2017

Comparing the Laws of Privacy: Review of Ronald J. Krotoszynski, Privacy Revisited: A Global Perspective on the Right to Be Let Alone

Marc J. Blitz, *Oklahoma City University*

Criminal Justice Ethics, 2017
Vol. 36, No. 2, 265–277, https://doi.org/10.1080/0731129X.2017.1358922

REVIEW ESSAY

Comparing the Laws of Privacy

Ronald J. Krotoszynski, Jr. *Privacy Revisited: A Global Perspective on the Right to Be Let Alone*. New York: Oxford University Press, 2016, 312 pp. US$85 (hardback). ISBN: 978-0-19-931521-5

MARC JONATHAN BLITZ*

Ronald Krotoszynski's *Privacy Revisited: A Global Perspective on the Right to Be Let Alone* is, in a sense, three books in one. It is, on the one hand, an engaging and systematic tour of different legal systems' constitutional privacy protection regimes—in this case, those of Canada, South Africa, the United Kingdom, and the European Court of Human Rights—highlighting the most notable features of each, and especially how they each differ from that of the United States. After an introduction to the concept of privacy and the questions surrounding it, each chapter (before the conclusion) leads the reader through many of the landmark court cases in a given jurisdiction. Moreover, beyond simply telling us how the highest constitutional authority has confronted such cases, Krotoszynski also places these decisions in the context of a bigger picture: he provides an overview of each system's privacy jurisprudence, and explains how this jurisprudence is related to larger aspects of its legal culture and constitutional structure. Even if this tour held no deeper lessons beyond illuminating the key distinguishing features of each privacy system, it would provide valuable perspective for lawyers (or others) who think about privacy protections.

But Krotoszynski's comparative analysis *does* offer deeper lessons, and it is for this reason that it is helpful to understand *Privacy Revisited* as entailing two other, more ambitious projects. More specifically, apart from merely being a descriptive journey of comparative privacy law it is also in two senses a critique of U.S. privacy law. First, it critiques, and aims to offer a way out of, the confusion in U.S. court cases—and some other democracies' case law,

*Marc Jonathan Blitz is Alan Joseph Bennett Professor and Executive Director, Murrah Center for Homeland Security Law and Policy, Oklahoma City University School of Law, Oklahoma City, OK, USA. Email: mblitz@okcu.edu.

protecting privacy rights—about precisely what those rights are. "For a concept of such central importance to many systems of protecting fundamental rights," Krotoszynski observes, "the precise contours of the right of privacy are surprisingly ill-defined." (1). In the United States, privacy has a spatial dimension: thanks to Fourth Amendment protection against unreasonable searches and seizures by government, Americans can escape police surveillance to some extent when they are in their homes or other private areas. U.S. constitutional law also safeguards individual freedom from government in other ways: the Fourteenth and Fifth Amendment due-process clauses keep government largely out of certain intimate spheres of life, and perhaps in other "central decisions about our personal lives" (7). But it is not clear what strand (if any) might merge rights to freedom from surveillance and to autonomous personal decision-making, into a single system of privacy protection—or what else such constitutional privacy protection might cover (7). And even when courts focus on Fourth Amendment or due-process rights in isolation (rather than on a principle that might unify both of them), the Supreme Court's language—while often poetic—frequently "fails to provide adequate concrete guidance regarding the inevitable balancing that privacy rights require" (7). A comparative analysis, Krotoszynski suggests, may provide a way out of this confusion—a way to "help fill in some of the salient details" (7). We might better define the "core interests" comprising "privacy (or the largely synonymous concept of 'dignity')" by looking at how this concept is understood by various "democratic polities sharing common constitutional commitments, similar economic and political systems, and even a common legal heritage" (7). To that end, he chooses—as the subject of his comparative analysis—the legal systems of the United States, Canada, South Africa, and England—systems that "all share a common legal background and have a shared legal history as dominions of the British Crown" (13). He adds a chapter on the European Court of Human Rights in order to include a "pan-European" perspective on privacy, one which he notes is important to exploring common principles that might ground transnational understandings of privacy law that can govern increasingly common transnational flows of data.

There is also another respect in which *Privacy Revisited* contains a critique of modern U.S. privacy law—and this is a third project within the book. Throughout his comparative analysis, Krotoszynski does not simply address the question of how to define the right of privacy (or dignity) that is central to various Western constitutional systems, he also does so with the aim of highlighting certain unstated assumptions in, and difficulties with, the U.S. answer to this question—what Krotoszynski calls "U.S. privacy exceptionalism" (xvi). As confused and uncertain as U.S. courts often are about what privacy entails, when they do provide an answer to this question, it is in some respects a problematic one. In short, U.S. privacy law is, he points out, a "global outlier" (xvi). It offers less robust protection for privacy than do other systems. In the United States, he observes, "privacy rights are often tethered closely to

property rights" (40). When individuals store their information outside the homes they live in, or the computers they own, they thus leave it in a place where privacy protections—at least in the US system—don't follow it. Moreover, United States privacy law has offered less vigorous protection against the threat to privacy raised by emerging technologies—especially when the threat comes from privacy companies' tracking of Web browsing or other Internet activities, rather than from the government action that, in U.S. law, is generally necessary to trigger constitutional protection (40).

This judicial hesitation about—or, in some cases, opposition to—enforcing privacy rights comes at a price not only for U.S. privacy protection, but also for the crucial effort of developing transnational privacy protection. In an era where Web users constantly connect to computer servers and access or store data in other countries, it is valuable for those sharing and collecting information to arrive at shared understandings about privacy protections—or at least have a clear sense of how they can reconcile the different privacy (and other data regulation) demands of different legal regimes (2, 167–8). Privacy law is thus an area where such transnational protection is needed "to a degree not present in most other areas of law" (2). And to the extent that U.S. privacy law is separated by an unbridgeable gulf from that of other countries, such a transnational privacy law will be harder to generate. Even in the absence of an official treaty or another official body of transnational law, stark differences between Western democracies' privacy laws may have consequences for individual nations: "a nation that cares about its international reputation within the global community," writes Krotoszynski, "will have little choice but to consider whether its privacy policies fall inside, or outside, the developing global mainstream" (188).

To be clear, Krotoszynski's aim is not to convince American lawyers or judges to simply replace their own constitutional privacy doctrine with that of Canada, South Africa, or any other nation. On the contrary, he makes it clear, for example, that while the United States may well learn from these systems—and think about how to better address certain challenges that have already been squarely confronted by Canadian court decisions, for example—it likely has to do so in a way that fits its own legal culture and tradition. U.S. courts could not easily superimpose on their existing privacy jurisprudence, for example, the proportionality analysis used in other Western nations wherein "the reviewing court will engage in a balancing exercise to ascertain if the government can justify the breach" (xiii). The Canadian Charter of Rights and Freedom specifically lays the groundwork for such balancing: Section 1 of the Charter "saves" from invalidation violations of Charter right and freedoms that consist of "reasonable limits [of those rights and freedoms] prescribed by law" and "can be demonstrably justified in a free and democratic society" (46). By contrast, Krotoszynski notes, "most provisions of the Bill of Rights are written in absolute and unqualified terms" (46). Still, U.S. courts may find other, implicit ways to conduct such balancing (and, in some respects already do so). And U.S. legal actors might likewise find ways, consistent with

their own legal tradition, to better protect individual privacy against non-state actors (particularly those that control Internet access). Moreover, Krotoszynski emphasizes, reforming the U.S. legal system on such a model is not the only possible or acceptable response to the insights generated by his comparative analysis: Americans may choose to defend and adhere to their own model of privacy protection, and a comparative analysis will in this case still help them understand what this choice entails (and what such a defense requires). And to the extent that Krotoszynski's book functions as a critique, and not simply a description, of the system he studies, he also makes it clear that his criticism is not reserved solely for U.S. law: If the U.S. legal system arguably leaves too little room for privacy and dignity torts, then European law often leaves too little room for freedom of speech: "Anyone publishing books, magazines, or newspapers, or making content available in Europe via the Internet, has good cause to be concerned" about the extent to which the European system allows privacy and dignity to trump speech (37).

The book offers the reader tremendous value in each of its three roles: as (1) a comparative tour of privacy law in different legal systems arising out of English law (and the European Court of Human Rights), (2) an attempt to refine the meaning of privacy as a constitutional right, and help rectify some of the confusion about this issue that marks U.S. and other countries' jurisprudence, and (3) an effort to help American readers understand the ways in which their domestic constitutional privacy jurisprudence differs from—and might, while remaining true to its own traditions, benefit from attending to the example of—that in other Western democracies.

Krotoszynski's analysis presents both an insightful diagnosis of, and solution to, some of the problems that mark modern U.S. privacy law. However, there are plausible alternatives to both the diagnosis and the suggestion he offers for addressing it. *Privacy Revisited* often views U.S. and other nations' constitutional privacy through the lens of the tension between privacy and freedom of speech. Given the importance he places on the role that this privacy–speech divide plays in shaping, and perhaps preventing, the development of constitutional privacy protections, Krotoszynski focuses the book's concluding chapter—"Bringing Meiklejohn to Privacy: On the Essential Complementarity of Privacy and Speech" (173–88)—on explaining how legal systems can, at least partially, overcome this divide. Drawing heavily upon the free speech theory of Alexander Meiklejohn, he emphasizes that while "at the microlevel, privacy and speech can and do conflict," both these rights are essential and complementary components of a larger project—at the "macro level" both "constitute necessary elements for the creation and maintenance of a functioning democratic polity" (183).

This focus is understandable: it is in the contest between individuals' (or groups') demands for privacy or dignity on the one hand, and others' rights to engage in vigorous (and sometimes hurtful) speech, on the other, that U.S. legal actors most clearly and consistently take sides against privacy—and it is in this contest between speech and privacy

that the privacy jurisprudence of the United States and that of other Western democracies most starkly part ways. What Krotoszynski calls the U.S.'s "privacy exceptionalism" (xvi) results, at least in large part, from its "free speech exceptionalism" (25): American courts' adherence to the principle that expressive liberty is an "absolute trump card," one that overrides government measures to protect individuals from attacks on their reputation, from words that generate emotional distress, or from speech (in newspaper articles and elsewhere) that divulges private information about their lives (26). Thus, while the different bodies of privacy law Krotoszynski examines differ along various dimensions, one of the key variables on which he compares them is the way claims to privacy or dignity fare in the face of contrary claims to expressive freedom. The United States, he notes in chapter 1, is on the pro-speech side of the spectrum: "The Supreme Court's free speech project, which gives full flower to the First Amendment, enjoys if not an absolute priority, then something very close to it" (29). Matters are different in South Africa: South Africa's Supreme Court sees privacy rights as a component of broader protection the South African constitution offers for human dignity (xiii, xvii, 93). And while the South African constitution also protects freedom of expression, "dignity and privacy" generally seem to have "priority over speech rights" (94–5). The European Court of Human Rights, he notes, also has created a jurisprudence wherein "privacy generally enjoys priority over speech and press rights" (160). Indeed, individuals may even be able to assert privacy rights to prevent the dissemination of pictures taken of them in public places (155–7). Canadian privacy law represents a kind of middle ground between the United States law's emphasis on autonomy (and giving priority to freedom of expression) and the priority, in South Africa and European human rights law, of dignity, reputation, and privacy—although, says Krotoszynski, it ultimately "remains closer in its ambitions to the U.S. model than it is to the prevailing European models" (59).

This focus on privacy's relationship to freedom of speech also follows naturally from Krotoszynski's earlier 2006 comparative study in his book *The First Amendment in Cross Cultural Perspective: A Comparative Legal Analysis of Freedom of Speech*. That book examined—and contrasted—free speech law in the United States with that in Canada, Germany, Japan, and England. Just as *Privacy Revisited* explains how the United States is a "global outlier" in its failure to protect privacy or dignity where other nations do so, his earlier free-speech study emphasized that the high burden the Supreme Court places upon defamation plaintiffs—by making them show not merely that a newspaper account is false (or negligently investigated), but that the newspaper published it with "actual malice"—makes the United States a "doctrinal outlier" compared to many other Western democracies, including "common law nations, such as the United Kingdom and Australia."[1] Whereas the United States routinely "subordinates values associated with personal dignity, honor, and reputation in favor of vindicating free speech claims," nations such as Germany, Krotoszynski writes, instead treat "dignity" and related

claims as having priority.[2] *Privacy Revisited* looks again at this speech–privacy tension, and the very different approaches to it in the United States and other democracies, this time from the privacy-rights side of the line. Meiklejohn's theory of free speech—which views the underlying purpose of free-speech protection as creating the conditions necessary for democratic deliberation and governance—played a starring role in Krotoszynski's 2006 book.[3] Krotoszynski brings it back in the final chapter of *Privacy Revisited*, as a theory that not only helps explain how free-speech rights provide a necessary foundation for democratic deliberation, but how privacy protections that allow for surveillance-free communication and intellectual exploration are similarly essential to the exercise of those free-speech rights (173–88). Krotoszynski, I think, is exactly right here: building upon arguments made by Neil Richards that protection against Internet surveillance is essential for freedom of thought,[4] and, as a consequence, for the expressive liberty made possible by that freedom of thought, he makes a compelling case that—while privacy may sometimes be at odds with freedom of expression—at least some privacy (and especially data privacy) is an indispensable condition of it (170–81).

However, while Krotoszynski's focus on using free-speech cases, and Meiklejohn's free-speech theory, provides an illuminating lens through which to view privacy law, the book seems to play down what one might miss in viewing constitutional privacy law primarily through that lens. First, even when courts do and should understand—and develop—privacy law through the lens of its relationship to free expression, it is useful to remember that Meiklejohn's free-speech theory, although it provides a valuable framework, is just one theoretical account of the value that both speech and privacy have in modern liberal states. Indeed, Meiklejohn's theory of free speech may not always be the best candidate for explaining why it might make sense for U.S. law to provide greater protection—in some circumstances—for individuals' "privacy, dignity, or personal honor," even where doing so requires some limits on freedom of expression. Consider the free-speech case that Krotoszynski relies on heavily—in chapters 1 and 2—to highlight the U.S.'s privacy and free speech "exceptionalism," the 2011 case of *Snyder v. Phelps* (5, 26–7).[5] In that case, the Supreme Court held—in an 8-1 decision—that the First Amendment insulated the Westboro Baptist Church against being found civilly liable for intentional infliction of emotional distress when it protested outside the funeral of an American soldier (Matthew Snyder) with bizarre and hateful message that U.S. support for gay rights somehow justified celebrating the deaths of Americans in battle. As Krotoszynski points out, "the outcome of Snyder would likely have been very different outside the United States" (28). Indeed, "in most of the wider world ….. the use of statutes and common law doctrines to protect the dignity of a funeral ….. would not merely be constitutional, but quotidian" (5). But while the dignity—and privacy—of a funeral has immense importance for individuals—and may well have enough importance to justify restricting protests that would interfere with it—this is not due to any contribution such ceremonies for honoring and mourning might make to

democratic deliberation. Rather, it is so important because, as Justice Alito writes in his dissent, it is the right of a parent who "experiences the incalculable loss" that occurs when his son is killed in war, to "bury his son in peace."[6] Likewise, the privacy of a doctor's prescribing decisions (like those subjected to legal restriction in *Sorrell v. IMS Health*)[7] may be important enough to justify restrictions on others' access to, or dissemination of, those prescribing records—and even as the Supreme Court struck down what it considered a highly selective, viewpoint discrimination version of such a rule in *Sorrell*, it noted that a more even-handed medical privacy rule might well pass First Amendment muster.[8] But this is not likely because doctors need privacy in their prescribing decisions in order to advance democratic deliberation of the kind Meiklejohn identified as the core First Amendment purpose, but rather because sharing sensitive medical information is viewed as potentially embarrassing and damaging for individuals. This is not to say that privacy is generally without value for democratic deliberation: on the contrary, the intellectual freedom made possible by Internet privacy may well be indispensable for the robust information-seeking and private exchanges between friends and colleagues necessary to create an informed citizenry (and for this reason, Krotoszynski's discussion of "bringing Meiklejohn to privacy" is understandably focused on issues related to big data and Internet privacy) (173–88). However, other privacy and dignity interests that, in the United States, sometimes give way to free speech seem to have only a tenuous connection to democratic deliberation. A better candidate for reconciling protection of such interests with free-speech concerns is the one offered by Steven Heyman. Heyman argues, in his 2008 book, *Free Speech and Human Dignity*, that while deserving of staunch constitutional protection, "freedom of speech is limited by other rights and that those rights are founded on respect for autonomy and the worth of human beings."[9] Heyman's theory considers the value such rights have for democratic deliberation, but that is far from their only justification—and he finds a foundation for protecting both free speech and human dignity in the natural rights tradition of John Locke and liberal theory.[10] With this "liberal humanist" framework as a guide, Heyman argues that First Amendment doctrine should permit laws protecting against funeral protests (like those of the Westboro Baptist Church) so long as such "laws are narrowly drawn." "It is difficult to imagine," he writes, "a deeper intrusion into private life—or a more outrageous infliction of emotional distress—than a demonstration that intentionally interferes with the ability of family members to mourn a loved one in peace."[11]

Second, not only might one think more broadly about the kind of First Amendment theory that might guide us if we view constitutional privacy laws through the lens of the apparent tension between privacy and free expression—we might also think about the benefits of sometimes viewing such laws through a different lens altogether. As Krotoszynski recognizes, speech is far from the only antagonist encountered by arguments for privacy in legal battles. Privacy rights are also in tension with a variety of other "imperatives

of a modern industrial state," among them the needs of "security, bureaucratic efficiency, and even other constitutional values (such as equality)" (xi). When one looks at Fourth Amendment law in particular, for example, the U.S. tradition of staunch free-speech rights does not seem to deserve the blame for the weakness of courts' failures to protect Americans from police surveillance. In part, perhaps, the gaps in Fourth Amendment protection (if that is what they are) stem from other idiosyncrasies of U.S. jurisprudence mentioned by Krotoszynski, such as its tendency to protect privacy only where individuals can claim property interests, and only against state rather than non-state actors. But there is likely another underlying force that undercuts such privacy protection, and that is the tendency—in certain circumstances—for courts to bend over backwards in order to accommodate certain kinds of government security measures where government (U.S. courts fear) would otherwise be powerless to fight crime or other security threats. Thus, courts have gone to lengths to leave room for police to use informants to battle organized crime and other criminal enterprises where informants seemed necessary.[12] They have bent over backwards to ensure that airports can search travelers to detect terrorist threats,[13] and to let police (as well as school authorities) ferret out hidden growing, transfer, or possession of drugs.[14] To the extent that courts have struck those balances with too little regard for privacy law, Meiklejohn's free speech theory may well provide *some* reasons for a more privacy–protective balance—emphasizing, for example, why the surveillance we tolerate in order to unmask criminal activity might (used in the wrong way) undercut intellectual freedom and democratic governance. But correcting this balance also requires some attention to the tension that might arise between privacy and security needs—perhaps with attention to other nations' security measures—of how a more privacy–protective regime can leave room for police to continue to fulfill security needs that Americans (however strong their distrust of the state may be) regard as crucial.

Indeed, Fourth Amendment law receives relatively little attention in the book. It is briefly discussed in chapter 2, dedicated to United States law, in passages where Krotoszynski observes that although "the Fourth Amendment … … serves as a general framing device for a great deal of privacy discourse in the United States," it is not most relevant to his analysis of privacy—except in so far as "it helps frame [American] culture's expectation of privacy as an interest running against the state," and not against non-state actors such as corporations (16–17). He returns to Fourth Amendment law when he uses it as a comparison for certain Canadian rulings on technologically sophisticated police searches—of houses using thermal imaging technology, and of a person's cell phone incident to arrest. These two cases are exceptions to the generalization that the United States tends to offer weaker protection for privacy relative to Canada (and other democracies). In *Kyllo v. United States*, the U.S. Supreme Court barred use of the thermal imaging of a home's interior —a kind of police use of technology that the Canadian court found permissible (under the Canadian Charter of Rights and Freedoms) in

R. v. Tessling (54–5).[15] In *Riley v. California*, the U.S. Supreme Court held a warrant was necessary for police to search a cell phone, even when they find it on the person of an individual they have just arrested, a search that the Canadian Supreme Court found in *R. v. Fearon* may sometimes be conducted absent a warrant (55).[16] (The book also notes, however, that Canada seems to offer greater protection in certain circumstances where Fourth Amendment law may not do so; for example, when an individual's privacy is at stake on the government's own property, such as a school computer [61].)

There is nothing wrong with this relative lack of emphasis on Fourth Amendment law. Krotoszynski is less focused on concerns specific to police or other law enforcement surveillance than he is with concerns that arise when journalists, or others exercising rights of free expression or other individual liberties, use them in ways that might undermine others' dignity, interest in controlling their image, reputation, or other aspects of their personal existence, or interest in avoiding disclosure of sensitive information. For this reason, his book places more emphasis on Fourteenth Amendment due-process law than on Fourth Amendment law—and also on looking at protections for privacy, personality, or dignity in other systems' constitutions (like that of South Africa) that are unlikely to have an analogue in U.S. constitutional law unless—and until—they find recognition as a "liberty" interest protected by the due-process clause. Thus, in beginning his discussion of "privacy's salience ….. in the United States," Krotoszynski writes that it "arises in no small measure" because the Court has invoked privacy in protecting "autonomy interests central to human self-definition and dignity, such as reproductive rights and the ability to enjoy some measure of sexual autonomy"(5). These rights to freedom from state interference in reproduction, sexual conduct, and other intimate affairs are the province of substantive due-process law—and Krotoszynski then moves on to begin to understand the contours of privacy in U.S. law by looking at the way the court discusses the rights at stake in due-process cases such as *Planned Parenthood v. Casey* (on abortion) and *Lawrence v. Texas* (on private sexual conduct) (6–7).[17]

To the extent that Krotoszynski's focus is on the territory occupied by Fourteenth Amendment law, however, it may be wrong to assume that uncertainties about that territory arise, first and foremost, because of "the highly protean nature of the concept of 'privacy'" (1), because "privacy" is arguably not the best term or concept to describe the autonomy interests protected by the due-process clause. The liberty or autonomy that a person exercises by, for example, choosing to date or marry someone of the same sex is not something that must be inherently private—as opposed to public and known to one's community (or a larger audience). Thus, as Justice Stevens said (in his dissent in *McDonald v. City of Chicago*), while due-process cases have "episodically invoked values such as privacy and equality," "substantive due process is fundamentally a matter of personal liberty."[18]

Of course, disclosure of information about these highly personal decisions may effectively undermine individuals' freedom to make them.

Indeed, even anxiety about being surveilled (by the state, or one's community) may lead people to avoid unorthodox or idiosyncratic behavior and instead to act in ways they think will conform to the expectations of a possible audience. In part for this reason, First Amendment doctrine already protects an individual's right not only to engage in speech and expressive association, but also to speak and associate anonymously.[19] In this respect, First Amendment law already incorporates the insight of Krotoszynski and other scholars that certain kinds of privacy can support freedom of thought and communication. But requiring people to disclose their unorthodox or unpopular choices—or leave them open to observation and condemnation by a community—is only one of the burdens a state can impose on the exercise of expressive or other liberty. A government might also burden liberty, for example, by denying someone the resources necessary to exercise it (for example, by denying a physical or digital space for a speaker to speak from, or denying individuals seeking an abortion access to the medical technology and care necessary to obtain one). Seen this way, privacy may be a (sometimes crucial) resource for supporting the exercise of an autonomy right rather than an integral part of that right itself. And if that is true, perhaps the confusion in current U.S. law about the contours of modern substantive due process is not the same as the confusion that also exists about the meaning of "privacy" (and the kinds of statutory protections that should allow us to prevent disclosure, or surveillance of, personal information). This does not mean Krotoszynski is wrong to assume (as he appears to) that the underlying connection between information privacy and the autonomy interests discussed in *Casey* or *Lawrence* is deeper: perhaps the logic for excluding the state and others from our informational spaces (by preventing access and observation there) is the same as, or similar to, that which, under the due-process clause, justifies excluding the state from certain realms of intimate conduct. And perhaps it therefore makes sense to treat any rights we have against disclosure or surveillance of data or other information as part and parcel of the same system of privacy rights as those protected by due process. But this is a theoretical argument that requires more development.

As Krotoszynski observes, Canadian jurisprudence does not clearly equate autonomy and privacy interests, either. Section 7 of the Canadian Charter states that "[e]veryone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with principle of fundamental justice" (44). It protects abortion rights and certain other rights analogous to those protected in the United States under the due-process clause. Section 8, by contrast, parallels the Fourth Amendment: It states:

> *Everyone has the right to be secure against unreasonable search or seizure. (45)*

Krotoszynski sees Sections 7 and 8 as working together in tandem to form a "robust and vigorous privacy framework"(48). But he notes that "it is unclear whether most Canadian judges, academics, and lawyers would categorize protection of

interests associated with bodily integrity and reproductive choice as sounding in 'privacy' (rather than a more general interest in 'liberty')" (44). He treats Section 7 decisions as privacy decisions in large part on the grounds that "comparable U.S. decisions,"—for example, on abortion or bodily freedom—"are routinely categorized as implicating constitutionally protected privacy rights" (49). But as noted above, "privacy" may not be the best concept to describe the autonomy rights protected by the Fourteenth and Fifth Amendments. Indeed, the United States Supreme Court has thus far refused the invitation to recognize a right to informational privacy as covered by the due-process clause. To the extent that the nature and scope of those due-process rights is unclear, this may stem not from the inchoate nature of the term "privacy," and perhaps not from any problem in defining privacy at all, but rather from another concern: when courts, to use the language of *Lawrence v. Texas*, reserve for the "autonomy of self" a certain realm of human activity—and insulate it against state control for the purpose of safeguarding individual liberty[20]—they risk undercutting, as Krotoszynski himself observes, "the right of the community, acting through democratically constituted institutions of government, to establish rules that permit peaceful coexistence over time" (6). Particularly when courts expand constitutional liberty protection beyond the realm of thought and expression covered by the First Amendment by erecting a constitutional force field that prevents the state from regulating even certain kinds of non-speech conduct, they threaten to hamstring government in its efforts to protect public safety, further economic well-being, and promote the public interest in other ways. Moreover, since the Constitution's text says nothing about what kinds of unenumerated rights (those not expressly identified in the Bill of Rights) are to be so protected—the due-process clause mentions that "liberty" is, along with "life" and "property," to be protected from certain kinds of state interference—courts have to find a principled method of defining it. This is clearly a significant challenge for courts, and one likely to benefit significantly from the kind of comparative analysis Krotoszynski undertakes here. But this is so not because this comparative analysis helps us to refine the concept of "privacy," but rather because it gives us a larger perspective on how Western nations' legal systems constitutionally (or otherwise) reserve certain spheres of existence for individual autonomy.

To be sure, Krotoszynski's comparative analysis is rich and nuanced enough to offer many insights that are of tremendous value even when one puts aside the speech–privacy contests and tensions that provide the central connecting thread for analyzing—and a key variable for comparing—the different jurisdictions he examines. For example, he notes that United States privacy and autonomy protections are unlike those in South Africa and Europe not only in the extent to which they prioritize speech, but also in that they are "negative rights" against government. As a consequence, this makes it harder for Americans to conceive of themselves as having robust privacy rights against corporations and other private actors (and to demand statutory safeguards for such rights). He also notes that in

the United States, rights—to the kind of privacy or autonomous decision-making protected by the due-process clause—tend to be defined as belonging to individuals rather than groups—and that distinguishes the U.S. system from other systems, such as that of Germany where the right to dignity is not only a right of individuals, but also "that of the collective" (34). Whatever nomenclature we use to describe the spheres that the Supreme Court, in *Lawrence v. Texas*, described as being reserved for an "autonomy of self"—whether we describe them as rights of liberty or a subset of privacy rights that also protect certain physical and digital spaces against government surveillance—Krotoszynski's study helps us to better understand how the U.S. approach compares to other approaches to securing similar rights in other systems, and to weigh privacy rights against other individual rights and communal needs central to modern liberal democracies.

Notes

[**Disclosure Statement**: No potential conflict of interest was reported by the author.]

1 Krotoszynski, *First Amendment* , xv.

2 Ibid., 115.

3 See ibid., 15–18; 21–5; 152–5; 167–71.

4 See Richards, *Intellectual Privacy.*

5 Snyder v. Phelps, 562 U.S. 443 (2011).

6 *Snyder*, 463 (Alito, J. dissenting).

7 Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).

8 Ibid., 573.

9 Heyman, *Free Speech and Human Dignity*, 149.

10 Ibid., 7–46.

11 Ibid., 155.

12 See e.g., Lewis v. United States, 385 U.S. 210 (1966). Here the Court ruled that treating warrantless use of informants as a Fourth Amendment violation would "hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest."

13 See e.g., United States v. Albarado, 495 F.2d 799, 803, 805 (2d Cir. 1974); United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972).

14 See, e.g., Ciraolo v. California, 476 U.S. 206 (1986), where the Court permitted warrantless of aerial surveillance to detect marijuana; Florida v. Riley, 488 U.S. 445 (1989); and Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) which permitted suspicionless drug testing of student athletes by the school.

15 See Kyllo v. United States, 522 U.S. 27 (2000); R. v. Tessling, [2004] 3 S.C.R. 432.

16 See Riley v. California, 134 S.Ct. 2473 (2014); R. v. Fearon, [2014] 3 S.C.R. 621.

17 Planned Parenthood v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003).

18 McDonald v. City of Chicago, 561 U.S. 742, 864 (2011) (Stevens, J. dissenting).

19 See, e.g., McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334, 342 (1995), where the decision notes that at times in the past criticism was only possible if voiced anonymously.

20 Lawrence v. Texas, 539 U.S. 558, 562 (2003).

Bibliography

Heyman, Steven J. *Free Speech and Human Dignity.* New Haven: Yale University Press, 2008.

Krotoszynski Jr., Ronald J. *The First Amendment in Cross Cultural Perspective: A Comparative Legal Analysis of Freedom of Speech.* New York: NYU Press, 2006.

Richards, Neil. *Intellectual Privacy: Challenges for the 21st Century.* Cambridge: Cambridge University Press 2015.