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Privacy in a Public Society: Human Rights in Conflict

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PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT. By Richard F. Hixson. New York: Oxford University Press. 1987. Pp. xvi, 255. \$19.95.

Privacy is a vague and inclusive notion, but the lack of a precise definition¹ does not indicate that Americans are indifferent to privacy. Professor Hixson's² *Privacy in a Public Society* asserts that today's society is increasingly jealous of its privacy (p. xiv). Hixson finds this trend worrisome, because he feels that the impulse to withdraw into private life will undermine the commitment to public affairs that he identifies as crucial to the proper functioning of any society (p. 132). His work has two purposes: to trace and explain the role of law in creating, defining, and enforcing privacy; and to argue that continued attention be paid to achieving "the best of both worlds": a commitment by each individual to the community and to the societal benefits of a public life, combined with protection for the individual privacy we all seem to desire.

Privacy in a Public Society undertakes three separate tasks, and achieves differing levels of success with each. The first is to explain the development of privacy from its status in colonial America as "more a matter of honor than of law" (p. 14) to its present position as a core value of modern society, both legalized and constitutionalized. The second is to argue, along with Jeremy Bentham, Hannah Arendt, and others, that privacy should "wear the character of *exceptions*,"³ that is, that society (and law) should protect privacy but keep it as a secondary virtue that will not undermine the necessary public life of the citizens. The third task is to use this argument to inform the analysis of and prescription for contemporary privacy problems.

The largest portion of the work is devoted to historical exegesis. Drawing on many and varied sources, Hixson examines the etymology of "privacy," the interaction of geography and architecture with privacy, and the attitudes toward privacy revealed in the popular literature of the 1800s. He reviews the work of Warren and Brandeis in the late 1880s when the relentless and insensitive Boston press prompted these two scholars to propose legal status for a right to privacy: "The

1. Several alternative definitions have been offered: the *right* of an individual to determine what information about herself may be communicated to others; the measure of control an individual has over "intimacies of [her] personal identity"; or the measure of control an individual has over "sensory access" to her person. See Schoeman, *Privacy: Philosophical Dimensions*, 21 AMER. PHIL. Q. 199 (1984). Professor Hixson discusses some of the many other possible meanings of "privacy," including privacy as autonomy and privacy as liberty.

2. Richard F. Hixson is Professor of Communication Law and Journalism History in the School of Communication, Information, and Library Studies, Rutgers University.

3. P. 102 (emphasis in text) (quoting THE COMPLETE WORKS OF JEREMY BENTHAM 351-80 (J. Bowring ed. 1843)).

design of the law must be to protect those persons with whose affairs the community has no legitimate concern"⁴

The new cause of action gradually gained acceptance in the courts. By 1960 the common law had given private plaintiffs redress for revelation of private facts, intrusion on privacy, false light depiction, and misappropriation of name or likeness.⁵ Hixson examines the common law development and the alternative constructions of the privacy right offered by several scholars.⁶ He then moves to the constitutionalization of privacy, focusing on *Olmstead v. United States*,⁷ *Poe v. Ullman*,⁸ *Griswold v. Connecticut*,⁹ and *Roe v. Wade*.¹⁰ Throughout this historical account, the author explains each new rule and application, examines critical comments on the decisions, and assesses how the decisions or theories deal with privacy itself. Of the constitutional decisions, Hixson argues that "the Court over a span of time appears to have been consistent . . . in wanting the best of both worlds . . ." (p. 87). The Justices have sought to protect some fundamental privacy rights (e.g., marital intimacy), but not to create broad blanket protections that would hinder the pursuit of information for our democratic society's functioning or foster individual isolation that would be detrimental to the community.

Professor Hixson, here as in the remainder of the book, demonstrates the depth and breadth of his reading. While the presentation is at times rather choppy, consisting of a long series of quotes and citations, this lack of polish may be understandable given the survey nature of the work.¹¹ One significant problem, however, undermines the reader's confidence in Hixson's general accuracy: In places he misconstrues cases.

In *Griswold v. Connecticut*,¹² a majority of the Court agreed with

4. P. 34 (quoting Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

5. Pp. 52-55. These categories are from W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1955). The Warren and Brandeis claim is Prosser's private-facts tort. The facts made public must be ones that would be highly offensive to a reasonable person and not of legitimate concern to the public. Intrusion involves invading an expectation of seclusion, usually physical privacy. False light involves information that is likely to mislead the public about the individuals portrayed. Appropriation is "the unauthorized use of one's name or likeness for commercial purposes." P. 54.

6. Pp. 52-70. Hixson draws on the work of Edward Bloustein, Alan Westin, Gary Bostwick, and Judge Burgoon, in addition to Prosser and a series of cases applying privacy rights.

7. 277 U.S. 438 (1928).

8. 367 U.S. 497 (1961).

9. 381 U.S. 479 (1965).

10. 410 U.S. 113 (1973).

11. Unfortunately, the entire work is marred by what seems an utter lack of editing. The Oxford University Press has published a volume that contains verbless sentences, nonparallel structures, and clauses whose actual meaning differs from their apparently intended meaning. Such errors do not dispose the reader to enjoy the book.

12. 381 U.S. 479 (striking down a Connecticut anti-contraception statute).

Justice Douglas' penumbra approach to finding a constitutional right of privacy.¹³ Douglas adopted this peculiar and strained analysis in order to avoid what he viewed as the discredited doctrine of substantive due process. The privacy part of the *Griswold* decision is Douglas', and his alone. The concurring opinions, whether they also join his (Goldberg, with Warren and Brennan) or simply agree with the result (Harlan and White, separately), all assert a separate basis for the decision. They all rely on the *liberty* protected by the Constitution. Harlan and White do not agree that a *privacy* right exists in the Constitution, while Goldberg does accept such a right.

Hixson attributes to Harlan the view that privacy was a fundamental right, "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."¹⁴ But Harlan wrote these words about "the liberty guaranteed by the Due Process Clause,"¹⁵ not about privacy. His refusal to join Douglas' opinion in *Griswold* provides evidence for this distinction. It is true that, in the overall scheme of the book, Hixson's misconstruction is hardly fatal. *Griswold* does establish a constitutional right of privacy, and nothing in Hixson's argument depends on having use of Harlan's analysis. But the error casts some doubt on the accuracy of Hixson's reporting of other sources,¹⁶ and may impair the book's usefulness as an introduction to the vast array of materials on privacy and privacy law.

The middle section of *Privacy in a Public Society* makes Hixson's central argument: that our society must have a developed sense of community in order to survive and that privacy needs community in order to exist. Hixson views the sense of community "as both a haven for the necessary private life and as a place for creative public commitment" (p. 132). Relying on Bentham, Hixson argues that privacy is a utility right, one valuable only to the extent that it helps society and operative only if the state will (through law) enforce it. The law should protect privacy only when to do so will not stifle the community and the public commitment of its members.

Why do we need a sense of community, why is privacy such a threat to community, and why does privacy need community in order

13. 381 U.S. 479. Douglas' majority opinion, joined by four others (Hixson incorrectly cites it as a seven-member opinion, p. 76, but only five Justices agreed on the penumbral privacy approach to the decision), held that penumbras of certain of the Bill of Rights must be protected if the core values are to remain secure. Douglas found a privacy right based in the first, third, fourth, fifth, and ninth amendments. See 381 U.S. at 482-86.

14. P. 75 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). Harlan refers to this dissent in his *Griswold* concurrence as a fuller elaboration of his views in *Griswold* (the two cases involved challenges to the same statute). 381 U.S. at 500.

15. *Poe*, 367 U.S. at 543.

16. This doubt is exacerbated by Hixson's construal of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as privacy cases (pp. 72-73) when they, too, are based in fourteenth amendment liberty.

to exist? Drawing on Hannah Arendt's work in philosophy,¹⁷ Hixson answers that privacy, taken to an extreme, leads to the isolation of individuals. And in modern society, which "functions largely on the interdependence of individuals" (p. 132), a real life is impossible without the "presence of others."¹⁸ Certain parts of life are truly private in that they are "beyond government intrusion and manipulation" (p. 129), but that sphere is small.

"[T]o be obsessed with privacy is to live a life deprived of objective relationships, devoid of any intermediary element, and destructive of aspirations more permanent than life itself," says Hixson (p. 130). "Our modern society, by encouraging competitiveness among otherwise egalitarian individuals, the privatizing of persons, actually creates a high degree of competitive indifference that works against common progress. When such a society promotes isolation, it fosters alienation among its people" (pp. 130-31). Hixson is concerned that a society where individuals are "afraid of being manipulated and worr[ie]d about their personal privacy" (p. 131) will give too much legal and moral protection to privacy, at the expense of the civic responsibility and public commitment necessary to maintain our interdependent world. "If the state is to survive, the individual must be more public than private" (p. 93).

Conversely, privacy cannot survive without a developed sense of community. "Privacy is a right created and bestowed by others . . ." (p. xiv). Without a community feeling, society will disintegrate and the forces that created the environment for privacy will disappear. "Privacy gets its strength from the community, from the others with whom the individual interacts" (p. 227).

The final portion of *Privacy in a Public Society* treats some modern privacy problems, including governmental and private organizations' compilation, via sophisticated computer data banks, of sensitive information about all of us. Hixson worries that, in legislating a solution to this new threat to personal privacy, we will fail to strike the necessary balance between privacy and publicity. But since the middle section of the book fails to develop any method for finding the delicate balance Hixson calls for, this third section falls short of its promise of developing a prescription for contemporary privacy problems.

The rise of computerized data systems has, to a degree, changed the focus of concerns about privacy. "Today, when people congregate to complain about their loss of personal autonomy, they focus on data intrusion by the government and other organizations with large centralized and interlocked information systems."¹⁹ The two main laws

17. See H. ARENDT, *THE HUMAN CONDITION* 50-52 (1958).

18. P. 129 (citing H. ARENDT, *supra* note 17, at 50).

19. P. 209. Hixson offers no empirical support whatsoever to buttress this claim, although the argument that these systems present a threat contains intuitive appeal.

that impact on this "data intrusion" are the Freedom of Information Act ("FOIA")²⁰ and the Privacy Act.²¹ Professor Hixson describes the workings of the two statutes, including an extensive section commenting on the developments of the nine exemptions²² under the FOIA, and concentrates on the potential conflict between the FOIA's command of openness and the Privacy Act's attempt to control what information is revealed to the public.²³

Despite the presence of these statutes, which seek to balance privacy and the openness needed by our society, Professor Hixson argues that the statutes are not enough to fill the gap in privacy protection created by the fourth amendment's inability to evolve quickly enough to keep up with advances in data gathering processes. The fourth amendment²⁴ served as an effective control over physical invasions of privacy for the era in which it was conceived, because such invasions were then possible only by "actual entry onto property, eavesdropping by ear, and the overseeing of individuals and groups" (p. 214). But with technological advances, our privacy is no longer as secure as the fourth amendment formerly assured it would be. Therefore, Hixson calls for a redefinition of what privacy means in order to cope with the new problems of computer-driven data collection, and for formulation of new laws to protect that privacy. "American society wants more and better information *and* personal privacy" (p. 216), so we must act to protect our privacy in a way that will not hinder the efficiency of the data systems; we must preserve "the best of both worlds."

Hixson's analysis is persuasive²⁵ here largely because he avoids the easy move to claiming a *right* of privacy in the personal data. His avoidance of the rights issue shows both admirable restraint and a focus fixed on his true concerns. Rather than advocating constitutional reform, Hixson argues that legislative change will be sufficient because the problems can be treated with fairly narrow solutions and are likely to change as privacy notions evolve. Legislation is easier to pass and

20. 5 U.S.C. § 552 (1982).

21. 5 U.S.C. § 552a (1982).

22. Pp. 192-204 (summarizing the *Duke Law Journal's* annual reviews of the law on the exemptions). The extensive reliance on others' work is indicative of Hixson's style in *Privacy in a Public Society*, underscoring the introductory nature of the book.

23. Hixson realizes and explains that the FOIA, despite its avowed purpose of freeing the flow of information to the public, has become a powerful tool used by government agencies to restrict access to information. See pp. 187 & 205.

24. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

25. Hixson's analysis of the privacy purposes and effects of the fourth amendment and its failure to keep up with advancing information technology is one of the few insights that seems to be truly his own. It is both plausible and persuasive, despite the lack of any detailed argument supporting his assertion that these computerized data systems pose so severe a threat to privacy.

to modify than are constitutional amendments, and finding a right to informational privacy in our current Constitution poses even more problems than gathering support for new privacy statutes.

Despite the usefulness of the fourth amendment analysis, this section, and therefore the book, is disappointing. Having announced a problem and called for a redefinition of informational privacy and new legal measures to solve the conflict, Hixson provides no solutions of his own, even of a tentative sort. He concludes, "Once agreement [over redefinition] is reached, a fair and equitable procedure could be established for deciding when a person has 'waived' her or his right by making the information public" (pp. 228-29). Perhaps, given his call for discussion and agreement, Hixson feels it unnecessary to offer a solution of his own. But it seems odd to progress through a laborious history of privacy, a complex argument for community, and an analysis of current legal privacy problems and then shy away from attempting a solution of the chief conflict identified. While Hixson's historical section is capable, it does not carry the work: by venturing beyond history into social theory and its implications for current legal problems, Hixson aims higher. In failing to offer any solutions that his theory might suggest, Hixson seems to fall short of the promise that his work holds.

The discussion of the Privacy Act,²⁶ especially of the early proposal that would have applied to private organizations as well as to the government, hints at the kind of solution that Hixson seeks. The current Privacy Act prohibits "the government's disclosure of individual records without the individual's prior written consent" (p. 224). The law is, however, riddled with exceptions,²⁷ and it does not apply to the large private organizations that hold sensitive personal data in their computer banks. Professor Hixson finds the present Privacy Act insufficient to deal with the growing problem he identifies. A revised Act, however, might be the solution toward which he gropes at the end of the book.

This is where the inadequacy of the theory of privacy, developed in the middle section of the book, reveals itself. Hixson has formulated no method for deciding how to strike the balance between privacy and publicity. A revision of the Privacy Act may well be the answer he seeks, but Hixson gives us little guidance as to what this solution might look like. Which exceptions to the broad no-disclosure-without-written-consent rule would best be excised? This is where balanc-

26. 5 U.S.C. § 552a (1982). Hixson discusses the Act at pp. 184-85 and 223-27.

27. The exceptions deal with disclosure for officers and employees of the agency that maintains the records involved; FOIA requests; routine use compatible with the purpose for which the data were originally collected; Census Bureau data; data used for statistical research; and data for the National Archives, for law enforcement, for health and safety, for either House of Congress, for the Comptroller General, and for data releases pursuant to a court order. See 5 U.S.C. § 552a (1982).

ing becomes crucial, where it becomes difficult to retain "the best of both worlds." Hixson profitably could have added to the assemblage of comments on the data privacy concern²⁸ his own balance of the privacy and efficiency interests in a revised Act. If, as it seems, he is worried about the current balance being weighed too far toward openness, he could start by cutting the Privacy Act exceptions that most bother him and appear least likely to hinder informational efficiency in our economy. Even providing a starting point for further work would have greatly increased the usefulness of *Privacy in a Public Society*.

— David Clark Esseks

28. Professor Hixson draws on several authors who have identified this data privacy concern in the past. Primary among these sources are D. BURNHAM, *THE RISE OF THE COMPUTER STATE* (1984), and A. MILLER, *THE ASSAULT ON PRIVACY* (1971).