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PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE

Jon L. Mills*

RONALD J. KROTOSZYNSKI, JR., *PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE* (OXFORD UNIVERSITY PRESS 2016). PP. 312. HARDCOVER \$90.00.

In *Privacy Revisited*, Professor Krotoszynski takes us on a compelling tour of privacy in the new world of rapidly advancing technology and increasing globalization.¹ Krotoszynski concludes that despite pressures of transnational enterprises and activities, nations remain distinct in their treatment of privacy. Especially distinct is the United States' tug-of-war between privacy rights and First Amendment freedom of expression.

With great clarity and substantial documentation, Krotoszynski captures the current state of privacy in five jurisdictions: the U.S., Canada, South Africa, the United Kingdom, and the European Court of Human Rights. From this comparative review, a spectrum of privacy rights emerges providing an opportunity to contextualize and contrast the United States' approach to privacy with that of other democratic bodies.

Looking to the work of Professor James Whitman, Krotoszynski explains that this spectrum results from the deeply cultural nature of privacy. Culture shapes national laws and norms, and despite globalization and transnational activities, each nation's approach to protecting its citizens' privacy varies due to cultural differences. Therefore, "[p]rivacy . . . more so than most areas of law, invariably reflects very local cultural understandings, traditions, and beliefs."² This conclusion is profoundly important for understanding the spectrum of privacy law.

Krotoszynski recognizes there is little merit or practical result in advocating a top down approach to international uniformity. However, there are some principles that do cut across jurisdictions and cultures. One such principle is that "regardless of the jurisdiction in question, protecting privacy will almost inevitably come at the cost of undermining other constitutional rights."³ This truth presents a conundrum and barrier for privacy

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1. RONALD J. KROTOSZYNSKI, JR., *PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE* 183 (2016).

2. *Id.* at 184.

3. *Id.*

advocates and scholars because there are efforts to harmonize privacy and speech in every jurisdiction. *Privacy Revisited* offers a foundation for any scholar or student seeking to garner a deeper understanding of this inherent conflict.

INTERNATIONAL APPROACHES TO PRIVACY PROTECTION

The United States. The U.S. Constitution does not explicitly mention privacy and therefore offers comparatively limited privacy protections. The privacy-related constitutional protections principally address searches and seizures under the Fourth Amendment and personal autonomy under the Fourteenth Amendment (such as the right of abortion, the right to marry, and the right to purchase and use contraception). However, the U.S. does provide statutory protections targeted to specific sectors and types of information; U.S. law affords substantial protection to health care information and financial information, for example. But there is no broad independent status for privacy in the U.S, and the market is generally the sole regulator of most private sector data collectors. It is important to note that U.S. privacy laws, in comparison to those of other countries, evince its national cultural ethos of high distrust of government.

Canada. Canada centers its protection of privacy on rights developed in its Charter of Rights and Freedoms. Like the U.S. Constitution, express privacy protection “does not appear in the four corners of the Charter,” but it does offer substantial protections under provisions that protect “life, liberty or security of the person” and against unreasonable searches and seizures.⁴ In contrast to the U.S. Supreme Court, the Supreme Court of Canada (“SCC”) “has developed a nuanced, thoughtful, and coherent jurisprudence that animates the right of privacy in a comprehensive and purposive fashion.”⁵ For example, the SCC utilized these provisions to declare unconstitutional a criminal ban on assisted suicide.⁶

Krotoszynski notes how the SCC uses normative values rather than objective standards to define the scope of privacy. This approach is important to prevent the risk of new technological developments and lowered objective expectations of privacy creating a “creeping surveillance state,” thereby reducing privacy and dignity protections.⁷ Krotoszynski also notes how Canada has enacted comprehensive legislation to protect privacy, the most important being the Personal Information, Protection, and Electronic Documents Act.⁸

Overall, Canada is more protective of privacy than the U.S.⁹ This is true with respect to both free speech and free press issues.¹⁰ Canada’s approach to the third-party doctrine is also distinct from that of the U.S.¹¹ Canada falls between the U.S. and the European

4. *Id.* at 44.

5. *Id.* at 39.

6. KROTOSZYNSKI, *supra* note 1, at 49; *Carter v. Canada (Att’y General)*, [2015] S.C.R. 331 (Can.).

7. KROTOSZYNSKI, *supra* note 1, at 60.

8. *Id.* at 41.

9. *Id.* at 59.

10. *Id.* at 65.

11. *Id.* at 72. Broadly stated, the third-party doctrine concludes that the disclosure of information to a third party is a waiver of the expectation of privacy. *See Smith v. Maryland*, 422 U.S. 735 (1979). For example, when we disclose our telephone information to the telephone company, we are deemed to have no expectation of

Court of Human Rights in privacy protection and may offer a rational basis for enhancing privacy's standing in the U.S.¹²

South Africa. Emerging from the gross inequalities of the apartheid era, South Africa's Constitution places great emphasis on "the 'Holy Trinity' of South African constitutionalism": human dignity, equality, and freedom.¹³ In particular, dignity occupies a central position in the Constitution, and South Africa's Constitutional Court places a premium upon it, consistently vindicating dignity-related interests over other constitutional interests that warrant lesser protection, such as freedom of expression.¹⁴ Krotoszynski identifies an important difference in how South Africa and the U.S. value speech and privacy; South Africa values privacy over speech, whereas the U.S. takes the opposite approach. In South Africa, privacy is an express constitutional provision and is treated as an important human right.¹⁵ That is not to say that speech is not important or protected; the South African provision is similar to the First Amendment. However, other values enshrined in their Constitution, such as dignity, enjoy a higher priority and so the South African Constitutional Court will engage in balancing speech and privacy, an endeavor U.S. courts reject because of the primacy of free expression.¹⁶

The United Kingdom. Krotoszynski proclaims that the U.K. is an "odd duck" when it comes to privacy policy.¹⁷ Not only do British courts lack any formal power of judicial review, but also English common law provides no generalized protection for privacy. The British judiciary continues to reject the existence of a general right to privacy,¹⁸ and yet the British do protect privacy rights. The British find most of the principles of privacy protection in a tort action termed a "breach of confidence."¹⁹ The case of supermodel Naomi Campbell illustrates the point.

In *Campbell v. MGN Limited*,²⁰ the House of Lords found that publication of a photograph of Ms. Campbell leaving a Narcotics Anonymous meeting gave rise to an action for breach of confidence. Like other jurisdictions valuing speech, there was a balancing of public interest and the privacy of Ms. Campbell.²¹ Lord Hope observed that

privacy in the telephone numbers we called. *Id.* at 742. Yet, in the modern world of mobile phones, apps, and cloud-based services, we leave an enormous amount of information in the hands of third parties, and thus a serious discussion about the continued suitability of the third-party doctrine is critical. Indeed, Justice Sotomayor recently seemed to signal her discomfort with the doctrine:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information to third parties in the course of carrying out mundane tasks.

United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

12. KROTOSZYNSKI, *supra* note 1, at 59.

13. *Id.* at 87.

14. *Id.* at 76.

15. *Id.* at 88.

16. *Id.* at 76.

17. KROTOSZYNSKI, *supra* note 1, at 117.

18. *Id.* at 125 ("English common law does not recognize a general right to privacy, while Parliament has been unwilling to introduce a broad statutory right.").

19. *Id.* at 127.

20. [2004] UKHL 22, 2 W.L.R. 1232.

21. *Id.* See also KROTOSZYNSKI, *supra* note 1, at 127.

“the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public.”²² Indeed this issue is ubiquitous in democratic societies.

The facts, of course, involved the revelation of personal medical information, which the court found to strongly implicate the zone of protected privacy. In balancing the disclosure of such information against public interest, the court decided that the photograph need not be made available to the public because it did not affect democratic systems, was not related to someone in elective office, and did not advance the general public interest.²³ This case is a landmark and was closely decided. Two of the five Lords would have permitted publication of all the contested information and the photograph, whereas three members permitted the publication of Campbell’s drug use and her treatment for it but held that “any specific details of this treatment (including the photograph showing Campbell leaving a Narcotics Anonymous facility in central London)” were protected.²⁴

Campbell successfully invoked the tort of breach of confidence to facilitate an action to prevent and punish the release of private information. However, Krotoszynski notes that “shoehorning” privacy into other, unrelated rights, such as the tort of breach of confidence, is not an attractive approach.²⁵ Indeed, he believes the British approach is dangerously inadequate in the era of Big Data, potentially endangering the very operation of democratic self-government. Like the U.S., the British approach to privacy protection is partial and piecemeal. Nonetheless, it is clear that Naomi Campbell received greater privacy protection in Great Britain than she would have in the U.S.

European Court of Human Rights. The European Union (“E.U.”) has the most intentional and comprehensive policy framework for privacy protections. Privacy is expressed as a human right, and the scope of protected privacy interests is significantly broader in Europe than in the U.S.²⁶ Further, recognizing the problems presented by government surveillance and Big Data, the E.U. developed a comprehensive policy on data security that is a stark contrast to the U.S. policy.²⁷ The E.U. balances privacy interests in Article 8, free speech interests in Article 10, and a comprehensive data protection regime.

E.U. law both informs and is informed by the domestic laws of individual countries.²⁸ There is no question that the E.U. is more deferential to privacy than the U.S. and that its commitment is culturally rooted in the importance of dignity. Further, E.U. courts actively engage in a balancing and proportionality analysis when comparing speech rights to privacy rights,²⁹ while U.S. courts are completely deferential to speech. Krotoszynski explains, in the U.S., “the press is more or less self-regulating,” though this is certainly not the case in the E.U.³⁰ Nevertheless, Krotoszynski argues that it is critical

22. *Campbell*, [2004] UKHL 22, ¶ 105.

23. *Id.* ¶ 148.

24. KROTOSZYNSKI, *supra* note 1, at 128.

25. *Id.* at 141.

26. *Id.* at 159.

27. *Id.* at 166–71.

28. *Id.* at 143.

29. KROTOSZYNSKI, *supra* note 1, at 148.

30. *Id.* at 154.

to recognize the strongly shared values between the E.U. and the U.S.: (1) free speech is not completely subordinated to privacy, and (2) public matters and public officials have diminished privacy rights.³¹

Finally, Krotoszynski discusses the advent of Big Data and the significant challenges to personal privacy that it creates. He recognizes that the modern capacity to collect, organize, and analyze masses of data is a threat to privacy of unprecedented proportions, a threat that is transnational and may radically diminish the scope of personal privacy.³² The oppressive presence of Big Data can have what has been termed a “panopticon effect,”³³ in which individuals suppress thought, expression, or communication because of the mere possibility of observation or intrusion.³⁴ The E.U. policy addressing the “right to be forgotten,” which the E.U. court embraced in the landmark case of *Google Spain v. AEPD*, is one effort to reduce the impact of Big Data.³⁵

In *Google Spain*, a citizen sought to exert his right to be forgotten through a complaint against Google for providing a link to information regarding the involuntary seizure and sale of his personal property to satisfy outstanding debt.³⁶ The E.U. policy required search engines, upon demand, to remove or correct incomplete or incorrect data, but the question here was much more profound. The issue was whether the agency empowered to enforce these rights (the Spanish Agency for Data Protection) could compel a search engine to remove a link to truthful but embarrassing information under the right to be forgotten.³⁷ The E.U. court found that web search engines are data processing operations, not mere information conduits, and are therefore subject to the E.U. policy guaranteeing a right to be forgotten.³⁸ Thus, the court ordered Google to remove the link—a link to entirely truthful and accurate information—but did not order the original source of the information, the newspaper *La Vanguardia*, to remove or expunge the information.³⁹

CONCLUSION

Krotoszynski concludes by discussing the importance of privacy in a democratic society—namely, that democratic self-government requires privacy and speech to function—and the myriad benefits of analyzing privacy jurisprudence in multiple jurisdictions. And although he candidly states that he “cannot realistically offer a complete or comprehensive proposal on the best way” to address conflicts between privacy and free speech,⁴⁰ he nevertheless argues that the era of Big Data requires transnational rules and

31. *Id.* at 160.

32. *Id.* at 166–69.

33. Thomas McMullan, *What Does the Panopticon Mean in the Age of Digital Surveillance?*, GUARDIAN (July 23, 2015), <https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham>.

34. KROTOSZYNSKI, *supra* note 1, at 169.

35. ECJ, Case C-131/12, *Google Spain v. AEPD* (2014).

36. KROTOSZYNSKI, *supra* note 1, at 167.

37. *Id.*

38. *Id.*

39. *Id.* at 167–68.

40. *Id.* at 174.

principles to effectively safeguard privacy rights, and the various national systems provide templates for such an option.⁴¹

On this point, Krotoszynski looks to the logic of one of the of the most widely regarded scholars on free speech, Alexander Meiklejohn, as a basis for protecting privacy going forward.⁴² Meiklejohn loudly proclaimed the value of free speech about unpopular or controversial topics, and his globally influential theory is that speech merits protection because of its inextricable relationship to the process of democratic self-government.⁴³ In particular, speech is a means to inform the public. However, Krotoszynski emphasizes that speech is influenced by coherent thought, which requires time, space, and freedom to think. Yet recalling the panopticon effect of Big Data, we know that freedom of thought can be suppressed by either Big Government or Big Data. Privacy, no less than speech, is essential to intellectual freedom.⁴⁴

Ultimately, Krotoszynski's *Privacy Revisited* offers three main takeaways for understanding the U.S. approach to privacy protection:

1. Privacy is hard to define. We should continue to examine what privacy means in the U.S., and the various national approaches to privacy should help inform our definition. Indeed, while Krotoszynski's articulation of the evolution of privacy in the U.S. from the venerable Warren/Brandeis article⁴⁵ through the current Supreme Court—which has offered mixed messages on privacy issues⁴⁶—is valuable, his major contribution to privacy rights scholarship is in the different insights he reveals by comparing various jurisdiction's legal approaches to privacy. The ultimate fact is that democracies seek to balance privacy, speech, and security but reach different conclusions in particular circumstances based on differing national cultures and legal norms, which is the ultimate challenge in enacting what Krotoszynski believes is a necessary transnational privacy protection scheme.

2. The U.S. has a particular view of free speech that has a unique effect on informational privacy torts. The cases of *New York Times v. Sullivan*,⁴⁷ *Hustler Magazine v. Falwell*,⁴⁸ and *Snyder v. Phelps*⁴⁹ established the uniquely high barrier that free expression presents to privacy intrusions. The U.S. allows outrageous, offensive, anti-democratic, revolutionary, and other types of speech that are restricted in other jurisdictions. The high value we place on free speech is rooted in our deep cultural distrust of government. There is fear of allowing government to define or censor speech, even if the governmental entity is a court. In many ways, this fear may be the central reason the U.S. approach to protecting privacy rights is a global outlier.

41. KROTOSZYNSKI, *supra* note 1, at 182–88.

42. *Id.* at 175.

43. *Id.* at 180.

44. *Id.* at 182.

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

46. *See, e.g.*, GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT* (2017) (arguing that, since 2005, the Court has narrowed the First Amendment by prioritizing social and political stability over dissenting public discussion).

47. 376 U.S. 254 (1964).

48. 485 U.S. 46 (1988).

49. 562 U.S. 443 (2011).

3. Privacy and speech are both critical elements of modern democratic societies. Professor Krotoszynski identified the common element to each jurisdiction—respect for both privacy and free speech—and illustrated that while each jurisdiction approaches such issues differently, each accords respect to both values through seeking a balance. The U.S. is on the end of the scale that tips in favor of speech. And while the U.S. approach to reconciling privacy rights with speech and press rights is not necessarily wrong, we would be imprudent to not consider the reasons that animate U.S. privacy exceptionalism. This book, by cataloguing the approaches of other successful democratic systems that have found a formula for the coexistence of privacy and free speech, presents a multinational perspective that enables us to critically consider the U.S. system.

Ultimately, Krotoszynski says that we must continue to struggle with defining privacy in a rapidly changing and complex world. His book provides us a critical tool in that noble endeavor.