

Bahdi on the Human Costs of Privacy Law

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COMMENTARY: What are the human costs of privacy law?

By Reem Bahdi

"The things most people want to know about," George Bernard Shaw once observed, "are usually none of their business." As Shaw's quip implies, the desire for space safe from the prying eyes of others constitutes a basic human need while the impulse to know more about other people's business can degenerate into an end unto itself. Partially for this reason, classic liberal theory recognizes that privacy and liberty are inextricably linked and posits that the state should not be allowed to intrude into the sphere of individual privacy absent compelling reasons.

Given the central role that privacy plays in defining individual identity and the parameters of legitimate state action, privacy has found its way into Canadian constitutional doctrine even though it is not explicitly protected in *The Charter*. At the same time, however, privacy is threatened in the post 9-11 era. Stanley Cohen's *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (LexisNexis Canada Inc., which also publishes *The Lawyers Weekly*) poses a stark question: "When crime and terror coincide and society's fears and insecurities

are elevated, can privacy survive?" Given the imperative to prevent terrorism, when does knowing what other people are doing or even what they are thinking become the business of the state?

National security remains a generally under explored area of legal inquiry in Canada despite the steady stream of new books dedicated to the subject. In this context, privacy has not yet received the attention it deserves in academic, policy or public circles. Only a few years ago, Canadians appeared more interested in the dining habits of the federal privacy commissioner than the sometimes chilling warnings that emanated from his office. Cohen's text thus represents a welcome addition to the legal literature.

Stanley Cohen adeptly traces the contours of the liberty-security trade off in its doctrinal and policy dimensions. The terrain covered is vast, the legislation at issue is diverse, and the policy debates prove multifaceted. Yet, he charts his way through often murky waters with admirable precision. The text is well researched and it offers a good starting point for research. I welcomed this book also because it takes the time to

discuss foundational issues like "why privacy is valued" before entering into the minutia of legal analysis.

Yet, Cohen's approach reflects two unfortunate trends in Canadian legal literature. First, he does not adequately assess the impact of the war against terrorism on people's lives. Exploring legislation, case law and policy does not

Cohen's, tends to measure the trade off between liberty and security by relying on court cases or analysis from politicians, security personnel, academics and judges. The lack of information from communities most affected by the privacy versus security trade off represents an unfortunate omission in our legal literature. We cannot know a law's impact simply by

the resources or because they do not want to draw attention to their experience for fear that they will be shunned by neighbours and potential employers. The human costs are significant but legal texts and experts either ignore these stories or they tend to dismiss them as "anecdotal" when assessing the impact of the war against terrorism.

Second, most policy-makers in Canada accept the zero-sum model of security as a given. In other words, they do not adequately question the premise that security can necessarily be achieved by trading off liberty. At least some scholars have questioned this intellectual paradigm though it remains the dominant mode of analysis for government decision-makers in Canada and abroad. More intellectual work is needed in this area.

Perhaps such gaps in the legal literature will be addressed as more studies are inspired by landmark Canadian events such as the Air India disaster and the Arar Inquiry.

Reem Bahdi is a professor at the University of Windsor teaching Access to Justice and Torts.

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tell the whole story about privacy, crime and terror in Canada.

To adequately assess the trade off between liberty and security, we need to know something about the consequences—particularly the unintended consequences—of the legal regimes under consideration. This is particularly true in relation to the *Anti-terrorism Act* as its impact is felt most acutely through the chilling effect it has on individual and institutional behaviour rather than through the direct application of the legislation itself.

Most studies, including

reading legal texts.

Seeking a more concrete elaboration of the individual and community costs of diluted privacy protections would give us a fuller understanding of the liberty costs associated with our national security responses. For example, Arab employees have been fired from their jobs because employers monitoring the employees' Internet surfing erroneously concluded that they were sympathetic to terrorism. Individuals in such circumstances rarely pursue legal remedies either because they lack