

# Privacy and the Press: Scoops, Secrets and Ethics in the New Media Landscape

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## Executive Summary

On December 3, 2010, experts in media, law and technology convened for the third annual conference on Privacy and the Press to discuss the shifting privacy norms of journalism, online identity, and freedom of the press. The conference was held at the Wolf Law Building on the University of Colorado at Boulder campus and sponsored by Silicon Flatirons, the Byron R. White Center, the ATLAS Institute, and the Leroy Keller Center. Discussion began with a welcome address from Dean David Getches, followed by a keynote address by Professor Jeffrey Rosen and three panel discussions.

## Introduction

The rise of blogs, social networks, and other new media channels is putting pressure on the way we think about two important and legally protected values: personal privacy and the free press. Adapting to these changes may require the use of markets, industry regulation, codes of conduct, lawsuits and technology to redefine the power of the First Amendment to protect both personal privacy and the freedom of the press. In an effort to address these issues, on December 3, 2010 the Silicon Flatirons Center and other partners brought together a panel of experts on media, law and technology to discuss challenges and possible solutions to the question of privacy and the press. The conference was held at the Wolf Law Building on the University of Colorado at Boulder campus and sponsored by Silicon Flatirons, the Byron R. White Center, the ATLAS Institute, and the Leroy Keller Center. Discussion began with a welcome address from Dean David Getches, followed by a keynote address by Professor Jeffrey Rosen and three panel discussions.

## Keynote: Jeff Rosen

Professor Jeff Rosen of George Washington University Law School gave a keynote address on how to reconcile free speech and privacy in an age when the web never forgets, creating a profound tension between the preeminent civil issues of our time that has led to tangible harm. Although this tension goes back a long way throughout history to the days of Brandeis and even the Talmud, the technological complexities of a world in which 500 billion pieces of new content are added to Facebook every month have escalated this issue to a new level. The sheer scope of the information is now so huge that imagining that it could be contained by some kind of legal framework is just outrageous: if there are remedies, we need to look to technology rather than law, as the “right to oblivion” being discussed in Europe is an impractical solution, a literally Orwellian method of rewriting history on a selective basis. One possible method described in a book called “Delete” involves setting expiration dates for data, while another solution could be using pseudonyms instead of real names online, as is commonly done in Japan. All in all, Rosen argued solidly in favor of free speech over privacy, asserting that the degree to which the web explosion allows the public to debate issues is a fulfillment of the highest free speech ideal, and

“sunlight is the best disinfectant.”

### **Panel I: The Shifting Privacy Norms of Journalism**

In the first panel, moderated by Associate Professor Harry Surden of the University of Colorado, the panelists discussed whether and to what extent privacy norms and ground rules for news reporting are shifting with the rise of social media and blogging. Associate Professor Amy Gajda of Tulane University School of Law began the discussion with a brief presentation on the shifting norms of crime reporting, which she is concerned has gone from a matter of public concern to a topic that is increasingly restricted for privacy considerations. The next presentation was by Associate Professor Paul Ohm of the University of Colorado and Wendy Seltzer, a fellow with the Center for Information Technology Policy at Princeton University, who are co-authoring a paper on the rise of social networks as a media source. The ethical discussions occurring in newsrooms as journalists attempt to navigate this new reality must be radically different from past standards of ethics, yet still bounded by Larry Lessig’s four methods of controlling behavior: laws, norms, markets and architecture.<sup>1</sup> A violation of privacy, as described by Helen Nissenbaum, can be understood as a breach of contextual integrity, i.e. taking information beyond the context in which it is expected to be used.<sup>2</sup> Taking social networking as a context, this means that expectations of privacy allow content to be shared within the network but would consider it a breach of privacy if the content is exposed outside of that network. Journalists are in a position to help society at large define the norms that shape these online social communities, creating safer spaces in which there is an expectation of privacy that would require a heightened level of newsworthiness before those journalists would be allowed to remove contextual information.

During the discussion, the panel addressed differences between past and contemporary journalistic norms. The main difference now, according to Ms. Sara Just of ABC News, is the sheer size of the newshole, which went from 22 minutes of air time for the evening news to a constant, 24-hour stream, with the same expansion of limits applied to print as it transitions from paper to the web. Another concern is the reliability of the source, as many online social media resources can be easily hacked. A third issue is whether a mainstream media outlet with a blog would have different standards for those different sections of news. Ms. Just affirmed that at ABC News there was no difference in standards, as employing bloggers with different journalist values on a mainstream website would be extremely risky. However, she added that there is an important contrast in deadlines because of the constant stream of information that means bloggers are often compelled to post whatever information they have as soon as possible, making it important to be extremely transparent about what information is confirmed and what is not. Another important difference is the power of comments to influence the impact of stories and the level of interaction that readers now have with reporters. Professor Craig LaMay of the Medill School of Journalism at Northwestern University agreed that comments can be important, but added that a large volume of comments does not make someone a journalist, explaining that a person who simply links to a story and takes comments is not the same as someone who goes

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<sup>1</sup> Lessig’s 4 means of controlling behavior <http://www.nehrlich.com/book/codelessig.html>

<sup>2</sup> Helen Nissenbaum CV [http://www.nyu.edu/projects/nissenbaum/main\\_cv.html](http://www.nyu.edu/projects/nissenbaum/main_cv.html)

outside and finds information. He concluded by citing the author of Wikileaks as someone who specifically should not be afforded journalistic privilege.

## **Part II: Unmasking Online**

Unmasking Online, the second panel, began with James Grimmelman, Associate Professor of Law of New York Law School, presenting work on First-Class Objects. Systems that accumulate data describe directly first-class objects and other data is described only in terms of the first-class object. Prof. Grimmelman explained that people are first-class objects on Twitter represented by the unique identifier of @username. Whether third parties utilizing information structures that create first-class objects should have more heightened legal obligations than those working with unstructured digital data and other questions related to anonymity and the press were posed to the panel moderated by Viva Moffat, Associate Professor of Law at the University of Denver.

With admittedly more questions than answers, the panel began discussing legal implications of these new information structures. Danielle Citron, Professor of Law at the University of Maryland, explained the shift of protection offered by anonymity from victims to attackers and suggested remedial possibilities, including safe-harbor incentives for sites that collect identifying information, anonymity provided for both parties when filing claims, and unmasking in and of itself. Evan Brown, Associate at Hinshaw & Culbertson, LLP, questioned what degree of meaning creation or level of reasoning a system would have to perform in order to subject it to the higher duty suggested by Prof. Grimmelman. Nathaniel Gleicher, of the Computer Crime and Intellectual Property Section of the Criminal Division of the Department of Justice, described new data structures as reductions in friction to the process of access previously provided by law and costs. After asking the panel whether attaching responsibilities to intermediaries would result in chilling effects, Prof. Moffat concluded the discussion by questioning how law can incentivize start-ups by limiting legal hurdles while still promoting good citizenship.

## **Part III: Shifting Norms of Freedom of the Press**

The third panel, The Shifting Nature of Freedom of the Press, was moderated by Helen Norton, Associate Professor of Law at the University of Colorado. This panel focused on the functionality of privacy torts and First Amendment freedoms in the new media landscape. Neil Richards, Professor of Law at Washington University School of Law, started the conversation with a presentation of his paper concerning the conflict between privacy tort claims and protection for the press under the First Amendment. Professor Richards explained that while the disclosure tort is largely unconstitutional as applied against the press, the free press critique of privacy tort law is limited as certain tort claims against the press are constitutional. Professor Richards suggested that because there is no concrete definition of “the press” for purposes of the First Amendment, understanding speech in the new media environment requires a different approach as well as new tools for evaluation.

David Lat, Founder and Managing Editor of AboveTheLaw.com, continued the conversation by

advocating for an updated defamation standard given society's new media landscape. As the distinction between public figures and private figures becomes increasingly blurred, Mr. Lat argued that defamation claims should instead turn on whether speech is a matter of public concern. Mr. Lat added that the distinction between public and private figures is of less importance in the new media environment as self-help remedies to combat defamation are widely available with the advent of new online media. Sandra Baron, Executive Director of the Media Law Resource Center, agreed that an updated standard for defamation is desirable but noted that there is no indication that courts will deviate from the standard application of privacy torts in the online context. Ms. Baron also noted that it is not a universally accepted norm that self-help remedies are available to everyone online. Steven Zansberg, Partner at Levine Sullivan Koch & Schulz, LLP, noted that while the law protects the public's right to receive information, it must evolve to protect against publication of private information as the new media landscape enables increasing aggregation of information.