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THE LANGUAGE-GAME OF PRIVACY

*Joshua A.T. Fairfield**

PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE. By *Ronald J. Krotoszynski, Jr.* Oxford and New York: Oxford University Press. 2016. Pp. xx, 292. \$90.

INTRODUCTION TO THE PROBLEM

Start with a thought experiment. Suppose someone asks you what the word “privacy” means. After thinking about it for a while, you realize you don’t really know. You can do one of two things: you can go and ask people how they use the word privacy, or you can begin to internally construct your own definition. But because you don’t know what privacy means, if you choose to construct your own definition, the only information that definition can contain is what *you* think privacy means. Worse: you may be aware that privacy could mean other things to some people, but those meanings don’t fit the operational definition you’re trying to reach here, and so you cut those meanings out, using the theorist’s scalpel. Those things are not privacy, you argue, because they fall outside the very theoretical structure that you just built. But you soon realize your attempt to “pare down” language until it meets your exacting criteria entails literally putting words in others’ mouths. You are claiming that what other people mean when they use the word “privacy” is precisely and only that which fits your theoretical structure. (You’re also taking words out of their mouths: you’re saying that when they use the word “privacy,” they’re often wrong.) And that’s obviously not true. It’s a dead-end street.

So instead you decide to take the richer path and find out how other people use the word privacy. You might read a few people’s papers, most of them by privacy law scholars, and come to the conclusion that one of their definitions is the answer. But of course you wouldn’t have found out what privacy means; you would have just gotten some data about what those scholars mean when they use the word privacy. There are more people in the world than Western privacy scholars trained in common law, and they use language too. Instead, it might be reasonable to ask how people use the term in daily life because the word privacy means exactly and only how people use it. In other words, meaning is use. In the grand debate about how the meaning of privacy should be explored, I fall into the “ask people” camp, whereas many thinkers about privacy, especially legal thinkers, fall into the “define it” camp.

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The “define—ask” divide does not just exist in law.¹ It exists in logic, philosophy, and mathematics, and thus lies at the root of the scientific method.² This is not a distinction to do with the divide between empirical and theory work. Rather, it is a divide in empiricism itself. On both sides of the divide, people develop sensible hypotheses and then test them by comparison to theories of reality. The debate regards not *whether we should test our conclusions*, but *which attribute of real experience should our hypothesis be tested against*. In the case of privacy, should we test how person A uses the word “privacy” in any one instance against a core essential definition, or should we test the use of a word in one instance against how people actually use it?

One way to see this clearly is to observe the revolution that Ludwig Wittgenstein’s theories worked in the social sciences. Traditionally, a scientist would develop a theory of reality, and would test whether results conformed with that theory. If the result was an outlier, then, that would point to a fault in the experiment or test. If it had lots of company, perhaps the theory would need revision. So before Wittgenstein, one could imagine (and this was the case)³ that some cultural anthropologists might arrogantly judge technologically undeveloped cultures, because those cultures’ usages fell short of the best theories the anthropologist had. But Wittgenstein’s point was that in examining *language* (and other constructed cultural artifacts), the empirical reality against which theories of linguistic meaning must be tested is the *use of language itself*.⁴ This shift worked serious changes in social science practice. Modern anthropologists would now find it alien to tell their subjects that their subjects’ use of language failed to match some definition or theory. Rather, any attempt to determine meaning must lie in describing uses.

Even among the “ask people” crowd, the technique of asking people is often applied ad hoc, or without really understanding what’s at stake. We read some case law to find out what those judges thought, or we read cases and theory from another legal tradition to try to get a handle on that. Rarely do we work out a system for how to ask—to ensure that we are gathering

1. I suspect, but do not have time to explore thoughtfully in in this Review, whether this is another version of the “mention—use” distinction in mathematics, which lawyers will be intimately familiar with through the legal move of making a statement “not for the truth of the matter asserted,” but to show something else. I can say “I am hot,” and that means one thing. That is *use*. When a lawyer says in court that “Joshua Fairfield said on May 20, 2017, ‘I am hot,’” he is mentioning it, not for the purpose of demonstrating that Joshua was hot, but for some other purpose. That is *mention*. In one sense, all I am saying in this Review is that we should stop examining *mentions* of privacy (definitions), and start examining *uses*. I will explore this and other potentially interesting ideas in further work.

2. See Roderick M. Chisholm, *The Problem of Empiricism*, 45 J. PHIL. 512, 512–13 (1948).

3. See LUDWIG WITTGENSTEIN, REMARKS ON FRAZER’S GOLDEN BOUGH (Rush Rhees ed., A.C. Miles trans., 1979).

4. See Bruce Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801, 808 (2005) (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 43 (G.E.M. Anscombe trans., 3d ed. 1974)).

good-faith meanings of the words (and not lawsuit-motivated lies, for example)—or, more importantly, how to feed what people think “privacy” means back into an understanding of the term, without just letting the term mean whatever people say it means.

We are talking here about two views of how words fit together: Are words atomistic sounds that refer to clearly defined things? Or are they drifting and interlinked, while remaining anchored in context and community? Linguists take the latter approach, as does anyone who notices how words shift and flow into one another over time.⁵ The question is how law and legal terms—and in particular legal terms like “privacy” that are also terms of common use—should be analyzed.

There is nothing wrong with carefully defined terms of legal art. The difficulty arises when lawyers and legal academics fail to signal that they are using a term of general use as a term of art—that they are using one explication of the term, not its full meaning. And this is particularly so when lawyers and legal academics make claims about the essential meaning of terms. For a legal thinker to say that privacy “is” something—by reference to case law, statute, and legal theory—is too often to say that privacy “is not” its everyday use. From a linguist’s perspective, that cannot be correct.⁶ And even lawyers must recognize that “privacy” is not a legal term of art. It can’t be. We ask whether ordinary people have a reasonable expectation of privacy. The meaning of the term is dependent in significant part on what people expect when they consider something “private.” Privacy is practiced in the bedroom and the bathroom, not the courtroom. So we must take the linguist’s path.

I am, of course, not the first to see that law is language and that, like other languages, the language of law develops according to systems of negotiated meaning—grammars—and does not in fact refer to atomistic physical or defined conceptual “things.” This is a straightforward application of some philosophical and linguistic observations made by Ludwig Wittgenstein, a little more about which below.⁷ I think that the field of law is likely to provide many fruitful applications of Wittgenstein’s theories. Wittgenstein’s point is that the meaning of language is not essential to any term; it is negotiated in context and by community.⁸ That is, to my mind, a pretty strong description of how law works. And understanding that law works in this way might help resolve some legal problems.

5. See, e.g., Veda R. Charrow, *Linguistics and the Jury*, 8 U. BRIDGEPORT L. REV. 303, 303 (1987).

6. See, e.g., *Discourse Analysis—What Speakers Do in Conversation*, LINGUISTIC SOC’Y AM., <https://www.linguisticsociety.org/resource/discourse-analysis-what-speakers-do-conversation> [<https://perma.cc/79RK-BVQH>].

7. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* paras. 31–39 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., 4th ed. 2009).

8. See *id.*

Dan Solove notices that law follows Wittgensteinian principles in his signal book *Understanding Privacy*.⁹ He argues that the search for a definition of privacy is futile because privacy, as used by humans, simply means a range of related things.¹⁰ And if that were all I needed to point out, that would be that. The difficulty is not with the choice of method, but its application. Solove starts well. He delves into case law, legislative histories, and a few recognizable other legal traditions and emerges with what he thinks privacy is, across a range of “privacy problems”: a coherent-but-sometimes-loose set of related difficulties that concern information, the individual, and society.¹¹ It is useful because it serves as a haystack, a collection of the thoughts from the immediately surrounding field of ideas, a one-stop shop for the conclusions of one legal academic mind that has done an enormous amount of reading about how other legal academic minds use the word “privacy.” Solove emerges from this haystack with a taxonomy of privacy—a hierarchy with kingdom, phylum, class, order, family, genus, and species.¹² But it would be an enormous mistake to confound this taxonomy with the linguistic community, contexts, and tasks that gave rise to the range of cases Solove collects. Taxonomies are definitions in sheep’s clothing.

Comparative law is precisely where Dan Solove’s method diverges from his conclusions. He claims that the taxonomy he creates identifies generalities that cross all cultures.¹³ He does this by reading a lot of case law, and sometimes the courts in these cases seemed to be working on similar problems despite cultural differences.¹⁴ His method of inquiry—asking people what they mean when they use the word privacy—must certainly be a constant across cultures. It is how language works, and so will work for any language-using culture. But his narrow conclusions—the taxonomy he produced—would not transition across the Atlantic. No French scholar would have written that taxonomy. Indeed, no other person would have written that exact taxonomy. To mistake the taxonomy for the process of linguistic inquiry would be to commit a serious error. There are of course elements of Solove’s taxonomy that resonate strongly across the Atlantic. But there are

9. See DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 41 (2008) (indicating that privacy is “a product of norms, activities, and legal protections” and that any theory of privacy must be able to adapt to privacy’s changing character).

10. See *id.* at 39–40 (arguing that continuing to search for the definition of privacy will never lead anywhere because privacy has varied use and practice around the world).

11. See *id.* at 9–11 (explaining how Solove’s taxonomy was developed and what it contains).

12. See *id.* at 10–11 (delineating Solove’s proposed taxonomy of privacy focusing on principal groups of activities and the privacy problems each poses).

13. Solove, however, also acknowledges the potential limitations of his taxonomy. See *id.* at 106 (recognizing that though the taxonomy boiled down law, policy, and cultures into one general system, this taxonomy could not “be completely neutral and free from value judgments”).

14. See, e.g., *id.* at 122–26 (explaining that both the United States and French courts have heard similar cases regarding identification of citizens).

parts of it, including the most basic part of constructing a taxonomy in the first place, that may not translate at all.

If one must produce an accurate definition of privacy, it must be only this: privacy is the linguistic-conceptual network of ideas, constrained within a grammar, that is invoked in one human when another human honestly and with intent to communicate makes the set of noises “privacy.” From this perspective the definitionalist’s work with its towering theoretical structures seems off target. What we mean by “privacy” is of course what we mean when we say “privacy.” And although the distinction appears to be of the narrowest sort, it has profound consequences for how we as a society go about finding out what important words, like privacy, liberty, security, autonomy, or obscenity, actually mean. One path is a path of discovery and leads to the laboratory. The other is a path of coercion, of *making* words mean something, and leads to the courtroom or academic conference.

The reader will now have noticed that I have talked myself into three sets of difficulties. First, if privacy’s meaning is its use, *and nothing else*, then what constrains plaintiffs from lying about whether they have suffered a privacy harm? If it means a big payout, I suppose I could find a deep and abiding privacy interest in my grading practices or teaching methods, or anything else for that matter. So if the meaning of a word is its use, it must be its honest use. That’s problem one.

The second problem is how to operationalize all this. Here, the “define it” camp has certain advantages. They can look to what is practicable, define privacy to mean that, and then do what is practicable. The practical outcome of the “ask people” camp is somewhat different. First, the method will change. We can operationalize a linguistically sound view of what privacy means by asking communities and cultures what it means to them in circumstances designed to promote honesty. The lab is one such place. The second is developing tools to analyze whether people are acting honestly and legitimately within a common grammar when they invoke the term “privacy.” Courts might devote more resources to determining whether the plaintiff honestly feels his or her privacy has been violated, than to invalidating the plaintiff’s concern because it fails to meet a court-constructed theoretical definition of the interest at stake. Here, the famous *Katz v. United States*¹⁵ decision is instructive. A reasonable expectation of privacy is both one that is subjectively honestly held and one that society is prepared to recognize as objectively reasonable.¹⁶ The objective prong does not define what privacy is; it defines a linguistic community that makes that determination.¹⁷ Or, put bluntly, if the privacy interest is one that falls outside of Dan

15. 389 U.S. 347 (1967).

16. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

17. The objective prong of the *Katz* two-prong test is supposed to be a public-facing inquiry asking whether or not society is prepared to accept a newly proposed use into its linguistic fold. It does not ask whether the legal community is prepared to accept it as reasonable, and it is not supposed to be asking judges whether they are prepared to accept it as reasonable. Using a Wittgensteinian approach, one can identify how we are actually using the

Solove's taxonomy but yet is one that society is prepared to recognize as reasonable, then linguistic community trumps taxonomy.

The third problem is related to the prior two but deals with the entire linguistic structure. If words are just sounds used by humans, then there is no absolute constraint on them. This is the challenge of relativism. You say "privacy" and I say "privacy" and our definitions never touch. This is not a problem of honesty, but a problem of stickiness of meaning. If words' use is their meaning, then I might use words idiosyncratically that, in a way absolutely unique to me, makes it impossible to tell whether I am lying or not. I might privately decide that "yes" means "no" and be honest about it. I might be telling the truth but use words in a way that is entirely unique to me, and thus of no use in communicating with anyone. The problem of relativity can be addressed with the concept of a Wittgensteinian grammar and what theorists call the "private language argument."¹⁸ The core is this: words can have sticky meaning even though they lack absolute meaning. Even though all words are made up, any high school English teacher can tell you that they can be used incorrectly. In this sense, words are made up, but they are made up *socially* and *in context*. Linguistic community and context provide stickiness of meaning—a way of telling when words are used out of context or community—even if one concedes that the meaning of words cannot be absolute.

An appeal to Wittgenstein's ideas about grammar and private language provides further answers to the three difficulties above. Imagine that language is a galaxy, and individual words are stars and planets. The galaxy floats, moored to other galaxies only by faint gravitational relationships and the expansion of the universe. The galaxy has no absolute position, but it has direction and momentum, and its constituent elements float together in a way that makes it clear the galaxy is interconnected through the laws of gravity and motion. Language works that way, too. There is no particular reason that the sounds "privacy" mean the concept "privacy." We could have picked the sounds "C'thulhu Ftaghn" to mean that. But once we do make the pick, the laws of linguistics, like the laws of gravity, keep the linguistic system spinning in the same direction. In short, even though we could have picked any word for "privacy," we are capable of correcting one another if one of us were to use the word completely incorrectly. Perhaps we would not do so often, being aware that the word packs a lot of various meanings in. But at some point, if I were to use the word "privacy" to describe a rabbit, we would put a stop to it. The point is that linguistic grammars, like galaxies, reflect the stability of relationships even in the absence of absolute position (for galaxies) or meaning (for words).

word "privacy" and prevent judges from constraining the community of meaning to their community of meaning.

18. See WITTGENSTEIN, *supra* note 3, at paras. 243–269.

INTRODUCTION TO PRIVACY REVISITED

It is this conflict that brings me to the subject of this Review, Professor Ronald Krotoszynski's¹⁹ book *Privacy Revisited: A Global Perspective on the Right to Be Left Alone*. Professor Krotoszynski seeks to discover the meaning of privacy by extensive comparative cultural and legal research and so offers the kind of work that throws the difference between Solove's method and outcome into strong relief. *Privacy Revisited* deals primarily with the United States and current and former British Commonwealth nations, which form a common law linguistic community through which ideas can cross the Atlantic (p. 12). These cultures share, at a certain level of abstraction, some common ideas about information, the individual, and the community, which permit uses of the term "privacy" or "free speech" within one instance—say, the United Kingdom—to be useful in determining the meaning of the word used elsewhere within this distributed linguistic community.

Privacy Revisited is exhaustively researched and fluidly written. It addresses privacy comparatively, looking at the cultural contexts and specifically the subcategory of legal culture within common law and Commonwealth countries: United States (Chapter Two), Canada (Chapter Three), South Africa (Chapter Four), and the United Kingdom (Chapter Five), with an additional look at the European Council and European Union decisions (Chapter Six). German law, influential on the continent and defining of the EU approach, appears as leaven throughout the text.

To begin at the end: the text contains critical comparative information about the international formation and structure of privacy rights. In particular, Krotoszynski, one of the nation's foremost First Amendment scholars, works a compelling integration of the U.S. law of free speech into the general global consensus on privacy through a comparative study of selected common law jurisdictions.²⁰ Krotoszynski takes the peculiar infatuation of U.S. law with free speech and shows that at the microlevel, privacy conflicts with speech.²¹ At the macrolevel, however, Krotoszynski explains that privacy and speech are both necessary as building blocks of democratic self-governance (pp. 173–87).

As a comparative text, particularly one that is sensitive to the peculiar U.S. institution of speech, the book is a critical addition to the growing global conversation about privacy. This leads to a further conversation about methods. Should we continue to ask lawyers—even lawyers from different cultures—what privacy means, or should we interrogate culture more broadly to see how people use privacy in daily life? Should we take a legal-analytic-definitionalist approach, or a linguistic-comparative-empirical approach? In defining a term, lawyers prune meaning. This is the opposite

19. John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law.

20. See p. 28 (explaining how the United States protects free speech and privacy differently than the United Kingdom and the European Court of Human Rights).

21. See pp. 25–30, 160–66, 183.

approach to cultural anthropologists and linguists, who gather meaning. Krotoszynski stands at the crux of this question. He gathers meaning from the common law transatlantic countries. He explores the history and some cultural precommitments that have led to differences in meaning. He could go further, however, in interrogating the meaning of privacy well beyond legal culture.

Legal academics often dispute the meaning of privacy because they pare meanings down to essential definitions that exclude the examples used by other academics. I assert here that the only way to find out what privacy means is to interrogate the larger community of meaning surrounding privacy—or, in English, to ask humans, not lawyers. I term this the language-game of privacy, which I will discuss first, before returning to *Privacy Revisited*.

A. *Lawyers and Linguists*

It is often the privilege of the reviewer to deliver a Trojan horse theory by means of a review, and that is what I am doing here. In *Privacy Revisited*, Krotoszynski yet again raises the question of what privacy means. It is currently fashionable to claim that privacy has no operational meaning.²² I believe that this is not a useful assertion. Privacy, as a word, means as much as liberty, or dignity, or autonomy. That these words do not have precise borders seems to frustrate lawyers, but it does not frustrate anthropologists or linguists.²³ The legal community may need to come to grips with the fact that its method, not any given term, is the problem.

Humans value something that they gather from the meaning of privacy. The word communicates information from one human to another, even though edges are blurred.²⁴ So, who is troubled by the failure to precisely define privacy? Not economists, who would recognize that humans expend valuable resources to protect what the humans themselves call privacy. Not practicing lawyers, who define terms to mean what they say they mean, or look up the meaning in statutes. Certainly not linguists or cultural anthropologists. And not philosophers, who I am convinced would recognize in the struggle to define privacy a classic Wittgensteinian *Sprachspiel*, or language-game.²⁵

Legal academics, however, suffer from a need to define. They do so by logically associating a word with examples or cases that the word represents and by excluding examples or cases that they believe fall outside of the meaning. This definition is often artificial. Consider the definition of “good faith” in a contract, which may be defined by the drafting attorneys to mean

22. See *supra* notes 4–5 and accompanying text.

23. See p. 3 (explaining the frustration of lawyers because of the ambiguous definition of the word “privacy”).

24. See p. 3 (clarifying that privacy is present and used in multiple facets of society, even if the definition of “privacy” is not clear).

25. WITTGENSTEIN, *supra* note 3, at para. 23.

things not particularly recognizable from the meaning of “good” or “faith.” Indeed, such an approach is necessary in tasks like contract law, because contractual definitions are the basis for the careful exercise of power by courts. But lawyers sometimes fail to recognize that their carefully pruned definitions are precisely that—maimed, crippled, pruned versions of words that have a richer life beyond the contract or academy. Legal terms of art are necessarily deprived of much of their natural meaning by the very process of definition. Legal terms of art are explications: specific tools for specific contexts, not explanations of the meaning of a term.

Cultural anthropologists and linguists, by contrast, engage in observation, not definition. Their tool is not Occam’s razor, but the dictaphone. They do not cut speech out of common meaning when it is used idiosyncratically but attempt to situate the meaning within a context and a community of meaning.

The difference in approach might be highlighted by a thought experiment. Imagine that a lawyer and a linguist travel to a remote village. There, villagers use the word “privacy” to correspond to the practice of going on a vision quest, in which the questor would put on specific clothing, from which time society would pretend that he or she did not exist until the completion of the quest. A lawyer would inform the villagers that they were using the word incorrectly—because the questor’s actions were entirely in public view, they could not be private. The linguist, though, would be disinclined to read the villagers’ usage out of the meaning of the word. The linguist might gather examples of speech, record the local dialect, and attempt to work out the influences that had brought the word to have that particular meaning. This is not to say that the linguist might not come to believe that the local villagers were using the word ungrammatically—outside of context or linguistic community—but rather that the linguist would use different tools and logic to do so.

Comparativists, particularly comparative legal scholars, are caught between the traditions of the legal academy and cultural anthropology. Comparativists are acutely aware that different cultures breed different contexts in which definitions are formed. Privacy scholars struggle to define their subject matter and *métier* because they must admit that privacy encompasses a plurality of interests and interested parties: informational and decisional, groups and individuals—never mind cultures, which are the subject of Krotoszynski’s analysis.

B. *The Language-Game of Privacy*

A language-game is a specific activity or context in which a word-system arises.²⁶ In the classic example, a builder, *A*, and an assistant, *B*, must build.²⁷ They must therefore develop a language to describe the elements that they

26. *See id.*

27. *See id.* at para. 2.

need to discuss: “block,” “pillar,” “slab,” “beam,” and so forth.²⁸ As things progress, the builders might develop words for “here” or “there,” to indicate where things ought to be placed.²⁹ Out of context, the words make no sense. “Here” has no meaning out of context. Words make sense in relation to the activity that the two share.³⁰ Further, even when grounded by context, the meaning of words must be negotiated by the community of builders. The assistant may disagree with the builder as to whether something is a “pillar” (vertical orientation) or a “beam” (horizontal orientation), and those differences must be further negotiated.³¹ The meaning is what *A* and *B* agree they mean, not measured by their mental assent to the definitions, but by whether the definitions let them coordinate to build something.

From this, we can take two points. First, the language-game is rooted in an activity. Second, and consequently, the development of language cannot be divorced from context and community. Wittgenstein warns against developing language in a metaphorical space free from context because there—in classic lawyers’ style—words can be defined to mean whatever one wishes. A context-free environment is like flat ice; there is no friction, no contours of the terrain that offer natural topological guidance to the semiotic lay of the land.³²

Wittgenstein’s builders’ language, as a story, fits well with the story of the development of a language of privacy. Humans are engaged in an activity. One installs a VPN. Another draws the blinds. A third grows a hedge. One might reasonably ask: What is the activity at the root of privacy? But that is jumping the gun, since the name of the activity has yet to be negotiated. Consider the builders’ language. If one were to ask them what they were doing, they, and you, might eventually negotiate a term for the activity. Let’s call it “building.” And that would be the answer. In a similar sense, one might negotiate within a linguistic community to call VPNs, hedges, and blinds part of something called “protecting privacy.” That is the activity.

C. *Privacy Revisited*

Using this framework, I return to Professor Krotoszynski’s compelling work. Although he makes the usual privacy scholar’s disclaimers—that privacy lacks a clear definition³³ (entirely truthfully)—and although he makes

28. *See id.*

29. *See id.* at para. 8.

30. *See id.* at para. 43 (explaining that “the meaning of a word is its use in the language”).

31. *See* Gordon Baker, *Wittgenstein: Concepts or Conceptions?*, 9 HARV. REV. PHIL. 7, 14 (2001) (“To a considerable extent, Wittgenstein’s philosophy involves *negotiations* with others . . .”).

32. *See* WITTGENSTEIN, *supra* note 3, at para. 107 (“We have got on to slippery ice where there is no friction, and so, in a certain sense, the conditions are ideal; but also, just because of that, we are unable to walk. We want to walk: so we need *friction*. Back to the rough ground!”).

33. *See* pp. 2–3.

the usual comparativist's disclaimer of universalism³⁴ (again, entirely correctly), Krotoszynski provides large and important building blocks in our discussion of the language of privacy. *Privacy Revisited* explores three levels of communities of meaning—national, Commonwealth and common law, and global—and it carefully delineates how the meaning of privacy as a communicative and linguistic concept shifts and changes as one moves from the national to common law to global contexts. While others mess about with definitions or obsess over the lack thereof, Krotoszynski gives us building blocks that we did not have before.

The book's analysis of South Africa, for example, is not to be missed.³⁵ Out of the Herrenvolk democracy of apartheid South Africa, Krotoszynski writes, came a fierce commitment to dignity.³⁶ The chapter hammers home the value of Krotoszynski's approach. One cannot understand the development of the language of privacy in South Africa without understanding the history and importance of the dignity imperative.³⁷ In particular, Krotoszynski provides a compelling account of the political maneuvering surrounding the development of constitutionalism under the radical reorientation of political and social power in the 1993 interim constitution and the 1996 constitution.³⁸ Particularly revealing is the analysis of discussions between National Party and ANC over a commitment to judicial review over parliamentary sovereignty.³⁹ Parliamentary sovereignty, inherited from the British, had served as a tool of oppression under apartheid.⁴⁰ Once the National Party accepted that loss of power was inevitable, it turned to constitutional judicial review and a bill of rights—like approach to guarantee political minority

34. See p. 3.

35. See chapter 4.

36. See pp. 84–85 (“In order to achieve a peaceful transition from Herrenvolk democracy to a non-racial state, the ANC agreed to embrace a constitution with entrenched human rights enforced by a politically independent Constitutional Court.”).

37. The right of privacy is not explicitly mentioned in the constitution. The right to privacy comes out of the right to dignity. Germany adopted positive human rights after the end of Nazi Germany. See pp. 111–12. South Africa, after facing a human rights tragedy of their own, adopted this system so that every person would have the ability to demand protection under the law without the need for those in the legislature to recognize it through legislation. The dignity imperative was especially important to South Africa because it had personally experienced the harms that can be suffered when those in power are indifferent to the harm. See chapter 4.

38. See pp. 85–87 (describing how South Africa created the 1993 interim constitution, and then, how South Africa moved to the 1996 constitution, breaking with the tradition of parliamentary sovereignty in the process).

39. See pp. 82–85 (recognizing that the National Party's agreement to end parliamentary sovereignty was rational because “vesting the enforcement of the new Constitution with the judges who staffed the apartheid-era courts would have presented serious, and quite difficult, issues of institutional legitimacy that would have greatly undermined public confidence in both the interim and new permanent constitutions”).

40. See p. 83 (“The South African legal system reflected a stark irony: at the same time, the Constitutions of 1910, 1961, and 1983 all incorporated the concept that all (white) citizens enjoyed equality under the law, while denying basic civil and political rights to the vast majority of South Africans.”).

rights.⁴¹ Through a discussion of the course of negotiation that led the ANC to accept this state of affairs, and the resulting enshrinement of dignity as *primus inter pares* under the new order, Krotoszynski explains why South African cases protecting privacy fall under the rubric of dignity and, much less often, under the separate expressly delineated South African constitutional right of privacy.

Privacy Revisited moves fluidly from one context to another in a way that permits linkages between communities of meaning. The experiments of Canada and South Africa set the stage for discussion of privacy in the United Kingdom, where the doctrine of parliamentary sovereignty remains fully intact.⁴² This permits the reader to identify linguistic and cultural vectors along which privacy ideas might travel. It also permits a crude comparison of results. For example, the coherent constitutionalism of Canada is contrasted against the freewheeling speech culture of the United States, revealing how legal structure and cultural norms within the judiciary radically affect the implementation of ideas about privacy.⁴³ Weak judicial norms of social development in the U.K. judiciary are contrasted with devastating effect against South Africa's dignitary approach. And Canada's use of rolling normative standards of expectations of privacy contrasts favorably with the vicious cycle of (partially) subjective expectations in the United States, whereby if a citizen expects no privacy from an overreaching government, her worst fears are confirmed by virtue of their existence.⁴⁴

D. *Reconciling Privacy and Speech*

Privacy Revisited is as much about speech, and particularly its peculiar U.S. instantiation, as it is about privacy. This is important because it relates to the discussion, above, about the dangers of atomistic and definitionalist views of language. When one asks "What is privacy?" in a vacuum, one risks divorcing the term not only from its on-the-ground context, but also its conceptual context. One risks divorcing the term from surrounding terms that create its meaning. The term "up" helps to create the meaning of the term "down," the term "left" shapes the term "right," and the term "speech" helps determine what "privacy" is at a root level. "Up" doesn't define "down," the two create each other. There is no "up" without "down," and there is no "privacy" without "speech," or disclosure. The terms are not merely antonyms, they're lovers, in that in their joining they create meaning.

41. See p. 84 (quoting Professor Hirschl's observation that "[w]hen it became obvious that the apartheid regime could not be sustained by repression, the incentives of political and economic power-holders among the white minority rapidly changed, and a sudden conversion to the supposed virtues of a bill of rights followed").

42. See chapter 5.

43. Compare chapter 2, with chapter 3.

44. Compare chapter 4, with chapter 5.

Krotoszynski expertly analyzes the interdependence of speech and privacy. Viewed simplistically, Krotoszynski notes, the disclosure of information and its protection are diametrically opposed.⁴⁵ This places the American experience at odds with the emerging global consensus on privacy described elsewhere in the text.⁴⁶ Seen more broadly, however, Krotoszynski draws on the scholarship of Alexander Meiklejohn on free speech and Neil Richards to argue that privacy is necessary to enable citizens to effectively participate in self-government.⁴⁷ The argument is largely routed through speech: privacy is necessary for speech to be produced and for it to be disseminated.⁴⁸

First, Krotoszynski posits that freedom to think privately is necessary to effectively formulate the speech needed for effective citizen self-government.⁴⁹ One cannot speak without private access to the intellectual raw material of thought.⁵⁰ Further, after one has spoken, one must have some sense that the speech will be without personal consequence, or else there will be self-censorship.⁵¹ The argument is put forth in nearly syllogistic terms. Privacy is necessary to speech. Speech is necessary to democratic self-government. Therefore the relationship between privacy and speech is, at the macrolevel, complementary to speech, and the development of effective privacy protection is necessary to democratic self-government.

This leads to the book's sole weak point, potentially a mere quibble. Krotoszynski's adaptation of Meiklejohn's theories to the privacy context can be read in two ways, both supported by the text. Krotoszynski is absolutely correct that privacy in obtaining the raw materials of thought, and privacy in expressing the resulting thought, are necessary for democratic governance.⁵² And his resulting conclusion of complementarity between privacy and speech is critical to undoing the zero-sum game between privacy and speech, especially as embraced by U.S. courts. But one might be

45. P. 182 (noting that "privacy and speech can and do conflict").

46. *See, e.g.*, p. 33 (explaining that the United States' commitment to free speech "represents a radical break from the current constitutional practice of most other industrial democracies, including Canada, France, Germany, South Africa, and the United Kingdom").

47. Pp. 180–83 (positing that "both privacy and speech constitute necessary elements for the creation and maintenance of a functioning democratic polity").

48. *See* p. 180 ("[T]he ability to formulate and articulate coherent thoughts, of any stripe, requires the time, space, and freedom to pursue reason's light wherever it may lead.").

49. *See* p. 176 ("Meiklejohn [believes] that freedom of expression is a necessary prerequisite to democratic self-government; if citizens are not free to think, speak, and debate, they will not be capable of exercising effectively their responsibility to oversee the government and its officers.").

50. *See* p. 180 ("Speech without thought is simply noise; it cannot communicate anything of value. Thought, in turn, requires the ability freely to engage in those processes that are preliminary to the articulation and dissemination of ideas (whether political, literary, artistic, or scientific).").

51. *See* p. 181 (arguing that if the government surveils important aspects of constructing one's self, we will no longer be unique individuals).

52. *See* p. 182 (explaining that "privacy constitutes an essential condition for democracy" because privacy is a necessary condition of intellectual freedom and intellectual freedom is a necessary condition of democratic self-government).

tempted to read the text as saying that the close relationship between privacy and speech is the only reason privacy is important to self-governance. That would be a misreading, but one that the text invites.

As clearly expressed elsewhere by Krotoszynski, this limited reading of the role of privacy in self-governance is not his true point. Privacy is needed as a basic restraint on government power, particularly in those legal-cultural contexts in which privacy has been defined primarily as a limited interest asserted only against the government.⁵³ This leads to an odd paradox in privacy law, where governments have more information about their citizens in cultures that frame privacy rights against governments than do citizens in countries where robust privacy rights run against state actors.⁵⁴ Private actors control more sensors than do governments, and they collect and parse far more data.⁵⁵ When governments are restrained in their collection from individuals, but not in their gathering of bulk data gathered by private parties, the net effect is greater surveillance. Liberty-based protections aimed at governments fail in their essential purpose because of bulk commercial data collection.⁵⁶

As Krotoszynski writes, bulk data collection and big-data parsing are turnkey tools for government oppression.⁵⁷ This might be because people are afraid to speak out. It might be because they are unwilling to enter certain search terms into search engines. It might be because they must weigh carefully who they friend on social media. Those are First Amendment concerns. But it might also be because dragnet surveillance is directly oppressive. It constrains citizens not merely in what they say but in what they do. It constrains not only First Amendment-protected expressions of sexuality on the electronic soapbox but also what is done in the bedroom. Privacy is therefore clearly important for democracy because of its knock-on effects on speech, but it is also a primary democratic value in its own right.

Having disposed of a quibble, let us move on to the undeniable value of Krotoszynski's complementarity of speech and privacy as a basal grouping under constitutive democratic (dare one say constitutional, even in the U.S. context?) values. One major multibillion-dollar benefit is that any balanced rapprochement in the transatlantic rivalry over personal data storage can

53. See p. 180 ("In a world of creeping government surveillance programs, threats to privacy are also threats to democracy itself.").

54. See generally p. 24. Krotoszynski explains that, in the United States, a country which requires state action to invoke constitutional privacy interests, the response to the Snowden disclosures was not to dismantle the program, but rather to grant it more power through the passing of the USA Freedom Act. A similar result would almost certainly not have happened in Europe, or in countries where constitutional privacy interests can be invoked against private actors, because the culture of the citizenry is so different.

55. VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 106 (2013) (explaining that internet and technology companies collect and analyze the most data).

56. See p. 4 (clarifying that a comprehensive understanding of privacy law must expressly address both state actors and private entities to protect privacy).

57. See p. 24.

only be positive. By rapprochement, I mean true conciliation, not mere forced agreement on the basis of the United States' technological dominance, or the EU's market power, or the emerging global skepticism surrounding U.S. privacy practices. As Krotoszynski notes, stable transatlantic compromises will best be found on common ground.⁵⁸

Krotoszynski proposes a potentially useful tool for addressing a Wittgensteinian conundrum. The problem of privacy between the United States and EU is multilayered and complex, but one problem is this: the sides do not speak the same language—often literally, and more often with respect to the meaning of legal terms. This poses a serious problem for Wittgensteinian analysis of the meaning of terms grounded in context and community. What if both context and community are different? There is no easy way for Wittgensteinians to resolve differences of definition across communities of meaning.⁵⁹

Krotoszynski's solution is to seek out a community of meaning that has roots in both the United States and Europe. In theoretical terms, Krotoszynski has noticed that linguistic communities overlap and so picked one overlapping community (former Commonwealth nations) to help mediate a divide between two cultures that seem to lack some common context. (Here the divide is between United States and EU at least, if not the United States and an emerging global consensus on privacy more broadly.) Practically speaking, one sees that this is true: the United States and United Kingdom have always been closer to one another in privacy conceptions than have, say, the United Kingdom and Germany. Krotoszynski uses meanings of privacy drawn from widely dispersed former Commonwealth nations to define a crosscutting community of meaning, to bridge the Atlantic divide on privacy. Like oblongs in a Venn diagram, the Commonwealth community that he explores does not exclusively define any one legal meaning of the term privacy within its boundary. But it does provide an avenue—a legal-linguistic community and a cultural context—for negotiation of meaning.

Thus, Krotoszynski writes, the selection of Commonwealth countries was purposeful.⁶⁰ Culture shapes and informs one's conception of privacy

58. See p. 12 (noting that a comparative analysis of Commonwealth countries provides for a bottom up approach which would "help to facilitate forging a global legal consensus on how best to address privacy interests").

59. Different communities naturally have definitional disputes. Culture *A* might say that chairs have four legs while culture *B* says chairs have five legs. As long as both of these definitions are properly recognized in their respective communities of meaning such that a member of the community of culture *B* could correct someone attempting to say that chairs have four legs and vice versa, the definitions are in a stalemate. Both are perfectly valid within their respective communities. Although Wittgenstein provides a familial-relation theory for related definitions, he does not provide a similar theory for communities.

60. See p. 13 ("The United States, Canada, South Africa, and the United Kingdom all share a common legal background and have a shared legal history as dominions of the British Crown.").

not just at the obvious level but at the level of linguistic meaning. This includes not only local culture but also broader elements which apply to multiple communities of meaning. Communities are complex and, just as words in Wittgenstein have familial relations, so do communities. *Privacy Revisited* can be used to posit an answer to Wittgenstein's problem. The common relationship among like communities allows ideas to flow along these vectors and influence the particular culture of that area, including how that culture might use a word like privacy. Although current and former Commonwealth countries may be extremely varied in practice, their common bond provides a vector along which ideas, and from which negotiation of terms, can take place. This negotiation process can be seen with the solutions offered by different Commonwealth countries to address the tension between free speech rights of the press and the privacy rights of people.

In the United States, the press has always been a part of the privacy debate, including inspiring Warren and Brandeis to write about the right to be left alone. The United States is so entrenched in its national precommitment to free speech as shown in decisions such as *Snyder v. Phelps*⁶¹ and *New York Times Co. v. Sullivan*⁶² that it may seem as if we are on our own, turtled up like North Korea but with free speech instead of nukes and human rights violations.⁶³ These decisions reflect an all-out attack on that which could chill free speech. Prosser torts, such as publication of private fact, laid down a foundation by which a European-style form of recovery could have developed, but the United States has used the First Amendment to cut back on these limitations on speech.⁶⁴ Yet instead of staying locked within the geographic borders of the United States, this commitment to free speech has been able to travel across the vectors of shared culture and affect the development of privacy law in other countries.

As the experience of Canada demonstrates, these are negotiations of meaning, not rote adoptions. The Supreme Court of Canada explicitly engages with similar law in other jurisdictions, most commonly other common law jurisdictions. For example, in *Hill v. Church of Scientology*,⁶⁵ the court considered whether it should follow the actual-malice standard set forth in *Sullivan*. In making this decision, it considered not only the United States, which developed the standard, but also other common law jurisdictions, such as the United Kingdom and Australia, that have squarely rejected the standard.⁶⁶ The court did not consider many European decisions that

61. 562 U.S. 443 (2011).

62. 376 U.S. 254 (1964).

63. See pp. 17–18 (describing how the U.S. decisions of *Snyder* and *Sullivan* elevated free speech concerns far above privacy concerns whereas Europe has elevated privacy concerns above free speech).

64. See p. 17 (explaining that the constitutionalization of tort law has functioned as a barrier for individuals attempting to hold nongovernmental actors accountable for privacy violations).

65. [1995] 2 S.C.R. 1130 (Can.).

66. See p. 67.

relied on many of the same principles and arguments.⁶⁷ This is important because it shows the ties that bind common law countries. Eventually, the Supreme Court of Canada declined to adopt the actual-malice standard. Although this decision seemed to downplay the chilling effect this could have on the press, subsequent decisions attempted to strike a more appropriate balance by conveying greater protections to the press.⁶⁸ *Hill* was not a case where the Canadian Supreme Court squarely rejected the value in preventing a chilling effect on speech venerated by the United States Supreme Court. Rather, it and subsequent cases demonstrate the negotiation of privacy and speech that takes place between legal-linguistic communities. Canada clearly was not ever going to adopt the actual-malice standard, but the United States was able to use international vectors to export the idea that the press should have protections in order to prevent a chilling effect on speech.

As Krotoszynski describes, similar tempering of harsher standards can be seen in South Africa.⁶⁹ In *Khumalo v. Holomisa*, a defamation case, the South African Constitutional Court (CC) tried to square human dignity and free speech rights.⁷⁰ In weighing these interests, the court considered similar cases from other jurisdictions such as *Sullivan*⁷¹ and *Hill*.⁷² It ultimately rejected the American approach and went further. Not only did the plaintiff not have to prove actual malice, but the court held that the defendant must prove that the defamatory statement was true and made for the public benefit.⁷³ From *Khumalo*, it would seem that South Africa does not share the same free speech values of the United States. But while they might not accord free speech pride of place as do United States courts, South Africa, like Canada, has tempered its laws in other ways to decrease the threat of a chilling effect on its press. While the liability standards are very plaintiff friendly, damages have been adjusted to be much more defendant friendly.⁷⁴

67. See p. 67 (“[T]he SCC declined to cite or discuss the many European domestic and transnational constitutional court decisions that mirror the legal and policy analysis set forth by the *Hill* majority.”).

68. See pp. 67–68 (noting that, in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 (Can.), the SCC expanded the defense of fair comment; that, in *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, para. 29 (Can.), the SCC created an affirmative defense specifically for media outlets reporting on matters of public interest; and that, in *Alberta (Info. and Privacy Comm’r) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, paras. 37–38 (Can.), the SCC partially invalidated a privacy statute that interfered too greatly with free speech and press).

69. See pp. at 103–04 (noting that the use of alternative remedies in defamation cases reduces the probability of litigation and better secures freedom of speech).

70. *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) at 33–34 para. 42 (S. Afr.).

71. *Id.* at 32–33 para. 40.

72. *Id.* at 28–29 para. 35.

73. *Id.* at 29–30 para. 37 (“The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit. The burden of proving truth thus falls on the defendant.”).

74. P. 97 (explaining that while it is much easier to get damages in South Africa than in the United States, the court carefully limits the damages which are awarded in such cases). The

In addition to greatly reduced monetary damages, the CC has been very open to alternate remedies, such as an apology in place of damages.⁷⁵ Although a quick glance at South Africa's system may appear to suggest that it is a wholesale rejection of free speech values, the consequences of its decision suggest that the value of free speech is more greatly valued than is overtly acknowledged. This happens not because the court has a secret agenda, but because the Commonwealth roots of the court allow ideas to travel across vectors and shape the development of law, like Adam Smith's invisible hand. Thus, even where a different legal system based entirely on dignity is imported from Europe to a Commonwealth country, the execution of the system looks more and more like other Commonwealth countries as time goes on.

The United Kingdom has also engaged in extensive negotiation regarding the relative spheres of privacy and speech. In particular, the United Kingdom has adopted an actual-malice standard for public officials and figures seeking compensatory damages, or any plaintiff seeking punitive damages.⁷⁶ Until recently, however, the United Kingdom was noticeably out of step with the United States in the area of defamation. For years, the United Kingdom has served as a destination for defamation tourism.⁷⁷ Damages awarded to successful plaintiffs were very high and the laws were very plaintiff friendly.⁷⁸ Other jurisdictions did not like the circumvention effect that this had on their own libel laws. In particular, the United States Congress passed the SPEECH Act in order to prevent the chilling effect that libel tourism was having on American news outlets.⁷⁹ It prevents plaintiffs from enforcing foreign libel judgments in the United States if the libel laws from

low barrier to entry is curtailed by a low amount of available damages. In contrast, the United States has a high barrier of entry, but once that barrier is broken, damage amounts are higher. P. 97.

75. See pp. at 97–98 (outlining how the South African courts, by unanimous vote, have integrated “the Roman-Dutch civil law concept of an *amende honorable*, or sincere apology” as an alternative remedy to monetary damages for cases involving injury to reputation or dignity).

76. Defamation Act 2013, c. 26, § 1 (Eng.).

77. Geoffrey Wheatcroft, *The Worst Case Scenario*, GUARDIAN (Feb. 28, 2008, 2:46 AM), <https://www.theguardian.com/commentisfree/2008/feb/28/pressandpublishing.law> [<https://perma.cc/VG33-4PC8>] (identifying the problem of “libel tourism” and discussing its deleterious effect on journalism).

78. See David Pallister, *Libel Legacy of Ousted Aristocrat Threatens Internet*, GUARDIAN (Dec. 26, 2005, 7:23 PM), <https://www.theguardian.com/technology/2005/dec/27/news.constitution> [<https://perma.cc/3W6C-6JTT>] (discussing the harm caused by the multiple publication rule in the internet age). The rule is precedent from 1849, where the Duke of Brunswick expanded the scope of British defamation law. The court held that every purchase of a newspaper was a separate actionable act of libel. This rule worked mildly well until the standard started being applied to the internet. The logical extension of this principle to internet articles would dictate that every page view on the internet counts as a separate publication. Per-page-view infractions can easily rack up damages and destroy entities in one fell swoop. *Id.*

79. Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. §§ 4101–4105 (2012).

those countries are out of step with the First Amendment of the United States.⁸⁰ In response to the unified opposition to their libel laws, the Parliament of the United Kingdom passed the Defamation Act of 2013.⁸¹ This made a number of changes to defamation law in England and Wales. For example, plaintiffs with little connection to England or Wales have the burden of showing that the country in which they file suit is the appropriate place for adjudication of the claim.⁸² Available defenses were enhanced. For instance, a new defense was introduced specifically for website operators that echoes section 230 of the Communications Decency Act in the United States.⁸³ These laws reflect a significant change of course to bring the United Kingdom back into the fold.

The laws of all the Commonwealth countries discussed in *Privacy Revisited* came about through the negotiation of the United States' free speech commitments. The United States' strong commitment to free speech spread through the Commonwealth countries by virtue of their shared heritage. There are two important points regarding this spread. First, even where American standards were rejected, it was only done so after careful consideration. This consideration to ideas is an important part of the negotiation of meaning of terms. The discussion of the Supreme Court of Canada's consideration of and responses to the law of other jurisdictions is illustrative of the different responses that can come about through negotiation. Second, even where a standard like actual malice is rejected, the idea that chilling effects on free speech should be mitigated where possible tempered the standards that were adopted and made the resulting law more cohesive with similar law from other commonwealth countries.

A major benefit of Krotoszynski's complementarity findings is that they provide a new move in the language-game of privacy. Negotiated meanings might be either already negotiated, in which case the parties can communicate fairly well. Or they might be in negotiation, in which case the moves in the game matter. Here, Krotoszynski provides a carefully researched countermove to the claim that privacy must be opposed to speech.

80. Roy Greenslade, *Obama Seals Off US Journalists and Authors from Britain's Libel Laws*, *GUARDIAN* (Aug. 11, 2010, 7:54 AM), <https://www.theguardian.com/media/greenslade/2010/aug/11/medialaw-barack-obama> [<https://perma.cc/K9EJ-QJKK>] (explaining that the SPEECH Act was drafted in response to oppressive British libel laws and that the newly minted law is designed to protect American journalists by preventing the enforcement of foreign libel judgments in the United States, if the award was obtained in reliance upon libel laws which do not satisfy the First Amendment).

81. See Clive Coleman, *Defamation Act 2013 Aims to Improve Libel Laws*, *BBC News* (Dec. 31, 2013), <http://www.bbc.com/news/uk-25551640> [<https://perma.cc/BYS9-U8VJ>] (explaining that new legislation would reform the outdated libel laws).

82. See *id.* (noting that a test was introduced which would kick out claims that did not bear a significant relation to the forum).

83. *Id.* (discussing the introduction of a single publication rule in order to prevent websites from being hit with multiple claims for the same published material).

CONCLUSION

The language of privacy cannot be divorced from its context, its activity, and the community of meaning that negotiates the meaning of words. Discussions of the meaning of privacy cannot be conducted on metaphorical flat ice, divorced from the work that the term must do for the humans that use the language to communicate. The language-game of privacy must proceed from the facts on the ground—the legal topology that gives language meaning by giving bite to the words. Professor Krotoszynski does not give us a mere series of snapshots of what privacy means in different legal cultures. Rather, he shows the vectors along which privacy language can travel between the United States and Commonwealth countries, and between U.S. and continental legal culture, especially as concerns the transatlantic data trade. In so doing, Krotoszynski indulges neither pure cultural descriptivism nor legal universalism. Instead, he defines the contours of a global conversation that is now iteratively and experimentally negotiating the meaning of privacy.