Book Review

Ronald J. Krotoszynski, Jr.,
Privacy Revisited: A Global Perspective on the Right to be Left Alone
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Chris D.L. Hunt[†]

Privacy Revisited: A Global Perspective on the Right to be Left Alone[1] is an ambitious book. Ronald Krotoszynski surveys the leading privacy cases from the United States, Canada, South Africa, the United Kingdom and the European Court of Human Rights (ECHR), giving the reader a bird's-eye view of each jurisdiction's privacy jurisprudence. Krotoszynski engages also in comparative legal analysis throughout, drawing to the fore points of both tension and convergence; moreover, the author is careful to situate each jurisdiction in its unique cultural context, demonstrating that different cultural forces continue to exert strong normative influences on each country's approach to privacy. An additional and important theme running through the book concerns the tension between the right to privacy and to freedom of speech which Krotoszynski revisits in the concluding chapter of this impressive monograph.

Chapter 1, "A Prolegomenon to Privacy",[2] introduces the project and justifies taking a comparative law approach to the study of privacy. The chapter begins with the usual refrains that the concept of privacy is fraught, being at once ill defined and notoriously protean. Rather than attempt an abstract definition of privacy, Krotoszynski proposes to explore concrete instances of its protection in each jurisdiction. In this way, the author side-steps largely irreconcilable conceptual debates about the nature of privacy while also contributing something meaningful about how this legal construct is treated by various apex courts. The author further justifies his comparative approach by noting that privacy-invading speech easily crosses physical boundaries in the internet era and that, accordingly, meaningful global protection will be achieved only if transnational cooperation is genuinely pursued. Comparative legal scholarship is said to be a precondition to cross-border understanding and hence eventual harmonization of disparate national approaches to protecting privacy.

[†] Associate Professor, Faculty of Law Thompson Rivers University, Canada.

[1] Ronald J Krotoszynski, Jr., *Privacy Revisited: A Global Perspective on the Right to Be Left Alone* (New York: Oxford University Press, 2016).

[2] *Ibid* at 1.

Chapter 2, "The Polysemy of Privacy", sets out to explore the "many faces and facets of the right to privacy"[3] in the United States. A primary focus of this chapter is on the extremely limited rights individuals to prevent the disclosure of their personal information. There are a variety of reasons for this which the author explains in detail. Unlike the other jurisdictions surveyed in this book, the United States does not have comprehensive data protection legislation.[4] As such, individuals seeking to prevent disclosure must rely on the law of torts. And here, the US Supreme Court's robust First Amendment[5] jurisprudence imposes a "substantial" obstacle to would-be plaintiffs by "consistently elevating the protection of free speech over privacy interests".[6] To take a particularly outrageous example, consider *Snyder v Phelps*[7] in which the defendants, a group of radical Baptists who believed God was blaming the United States for tolerating immoral behavior, picketed the funeral of an American serviceman killed in Iraq, brandishing signs with slogans such as "God Hates Fags" and "Thank God for Dead Soldiers".[8] The Supreme Court held that such speech was immunized from tort liability by the First Amendment where it related to a matter of public concern. And public concern was established simply because the defendants' signs reflected their "honestly believed"[9] views on public issues.

Drawing on this, and other leading defamation cases,[10] Krotoszynski makes a compelling case that in the United States there is "little, if any"[11] breathing room for privacy torts to prevent the public disclosure of personal information. Krotoszynski contrasts this approach with those taken in England and by the European Court of Human Rights. In those jurisdictions, the outcome of a case like *Snyder* would be very different, as courts balance the rights to privacy and speech on a case by case basis—giving neither *a priori* priority. As explained below, where speech does not advance a genuine public interest, objectively assessed, and where it is particularly intrusive, the balance will tip in favour of protecting privacy.[12]

Krotoszynski concludes this chapter with interesting cultural reflections that he argues account for the free speech fundamentalism seen in the United States. Drawing on the work of other prominent free-speech theorists, Krotoszynski argues that Americans have a pervasive, historical distrust of

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3 *Ibid* at 15.
4 See *ibid* at 22–23.
5 US Const amend I.
6 Krotoszynski, *supra* note 1 at 17.
7 *Snyder v Phelps*, 562 US 443 (2011).
8 Krotoszynski, *supra* note 1 at 26.
9 *Ibid* at 27.
10 *New York Times Co v Sullivan*, 376 US 254 (1964); *Hustler Magazine Inc v Falwell*, 485 US 46 (1988).
11 Krotoszynski, *supra* note 1 at 27, 29.
12 *Ibid* at 28–29; and see especially *Campbell v MGN Ltd*, [2004] UKHL 22, [2004] 2 AC 457; *Von Hannover v Germany* [2004] ECHR 294, 40 EHRR 1.

government power. Accordingly, courts approach the First Amendment as a "prophylactic rule" that prevents almost all limits on free speech for fear that restricting any speech could open the door to government censorship and ultimately undermine the project of democratic self-government.[13] The net effect of this approach, the author concludes, is that in the United States privacy is largely sacrificed on the altar of free speech, and the cost of outrageous speech "must be borne by those against whom it is directed."[14]

Chapter 3, "Taming a Notoriously Protean Legal Concept with a Coherent and Purposive approach"[15], concerns the law in Canada, which Krotoszynski regards as a halfway house between the limited rights to privacy in the United States and the much more robust protections found in Europe.[16] After introducing the structure of the *Canadian Charter of Rights and Freedoms*[17], the author examines recent Supreme Court decisions applying sections 7 and 8 of the same. His discussion of the section 7 jurisprudence, which includes *R v Morgentaler*[18] (abortion), *Carter v Canada*[19] (physician assisted suicide), *PHS Community Services Society v Canada (AG)*[20] (safe injection sites) and *Bedford v Canada (AG)*[21] (criminalizing prostitution), while interesting, takes his project somewhat out of scope, for none of these cases engaged substantively with privacy *per se* (instead concentrating on liberty and security of the person); nor do they have anything to say about the relationship between privacy and free speech, which the author identifies as a major theme of this monograph. Additionally, the failure to discuss analogous American cases in the previous chapter tends to limit the comparative value of these cases. Krotoszynski's analysis of several recent section 8 cases, including *Morelli*[22] (search of personal computer), *R v Cole*[23] (police search of a teacher's school-owned computer) and *R v Spencer*[24] (internet service provider's cooperation with police to de-anonymize customer information) is more beneficial. These cases each engage at length with the framework of the reasonable expectation of privacy (REP) test deployed by the Supreme Court and also elucidate the values of dignity and autonomy that underpin the right to privacy. Krotoszynski is especially flattering of the Supreme Court's consistent view that the REP test be approached from a normative, values-driven perspective, and that it

[13] Krotoszynski, *supra* note 1 at 33–35.
[14] *Ibid* at 28, and see 29–37, contrasting this approach with that followed in Europe.
[15] *Ibid* at 39.
[16] *Ibid* at 59.
[17] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.
[18] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.
[19] *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331.
[20] *PHS Community Services Society v Canada (AG)*, 2011 SCC 44, [2011] 3 SCR 134.
[21] *Bedford v Canada (AG)*, 2013 SCC 72, [2013] 3 SCR 1101.
[22] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253.
[23] *R v Cole*, 2012 SCC 53, [2012] 3 SCR 34.
[24] *R v Spencer*, 2014 SCC 43, [2014] 2 SCR 212.

is not conditioned on property ownership.[25] The author also provides a few interesting points of comparison between the Canadian cases of *R v Tessling*[26] (infrared search of house to detect grow op) and *R v Fearon*[27] (police search of cellphone incident to arrest) and their American equivalents (*Kyllo v United States*[28] and *Riley v California*[29], respectively) to illustrate that, at least where police searches are involved, American jurisprudence is sometimes "considerably more privacy-friendly"[30] than Canada's. Moving from constitutional to tort law, the author engages briefly with *Aubry v Editions Vice-Versa Inc*[31] in which the Supreme Court of Canada found a violation of privacy under Quebec's Civil Code when an anodyne photograph of a young woman was taken while she was in a public place and published in a magazine without her consent. However, the author does not consider the jurisprudence in other provinces in Canada rendered under statutory privacy torts[32] or the developing common law privacy tort that has recently emerged in Ontario.[33] This omission is unfortunate, as these various regimes would provide much fodder for discussing the relationship between privacy and free expression in Canada. That said, Krotoszynski does conclude with a useful analysis of the recent Supreme Court decision in *Alberta (Information and Privacy Commissioner) v UFCW, Local 401*[34] in which the Supreme Court of Canada suggested that when privacy and free-expression rights collide (in that case, under provincial data-protection legislation) courts must carefully balance these, as neither right is absolute. As explained below, the Canadian approach mirrors its European coutnerpart, and contrasts favourably with the aforementioned American approach in which free speech invariably trumps the right to privacy.

Chapter 4, "Deploying Dignity, Equality and Freedom to Safeguard the Process of Democratic Self-Government"[35], examines the law in South Africa. Krotoszynski introduces the chapter with a discussion of South Africa's troubled constitutional past, noting that the first three constitutions (1910, 1961

[25] Krotoszynski, *supra* note 1 at 61–62.
[26] *R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432.
[27] *R v Fearon*, 2014 SCC 77, [2014] 3 SCR 621.
[28] *Kyllo v United States*, 533 US 27 (2001).
[29] *Riley v California* 573 US 783 (2014).
[30] Krotoszynski, *supra* note 1 at 55.
[31] *Aubry v Editions Vice-Versa Inc*, [1998] 1 SCR 591, 157 DLR (4th) 577.
[32] *Privacy Act*, RSBC 1996, c 373 (British Columbia); *Privacy Act*, RSS 1978, c P-24 (Saskatchewan); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland); *The Privacy Act*, RSM 1987, c P125 (Manitoba). For a detailed discussion of the jurisprudence emerging from these statutes, with comparisons to Commonwealth approaches, see Chris DL Hunt & Nikta Shirazian, "Canada's Statutory Privacy Torts in Commonwealth Perspective" (2016) 1 Oxford U Comparative L Forum 3.
[33] *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241 [*Jones*]; *Jane Doe 46533 v D(N)*, 2016 ONSC 541, 128 OR (3d) 352 [*Jane Doe*].
[34] *Alberta (Information and Privacy Commissioner) v UFCW, Local 401*, 2013 SCC 62, [2013] 3 SCR 733 [*UFCW, Local 401*].
[35] Krotoszynski, *supra* note 1 at 75.

and 1983) were "instruments of subordination that served to facilitate white-minority rule."[36] An Interim Constitution[37] was created in 1993 and replaced with the country's current one in 1996. These latter documents provided a very deliberate "clean break" with the Apartheid past by vesting judges with the power to judicially review and invalidate legislation where it conflicts with the newly entrenched Bill of Rights.[38] Importantly, the Constitution evidences a clear commitment to human dignity, which has been repeatedly held to be both an interpretive value underpinning the entire Constitution as well as a discrete right "that must be respected and protected."[39] Furthermore, the *Bill of Rights* expressly empowers courts to modify the common law to align with Constitutional values, so that, in effect, these rights apply to disputes between private litigants.[40] Although privacy finds express protection under section 14 of the Constitution by conferring a freedom from warrantless searches (analogous to section 8 of the *Charter*), and has been interpreted broadly to confer informational privacy rights against non-state actors,[41] Krotoszynski notes that most cases give effect to privacy interests under section 10 which creates an "inherent" right to "dignity" for everyone.[42]

The author next explores the wide-ranging circumstances in which the right to dignity has been applied by South Africa's highest court. For instance, the dignity right is engaged in tort actions for defamation and in that context the Court has determined that in balancing dignity, privacy and reputation against the right to free expression, the former should enjoy priority over the latter.[43] Krotoszynski aptly notes that this is the opposite approach taken to such conflicts in the United States, and is concerned that South Africa's courts have underestimated the potential chilling effect such decisions can have on press freedom and ultimately democratic self-governance.[44] Interestingly, in an attempt to mitigate such effects, South African courts have expressed a preference for capping monetary damages at low levels, while vindicating affronts to dignity by requiring defendants to make sincere apologies.[45] The balance of the chapter moves away from privacy *per se* to explore cases where the dignity right has been construed broadly to encompass claims for security of the person and sexual equality, including *State v Jordan*[46] (concerning a

[36] *Ibid* at 80.
[37] *Constitution of the Republic of South Africa*, 1993, No 200 of 1993.
[38] Krotoszynski, *supra* note 1 at 85; Constitution of the Republic of South Africa, 1996, No 108 of 1996, c 2.
[39] Krotoszynski, *supra* note 1 at 87, noting that a commitment to human dignity appears throughout the Constitution, including as a Founding Provision that frames the entire document, and in the introductory clauses to the *Bill of Rights*.
[40] *Ibid* at 91.
[41] *Ibid* at 89–90.
[42] *Ibid* at 88.
[43] *Ibid* at 94–95.
[44] *Ibid* at 96–97.
[45] *Ibid* at 97–99, noting this stems from the Roman-Dutch civil law concept of an "amende honorable".
[46] *State v Jordan*, [2002] ZACC 22, 2002 (6) SA 642 (CC).

ban on prostitution, which came to the opposite result as Canada's *Bedford* case) *National Coalition for Gay and Lesbian Equality v Minister of Justice*[47] (criminalization of sex between men) and *Minister of Home Affairs v Fourie*[48] (same-sex marriage), among others. As with his discussion of section 7 Charter cases, above, Krotoszynski's analyses here, while interesting, do take the reader away from privacy and into broader discussions of liberty, which feels unconnected to the book's primary focus. It is unfortunate that this chapter did not make greater use of jurisprudence pertaining to section 14, which presumably would have afforded interesting comparative material with Canada's section 8 of the *Charter*.Chapter 5, "On the Perils and Promise of Weak-Form Judicial Review in Securing Privacy Rights",[49] examines the law of privacy in the United Kingdom. Krotoszynski begins by explaining the traditional adherence to the principle of Parliamentary Sovereignty, the reason why English judges lacked the power to judicially review legislation.[50] Since passage of the *Human Rights Act 1998*,[51] which mandates English courts to apply the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[52] the judiciary now has what Krotoszynski calls "weak form judicial review"[53]—courts measure domestic law against Convention rights as interpreted by the European Court of Human Rights, and try, where possible, to achieve a harmonious result. However, where English legislation fails to comply with the *Convention*, judges may not invalidate it—as in the United States, Canada and South Africa. Instead, the courts may enter only a "declaration of incompatibility",[54] which leaves the English legislation in place but in theory, sends a political message to Parliament to amend it.

Courts have also developed a doctrine of horizontality, which, like the doctrine of *Charter* values in Canada, empowers judges to modify the common law to reflect the values enshrined in the Convention, including those conferring rights to privacy (article 8) and free speech (article 10). Importantly, however, unlike in Canada, where *Charter* values have been invoked to create novel, free-standing privacy torts in Ontario,[55] English courts use this principle in a more limited way—to imbue existing common law actions with privacy values, but not to create entirely new causes of action.[56] The

[47] *National Coalition for Gay and Lesbian Equality v Minister of Justice*, (1999) 1 SA 6, 1999 (1) SA 6 (CC).
[48] *Minister of Home Affairs v Fourie*, [2005] ZACC 19, [2006] 1 SA 524 (CC).
[49] Krotoszynski, *supra* note 1 at 115.
[50] *Ibid* at 117.
[51] *Human Rights Act 1998* (UK), c 42.
[52] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS (Entered into force 3 September 1953) [*Convention*].
[53] *Ibid* at 115 and see 124.
[54] *Ibid* at 124.
[55] *Jones*, *supra* note 33; *Jane Doe, supra* note 33..
[56] Krotoszynski, *supra* note 1 at 126 and see especially Wainwright v Home Office, [2003] UKHL 53, [2004] 2 AC 406.

leading example here is the House of Lords decision in *Campbell*,[57] in which the court modified traditional breach of confidence doctrine (by dropping the requirement that the parties be in an antecedent confidential relationship) to allow a celebrity to sue a tabloid for publishing photographs of her taken while she exited Narcotics Anonymous. Although this action has developed rapidly since *Campbell v MGN Limited*, such that England now has a *de facto* tort for the misuse of private information, Krotoszynski is critical of the judiciary's reluctance to draw on the *Convention* to create a generalized right to privacy applicable both to government and non-government actors.[58] As explained below, the ECHR has taken a much broader approach to *Convention* rights, consistently holding that the *Convention* mandates states take positive actions to secure the privacy rights of every individual from privacy violations occasioned by state as well as purely private parties.[59] Krotoszynski concludes by arguing that the English judiciary's unfortunate reluctance to give full effect to *Convention* rights (which he attributes to vestiges of Parliamentary Sovereignty leading to undue deference to the legislature[60]) leaves privacy protections "incomplete"[61] in the United Kingdom. In Chapter 6, "Reconciling Privacy and Speech",[62] Krotoszynski turns to examine the jurisprudence of the ECHR. This chapter makes for an interesting comparison with the United States, as the author illustrates three key differences between these jurisdictions. There is an important methodological difference. The ECHR treats privacy and free-expression rights as being of equal value in the abstract; conflicts between them are resolved through a proportionality test that balances the relative importance of each against the other in the specific context of each case.[63] This is very different from the American approach, which, as explained above, affords clear priority to free speech by giving it virtually absolute protection once the First Amendment is engaged. Second, privacy rights have far broader application in ECHR's jurisprudence than they do in the United States. The ECHR consistently has held that States have positive obligations to take affirmative measures to ensure privacy is respected—even absent any State conduct. Consider, for example, *X and Y v The Netherlands*[64], in which the ECHR found a breach of a disabled claimant's article 8 privacy rights where the State had failed to create a legal mechanism for her guardian to sue on her behalf to vindicate a sexual assault she had suffered at the hands of a

[57] *Campbell v MGN Limited*, [2004] UKHL 22, [2004] 2 AC 457.
[58] Krotoszynski, *supra* note 1 at 130–33.
[59] *Ibid* at 141.
[60] *Ibid* at 131–40.
[61] *Ibid* at 141.
[62] *Ibid* at 143.
[63] *Ibid* at 148–49.
[64] *X and Y v The Netherlands*, No 8978/80, [1985] ECHR 4, (1986) EHRR 235.

non-state actor.[65] In the United States, as in Canada, constitutional rights do not apply directly to disputes between private parties; some State action is required before rights are engaged. Finally, the ECHR's jurisprudence has taken a very broad approach to the matters that fall within article 8's sphere, including decisions affirming a reasonable expectation of privacy exists in anodyne photographs of public figures taken in public places (*Von Hannover v Germany*[66]), and finding a violation of privacy where a local newspaper published photographs of two woman outside a courthouse immediately after they had been convicted of murder (*Egeland & Hanseid v Norway*[67]). Such decisions, Krotoszynski notes, would be "unthinkable"[68] in the United States, because no REP would exist in such a circumstance and furthermore because the First amendment would insulate newspapers from liability even if a *prima facie* tort claim could be made out. Finally, Krotoszynski briefly describes the ECHR's recent decision in *Axel Springer AG v Germany*[69] which carefully sets out a multifactorial balancing test used to adjudicate conflicts between privacy and free speech rights under the *Convention*. Once both rights are engaged, the court balances these from a position of abstract equality by considering matters such as the claimant's location, the claimant's status as a public figure, the degree of intrusiveness and, crucially, the extent to which the speech right genuinely advances an issue of public interest.[70]

Chapter 7, "On the Essential Complementarity of Privacy and Speech",[71] concludes the monograph. Krotoszynski's focus here is to question American free-speech fundamentalism by illustrating that privacy is in many ways as important to the project of democratic self-government as freedom of expression. Accordingly, an approach which seeks to mediate conflicts between these rights through balancing and proportionality (as in Canada, South Africa, the United Kingdom and Europe), rather than by inevitably sacrificing one to the other (as in the United States), is arguably a preferable way forward. Krotoszynski begins by outlining the influential theorist Alexander Meiklejohn's work,[72] in which Meiklejohn argued that the primary purpose of the First Amendment was to ensure no limits were placed on speech "worth saying"[73] in the sense that it relates to participatory democracy, primarily capturing core political speech, but extending as well

[65] Krotoszynski, *supra* note 1 at 150.
[66] *Von Hannover v Germany*, No 59320/00 [2004] ECHR 294, 40 EHRR 1; discussed in Krotoszynski, *supra* note 1 at 152–53.
[67] *Egeland & Hanseid v Norway*, No 34438/04 [2009] ECHR 622, 50 EHRR 2; discussed in *supra* note 1 at 155.
[68] *Supra* note 1 at 155.
[69] *Axel Springer AG v Germany*, No 39954/08 [2012] ECHR, 227, 55 EHRR 6.
[70] *Ibid*.
[71] Krotoszynski, *supra* note 1 at 173.
[72] Alexander Meiklejohn, *Free Speech and Its Relation To Self-Government* (Clark NJ: The Lawbook Exchange, 2004) (originally published 1948).
[73] Krotoszynski, *supra* note 1 at 176.

to expressive activities relating to education, literature and the arts, for from such speech the voter derives the "knowledge, intelligence [and] sensitivity to human values" that are required for him or her participate meaningfully in democracy.[74] Krotoszynski notes that although these categories of speech are broad, Meiklejohn was careful to emphasize that "communicative activities with no relationship to self-governance, whether direct or indirect, 'are wholly outside the scope of the First Amendment'".[75] Krotoszynski next draws on Meiklejohn's work to illustrate that, just as exposure to literature and the arts facilitates intellectual freedom, and thereby advances democracy, so, too, does a proper respect for privacy. Simply put, privacy affords the space—physical and informational—for individuals to read, reflect, form political opinions and ultimately decide how best to participate in democracy, including manifesting their speech rights. Without physical and information spaces free from intrusion, personal autonomy is threatened, and democracy is undermined.[76] Interestingly, this argument, which sees privacy as essential to democracy, was recently articulated in the following terms by the Supreme Court as well: "Democracy depends on an autonomous, self-actualized citizenry that is free to formulate and express unconventional views. If invasions of privacy inhibit individuality and produce conformity, democracy itself suffers."[77] Krotosynski concludes by calling for greater engagement with comparative law which he sees as a fertile source for the cross-pollination of principles that treat privacy and speech as inherently complimentary in their relation to furthering modern, robust, democratic self-government.

Privacy Revisited covers a great deal of terrain. While at times the book's ambition detracts from its core focus—especially those parts that shift from privacy *per se* into lengthy discourses about dignity and equality rights that are only tangentially connected to the privacy context—on the whole this is an impressive scholarly work that, in my view, is an essential read for anyone wishing to gain a comparative insight to the treatment of privacy in the jurisdictions discussed.

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[74] *Ibid* at 177 citing Alexander Meiklejohn, "The First Amendment Is an Absolute" (1961) Sup Ct Rev 245 at 256.

[75] Krotoszynski, *supra* note 1 at 177.

[76] *Ibid* at 181–82.

[77] *UFCW, Local 401*, *supra* note 34 at para 22.