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Preface: Privacy Revisited: A Global Perspective on the Right to Be Left Alone

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PREFACE

Privacy is a notoriously protean concept. Although it enjoys immense legal, political, cultural, and philosophical relevancy in the contemporary United States, the concept remains remarkably difficult to define with precision. This holds true in the United States; it is also true in other democratic polities. The purpose of this book is to try shed greater light on the concept of privacy through a careful comparative legal analysis. Simply put, consideration of how other nations, sharing common human rights commitments—and with respect to the nations canvassed in the chapters that follow, also legal genealogies—can help us better understand the concept of privacy in domestic law terms.

The Supreme Court of the United States has been notoriously undisciplined in defining and deploying the concept of "privacy" to secure and advance certain fundamental autonomy interests. Definitional haziness leaves the protection of privacy interests at some risk; although coherence is not an essential attribute of a regime of human rights protection, it surely is a desirable characteristic. One way of seeking to establish greater jurisprudential and doctrinal clarity would be to consider how other liberal democracies seek to balance the interest of individual citizens in being autonomous and self-defining with respect to matters of fundamental significance against the imperatives of the modern industrial state, including security, bureaucratic efficiency, and even other constitutional values (such as equality).

In addition, a comparative legal analysis potentially provides the best way forward for finding common ground on transnational rules to protect privacy interests—both in the context of data protection and with respect to other important aspects of privacy. Understanding how different societies frame and decide privacy questions would seem a necessary prerequisite to proposing a global system of privacy protection. Significant differences in both local understandings and practices will make finding a global consensus on privacy rights very difficult to achieve—perhaps even impossible. Nevertheless, unless we make the effort to understand privacy from the bottom up, rather than from the top down, we will never know what might be possible.

Privacy, as much or more than many other human rights, possesses transnational legal significance. For example, major foreign and transnational human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, routinely include express privacy protections. These protections wear different labels and are almost inevitably broader than the more limited notion of privacy directly safeguarded under the Fourth Amendment

to the U.S. Constitution. Even in the United States, one has to look beyond the Fourth Amendment to understand constitutional privacy; the Due Process Clauses of the Fifth and Fourteenth Amendments also secure important "privacy" interests in the United States—and possess a considerably broader scope of application than the Fourth Amendment. In other words, one must seek privacy rights where one can find them. A comparative legal analysis is particularly well-suited to this enterprise of defining privacy based on how it actually exists in the world—rather than from an entirely normative perspective on what privacy ought to mean or potentially could mean in an ideal world (which does not exist).

Of course, simply lining up privacy provisions from various jurisdictions, and then comparing them with each other, would not be a particularly useful exercise. Simplistic comparisons seldom produce any useful insights into how best to address common legal problems. For a comparative legal analysis to be useful—for it to shed meaningful light on common legal problems in different nations—it must be highly contextual. By this, I mean that the analysis must take into account not merely formal substantive rules, but also questions of institutional structure, legal and broader social culture, and even the institutional role of courts, rather than legislatures, in tackling major questions of social policy. Only if the comparative legal analysis takes these contextual factors into account, within each and every legal system under consideration, will the exercise yield any useful observations about how a particular national legal system seeks to define, promote, and protect privacy.

To take one salient example, important structural differences—some specific to privacy, others not—affect the scope and meaning of constitutional privacy rights. In Europe, many national legal systems, as well as the European Court of Human Rights, apply constitutional human rights against both *private* and *public* institutions. In other words, in some nations, human rights, including privacy, have both negative and positive dimensions; they prohibit the state from taking certain actions, but they also obligate governments to take affirmative steps to secure human rights more broadly within society as a whole.

To be clear, I do not suggest that the United States should "borrow" this concept, known as *drittwirkung*; the U.S. Constitution has always been understood as a charter of exclusively negative rights. U.S. constitutionalism, at the federal level, has no workable account of positive rights—and it would take a legal revolution to change this state of affairs. Yet, in thinking more broadly about how a just polity should protect privacy, surely constitutional obligations to secure privacy interests against nongovernment actors merit at least some consideration. Even if federal courts in the United States will enforce constitutional rights only against state actors, Congress and state legislatures are entirely free to secure privacy rights against nongovernment actors through the enactment of positive legislation.

Methodological differences are also relevant. In most of the world, proportionality analysis is a central feature of human rights litigation. Simply put, establishing that a constitutional right, such as privacy, has been breached is a necessary, but not sufficient, condition for securing judicial relief. Instead, once a court finds that a particular statute or executive action trenches on a protected right, the reviewing

court will engage in a balancing exercise to ascertain if the government can justify the breach. Proportionality analysis invites courts to define and apply rights broadly, because finding that a right has been breached does not necessarily mean that the government's policy will be judicially invalidated.

As with applying constitutional rights to nonstate actors, I do not advocate incorporation of proportionality analysis in the United States, where most provisions of the Bill of Rights are written in absolute and unqualified terms. Yet, to understand the adjudication of privacy claims in nations that embrace proportionality analysis, this methodological feature constitutes an important part of the overall picture of how rights work. Moreover, the ubiquity of proportionality analysis abroad should invite us to at least consider whether U.S. courts engage in proportionality analysis as well—if not overtly and directly, then indirectly by limiting the scope of application of constitutional rights through an initial social cost/benefit analysis that takes place before a court will agree to apply a constitutional right to a particular dispute. At least arguably, the Supreme Court's exclusion of legally obscene materials from the First Amendment's scope of protection seems to fit this model.

Nomenclature also matters and must be factored into the analysis. More specifically, in thinking about "privacy" in global or comparative law terms, it is essential to consider related, but arguably distinguishable, concepts such as dignity, reputation, and personal honor. Although these interests are theoretically distinguishable from "privacy," they nevertheless work to safeguard highly related autonomy interests.

For example, South Africa's Constitution contains a direct privacy clause, Section 14, but the Constitutional Court mainly applies Section 14 in the context of placing limits on government searches and seizures (although it also serves as the basis for constitutional protection of informational privacy). Privacy interests more broadly, as they are understood in the United States, generally receive protection under Section 10, which protects human dignity ("Everyone has inherent dignity and the right to have their dignity respected and protected."). To speak of privacy in South Africa, then, is to speak of human dignity. Any consideration of privacy in South Africa that fails to take account of Section 10, and human dignity, would be radically incomplete; such an analysis would miss the forest (the ubiquitous and foundational right of human dignity protected under Section 10) for the tree (the express privacy provision in Section 14).

An important sustained point of comparison across jurisdictions involves conflicts between the right of privacy (or dignity) on the one hand, and the rights of free speech and press, on the other. Litigation involving conflicts between privacy and speech has arisen in all of the jurisdictions discussed in the chapters that follow, yet only in the United States have expressive freedoms routinely trumped privacy interests in an absolute—or nearly absolute—way.

Moreover, the systematic privileging of privacy interests over expressive freedoms in the larger world community obtains not only when ordinary private citizens object to the disclosure of true but embarrassing facts, but also when government officials and public figures object to the unconsented-to disclosure of information about their private lives. This is so because public officials and public

figures generally enjoy a strong legal claim to protection of their privacy/dignity that is usually not significantly less robust than the right of privacy enjoyed by everyone else. I do not claim that the U.S. approach—reflected in the *New York Times Co. v. Sullivan* line of decisions, which confers more limited privacy rights on public officials and public figures—is fundamentally wrong or misguided solely because it is different. However, the radically different baselines that exist regarding how best to frame and accommodate these conflicting constitutional interests merit sustained consideration and, if possible, explanation.

An important related point: Canada, South Africa, the United Kingdom, and most nations in Western Europe are, in general, more sanguine about the imposition of mandatory civility norms, enforced through both the civil and criminal law, than is the United States. The connection between civility norms and privacy may not, at first blush, be self-evident, but upon more sustained consideration, the link appears in clear focus: mandatory forms of respect and civility exist to secure personal dignity from private forms of abridgment; dignity, in turn, constitutes an important attribute of "privacy" in much of the world.

This book posits that distrust of government, and a related fear of a government empowered to censor (for whatever reasons), helps to explain the U.S. failure to protect privacy as comprehensively or reliably as other liberal democracies. Simply put, permitting the government to impose mandatory civility norms, or to decide what materials may legally circulate about public officials, public figures, or matters of public concern, whether under the rubric of privacy or dignity, has the effect of vesting government with the power to establish and enforce mandatory limits on speech. For a society whose institutions of government rest on a broad-based principle of distrust of government and the institutions of government, vesting government with this authority requires something of a leap of faith. However, this radical distrust of government does not generally exist in the wider world and will make finding global common ground on the protection of privacy considerably more difficult. The chapters that follow develop and explicate this thesis.

In sum, I hope that readers will find my methodology both effective and persuasive. At the end of the day, however, this book assumes as a first premise that comparative legal scholarship can provide useful insights into common legal problems. The pages that follow reflect and incorporate this first premise. Simply put, I believe that if carefully undertaken, with sufficient attention to issues of structure, politics, and culture, comparative legal scholarship can draw useful comparisons among and between legal systems, which shed important light on the meaning and scope of constitutional rights both here at home as well as abroad.

Privacy Revisited advances four main points. First, and at the most descriptive level, the book provides relevant, and reasonably detailed, information about both the substantive and procedural protections of privacy/dignity in the United States, Canada, South Africa, and the United Kingdom, and among Council of Europe member states. This contribution adds something new to the literature that I hope will assist others working in this field. Readers seeking a basic grounding in the privacy law of each of the canvassed jurisdictions should find this book to be a helpful, and useful, resource.

Second, the book explores the inherent tension between affording significant legal protection to the right of privacy (or human dignity) and securing expressive freedoms, notably including the freedom of speech and of the press. All of the covered jurisdictions have faced the problem of reconciling privacy protection with respect for expressive freedoms. Precisely because privacy interests run not only against the government, but also against other private entities, the protection of privacy will necessarily cause collateral damage to other fundamental human rights. Comparative legal analysis will not provide definitive answers on how a just polity should reconcile, or harmonize, these conflicting rights. Nevertheless, the analysis will prove useful in helping to understand this conflict—and understanding is a prerequisite to building a global legal consensus about the appropriate scope and meaning of privacy.

Third, consideration of the protection of privacy helps to illuminate some of the underlying social and political values that lead the United States to fail to protect privacy as reliably or as comprehensively as other liberal democracies. Although rights on paper certainly matter, a general legal culture can have as much, if not more, relative importance than formal commitments to safeguard a particular human right. Privacy law provides an excellent example of how a legal culture's general faith in government and the institutions of government can significantly affect how courts within a polity will reconcile conflicting human rights. Moreover, a general posture of hostility, or skepticism, toward government will probably affect the scope of some rights more than others. This seems to be the case with privacy in the United States.

Fourth, finally, and perhaps most important, the book establishes that although privacy and speech come into conflict with some regularity, it is both useful and necessary to start thinking about the important ways in which both rights are integral to the maintenance of democratic self-government. In significant ways, a comparative legal analysis helps to demonstrate that privacy and speech are symbiotic rights that reinforce each other—and together help to facilitate the deliberative process that is integral to democratic self-government. As technological advances make it easier, faster, and cheaper to create a surveillance state, the ability to control what we disclose, and to whom, is ever more essential to creating the intellectual freedom necessary to facilitate the project of democratic self-government.

A brief overview of the book is in order. The chapters that follow consider the difficulty of defining privacy as a general matter and then examine, in some detail, how constitutional courts have gone about defining and protecting privacy rights in the United States, Canada, South Africa, and the United Kingdom, and in the jurisprudence of the European Court of Human Rights.

Chapter 1 begins the analysis be examining a critically important definitional question: What is privacy? Moreover, what are the appropriate metes and bounds of the right of privacy? Does the concept of privacy really do any useful jurisprudential work that more carefully articulated discrete liberty interests could not protect as well as, if not better than, the construct of a right of privacy? Would other, alternative nomenclature, such as human dignity, better serve to conceptualize the

discrete interests that we seek to protect from government coercion? An initial difficulty with any study of privacy is the protean nature of the concept. Chapter 1 seeks to elucidate these issues and also to provide a working definition of "privacy" that will carry forward in the chapters that follow.

Chapter 2 begins the comparative legal analysis of the right of privacy with a study of the use of the concept of privacy in the constitutional jurisprudence of the Supreme Court of the United States. The Supreme Court consistently has recognized that the Fourth Amendment creates a spatial zone of privacy that protects one's person, papers, effects, car, and home. But, police search and seizure law, and the privacy rights of government employees and students in public schools and universities, are hardly the only, or even the most important, context in which the Supreme Court has used privacy as a framing device to secure fundamental human rights. In the context of abortion rights, for example, in *Roe* and also in *Casey*, the Supreme Court recognized a right of privacy that encompassed autonomy with respect to whether a woman will become a parent. In addition, *Obergefell* and *Lawrence* also feature themes and arguments that sound in privacy as autonomy (and also feature privacy as human dignity).

This chapter also establishes how and why the U.S. approach to protecting privacy rights constitutes a global outlier. Landmark U.S. Supreme Court decisions, such as *Snyder* v. *Phelps*, which held that the First Amendment protected a highly offensive, targeted funeral protest, and *Hustler Magazine, Inc. v. Falwell*, which held that the First Amendment protected an intentionally outrageous parody of a public figure, would be, if not quite unthinkable, then highly unlikely outcomes in most of the democratic world. As subsequent chapters will show, in most of the world, securing privacy, dignity, and personal honor enjoys a higher relative priority than protecting the rights of free speech and a free press. Of course, this does not mean that the U.S. approach to reconciling privacy rights with speech and press rights is necessarily wrong or misguided. It does, however, suggest the need for careful consideration of the reasons that animate U.S. privacy exceptionalism.

Chapter 3 considers the right of privacy in Canada. Canada maintains a written bill of rights, the Canadian Charter of Rights and Freedoms, which safeguards certain fundamental human rights from government abridgment absent sufficient justification. Chapter 3 provides a concise general overview of Canadian constitutional law's protection of fundamental rights, including privacy rights. The Canadian courts use a two-step process of analysis in which reviewing courts first ascertain if a government action abridges a Charter right and, at step two, determine whether the government's reasons for the abridgment are sufficient to justify the burden (using the *Oakes* balancing test). The Supreme Court of Canada has developed a durable and workable doctrinal architecture to structure privacy analysis under Sections 7 and 8 of the Charter. Moreover, the Canadian justices have been remarkably proactive in deploying constitutional privacy to meet the challenges presented by new and emerging technologies. Canada's example teaches that privacy law need not be a doctrinal quagmire. Moreover, it also demonstrates that judges on constitutional courts are capable of mastering complex technological change and developing legal doctrines to meet it.

Chapter 4 takes up privacy in South Africa. The Republic of South Africa provides an example of a nation that largely renormalizes "privacy" into a broader concept of "human dignity." Like the Federal Republic of Germany's Basic Law, the 1996 Constitution establishes dignity, along with equality and freedom, as the nation's "foundational" values. Dignity has, if not an absolute priority over other human rights, then at least a strong relative priority. South Africa's commitment to dignity is plainly part of a larger effort to use the new post-apartheid Constitution, and the creation of a Constitutional Court vested with a power of judicial review, to ensure a clean, and complete, break with the twisted Herrenvolk democracy that it replaced. Dignity in South Africa is the legal concept used to help create and ensure not merely the theoretical equality of citizens under the law, but the reality of equal citizenship for all South Africans. The Constitutional Court consistently interprets human rights purposively—and with the goal in mind of securing the equal legal standing, and worth, of all persons before the law.

Chapter 5 examines the concept of privacy in the United Kingdom. Although the U.K. lacks a written constitution and the British judiciary does not possess the power of judicial review, one would be mistaken to think that privacy lacks either legal or cultural salience as a result. In fact, in both common law cases and in other contexts, the British courts are remarkably receptive to privacy-based claims. The U.K. provides powerful evidence that protection of a particular right need not rest solely on an express, judicially enforceable constitutional right, but may enjoy protection if the interest in question otherwise resonates within a particular legal culture. At the same time, however, privacy seems less completely and effectively protected in the U.K. than in other jurisdictions. The limited scope of authority that the Human Rights Act conveyed on the British courts explains this outcome, at least in part. On the other hand, however, the institutional modesty of the domestic judiciary provides a more complete explanation; simply put, in the United Kingdom, judges do not view it as an appropriate institutional role to devise and deploy major new social policies—instead, this responsibility belongs exclusively to Parliament.

Chapter 6 considers privacy in the jurisprudence of the European Court of Human Rights (ECHR), a supranational tribunal that enforces a kind of pan-European human rights law. The ECHR, established in the immediate aftermath of World War II, has been a leading expositor of human rights values for over 60 years. Its sponsoring institution, the Council of Europe, is comprised of 49 independent nations that all have agreed to accept the jurisdiction of the ECHR over complaints brought directly to Strasbourg by their residents. Consideration of the privacy jurisprudence of the ECHR helps to illustrate some of the points of tangent, and points of departure, between the wider world and the United States. The standard narrative, that Europe prioritizes privacy, whereas the United States prioritizes speech, does hold true—but it holds true only to a point. To a degree that has escaped much notice, significant common ground exists between Europe and the United States. This chapter argues that in the age of Big Data, both Europe and the United States will have to use this common ground to find ways of reconciling privacy and speech in the service of democratic self-government.

The concluding chapter, Chapter 7, brings this project to an end and draws on the iconic work of Professor Alexander Meiklejohn to mount a sustained argument that privacy and speech are, at bottom, fundamentally complementary, rather than conflicting, human rights. Meiklejohn famously argued that free speech merited constitutional protection because it was integral to the process of democratic self-government. Chapter 7 argues that in the era of Big Data, privacy is no less integral to democratic self-government than speech. It also considers the ways in which privacy and speech are more complementary then we commonly suppose them to be, because privacy and speech are both necessary conditions for democracy to function. Chapter 7 also provides a summary and overview of some of the more salient potential lessons that a comparative law survey of privacy law provides.

In conclusion, the advent of drones and metadata presents a threat to privacy on a global scale. Arguably, a global solution will be needed to check the inexorable pressure that technology will place on personal privacy. Finding common ground will not be easy, but, at the same time, to secure privacy rights effectively in a globalized world, it is clearly necessary. I do not claim that comparative legal analysis can provide *all* of the answers, but I am absolutely convinced that it can provide *some* of them—and also help to better shape and inform other questions that will need to be asked and answered if we are ever to arrive at an effective transnational framework for protecting personal privacy.

Moreover, the fact that application of the right of privacy differs in material respects from place to place does not undermine the larger truth that citizens expect just governments to respect and secure privacy rights (whatever the right of privacy's precise local scope and meaning). Accordingly, rather than using these differences as a facile excuse for doing nothing to attempt harmonization of conflicting domestic law privacy frameworks, the variations in how domestic legal systems deploy the concept of "privacy" should instead serve as a basis for larger national—and international—dialogues about the appropriate role of government in regulating nondisclosure, autonomy, and human dignity.