reducing technology.

70. Tien, *supra* note 65, at 902–05.

71. 124 S. Ct. 2451 (2004).

72. Justice Stephen Breyer's dissent made the connection between identity and control clear when he quoted from *Terry v. Ohio*: "The Court recognized that the Fourth Amendment protects the 'right of every individual to the possession and control of his own person.'" *Id.* at 2465 (Breyer, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).

73. Tien, *supra* note 65, at 906–07.

74. Richard Warner, *Surveillance and the Self: Privacy, Identity, and Technology*, 54 DEPAUL L. REV. 847 (2005).

75. *Id.* at 848–49.

identity.<sup>76</sup> Also, information privacy is central to Professor Warner's Article for many reasons, such as the fact that information is the key to market efficiency.<sup>77</sup>

Professor Warner highlights two theories for achieving a balance between privacy and market efficiency.<sup>78</sup> First, there is top-down regulation in which control is consolidated with the government. Second, there is bottom-up regulation in which control is disseminated among market participants. Allowing individuals to exchange their information, but only after businesses have obtained their consent, is a form of bottom-up regulation, which Professor Warner believes to be more efficient than top-down regulation.<sup>79</sup>

The consent requirement is central to Professor Warner's analysis. He asserts that it balances privacy and market efficiency,<sup>80</sup> and he further contends that it may help nullify the threats that technology poses to privacy.<sup>81</sup> However, Professor Warner does recognize the limits to the consent requirement, especially when data aggregation is involved.<sup>82</sup> Professor Warner is correct to observe that a consumer's consent may control who initially receives their data, but the consumer wholly fails to control who else obtains that information,<sup>83</sup> and

76. *Id.* at 848.

77. *Id.* at 849–50.

78. *Id.* at 852–53.

79. *Id.* at 853–54, 861. Allowing consumers to trade or sell their data is a proposition that is not free from controversy. One argument posits that relying on the market will reduce privacy and that any benefits will only accrue to those who can either afford increased privacy protections or are in positions in which they do not have to offer their personal information to the market. See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2087 (2004). Another argument is that privacy thwarts market efficiency due to its potential for shielding misrepresentations. See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).

80. Warner, *supra* note 74, at 863.

81. *Id.* at 868.

82. *Id.* at 869.

83. See Schwartz, *supra* note 79, at 2090–91 (“Free alienability thus prohibits an individual from limiting another party in the use or transfer of data. In other words, an individual cannot restrict those property interests that he signs away.”). Another description of the marketplace dynamic depicts a pronounced power imbalance that largely results from consumers' ignorance about the information trade and the lack of incentives to induce businesses to create more secure and effective privacy policies:

Empirical studies seem to confirm that sellers have disproportionate market power when consumers possess imperfect information. In such circumstances, sellers cannot be expected to compete on the basis of how much security they provide for information; instead, sellers can be expected to exploit consumer ignorance. To put it more bluntly, consumers cannot protect their personal information when they are unaware of how it is being used by others.

Jeff Govern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1074 (1999).

perhaps more importantly, how that data is stored and combined with other data. Data aggregation will lead to consumer profiles, which inevitably will promote inaccurate summations of an individual's existence.<sup>84</sup> Those profiles also impact privacy in that they are based on decontextualized and incomplete judgments of who we are.<sup>85</sup> Profiles based on more personal, non-marketplace oriented data are potentially more destructive than profiles based on our consumer habits.<sup>86</sup> Further, profiles based on data aggregation and mass data surveillance are inconsistent with our notions of a free society.<sup>87</sup> Professor Warner discusses how we define ourselves by choosing the social roles that we assume.<sup>88</sup> Profiles created by data aggregation impede that process, as they not only define the roles in terms of consumption (i.e., based on a consumer's preferences in the marketplace), but also they prevent the individual from choosing what role to assume.<sup>89</sup> But data

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84. Arbitrary assemblage of personal data long has been a chief concern to those supporters of privacy rights. See Bloustein, *supra* note 1, at 1006 ("And the fear that a private life may be turned into a public spectacle is greatly enhanced when the lurid facts have been reduced to key punches or blips on a magnetic tape accessible, perhaps, to an clerk who can throw the appropriate switch.").

85. See ROSEN, *supra* note 36, at 115 (commenting that privacy "protects us from being objectified and simplified and judged out of context in a world of short attentions spans, a world in which part of our identity can be mistaken for the whole of our identity").

86. Tribe, *supra* note 27, at 1896. Professor Tribe argues:

The outlawed acts—visualized in ways that obscure their similarity to what most sexually active adults themselves routinely do—come to represent human identities, and this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy.

*Id.*

87. See JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 61 (2004) ("One ideal of America insists that your opportunities shouldn't be limited by your profile in a database, that no doors should be permanently closed to anyone who has the wrong smart card.").

88. Warner, *supra* note 74, at 855–56.

89. That is unless "choice" (in the context of choosing what social role to assume and thus who we are) is defined solely in terms of marketplace behavior, which is not an option for those of us who believe we are more than the sum of our credit card bills and grocery store receipts. Over fifteen years ago, when data collection and aggregation was much less ubiquitous than it is today, one author observed:

Inhibition, however, tends to be the rule once automated processing of personal data becomes a normal tool of both government and private enterprises. . . . Habits, activities, and preferences are compiled, registered, and retrieved to facilitate better adjustment, *not* to improve the individual's capacity to act and to decide. Whatever the original incentive for computerization may have been, processing increasingly appears as the ideal means to adapt an individual to a predetermined, standardized behavior that aims at the highest possible degree of compliance with the model patient, consumer, taxpayer, employee, or citizen.

Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 733 (1987).

aggregation expeditiously achieves market efficiency by greatly reducing the time and resources necessary for marketing. Thus, unregulated data aggregation will value market efficiency over privacy and prevent a balance from existing between the two.

Professor Warner suggests that top-down regulation may be appropriate with respect to data aggregation.<sup>90</sup> But there are other possible solutions to this problem, most notably Professor Schwartz's "hybrid inalienability" model that "follows personal information through downstream transfers and limits the negative effects that result from 'one-shot' permission to all personal data trade."<sup>91</sup> Due to the skyrocketing value of our personal information<sup>92</sup> and the increasing ease with which that information is collected, it is imperative that we develop and institute models to protect that information, especially because it is connected so integrally to our individual identities.

As should be apparent, the authors' issues in this Symposium cover a wide range of territory and topics in their explorations of how privacy impacts identity. But that is to be expected since issues of privacy and identity must be understood from multiple perspectives and a plurality of views. Those issues do not lend themselves to singular, or even binary definitions. However, the Articles do share many common themes: One of which is the notion that privacy is power. No single Article mentions this explicitly, but it is implicit in all of them. For Professor Hermann, privacy involves the power to engage in consensual, intimate, homosexual behavior with another adult. For Professor Samar, privacy leads to the power of equality. For Professor Strahilevitz, privacy is the power to engage in conduct that does not create external harms, even if others deem that conduct morally offensive. For Professor McClain, privacy leads to the power to form one's own identity without succumbing to cultural and societal norms and expectations. For Professor Kahn, privacy involves the power that individuals have to control their identities, rather than having the state dictate those identities for them. For Professor Slobogin, privacy represents the power to require the government to abide by constitutional principles prior to obtaining our personal papers. For Lee Tien, the essential issue is that we must have the power to protect our privacy. And for Professor Warner, the issue is that we must have the power to protect our information in light of technological threats in-

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90. Warner, *supra* note 74, at 871.

91. Schwartz, *supra* note 79, at 2094.

92. *Id.* at 2056 ("Personal information is an important currency in the new millennium. The monetary value of personal data is large and still growing, and corporate America is moving quickly to profit from this trend.").

herent in a market economy. Ultimately, privacy is more than “the ‘right to be let alone.’”<sup>93</sup> It is the power to be free from invasive intrusions,<sup>94</sup> and in that state to define our identities and decide what roles, rights, and responsibilities we will assume in society.<sup>95</sup> For us, privacy involves the power to be free.

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93. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting COOLEY ON TORTS 29 (2d ed. 1888)).

94. Professor Bloustein explains:

The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. Bloustein, *supra* note 1, at 973; see also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1424 (2000) (“Autonomy in a contingent world requires a zone of relative insulation from outside scrutiny and interference—a field of operation within which to engage in the conscious construction of self.”).

95. Rosen argues:

Privacy is necessary . . . to protect important social relationships—to make it possible for people to interact as citizens in the public square, as professionals in the workplace, and as friends, lovers, and family members in intimate group settings. But there is also an important case for privacy that has to do with the development of human individuality.

ROSEN, *supra* note 36, at 216.