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Outcomes Report

A Silicon Flatirons Privacy Initiative Conference: “Privacy at the Margins”

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Introduction

On March 12, 2021, the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado Law School hosted a conference to celebrate the recent publication of [“Privacy at the Margins,”](#) a book by Professor Scott Skinner-Thompson, and to discuss themes in his work, such as the material harms caused by privacy invasions, the structure of privacy law to deny legal privacy rights to the marginalized, and ways to meet and remedy these injustices.

Part I

Racial and Immigrant Disparities in Privacy Law

The first panel analyzed the reality of heightened surveillance as a defining aspect of technological engagement for both citizens and non-citizens, and the surveillance conducted by both public and private actors to monitor racial minorities and immigrants. Early on, panelists challenged the basic requirement that individuals exchange private information as a term of use of the “free” internet. They noted that, while this requirement is typically framed as posing abstract, mild costs to privacy that are justified by convenience and consensual participation in the internet, such a justification is true only in certain circumstances and regarding certain groups in society. As speakers discussed, engagement in the internet is quickly becoming a basic civil right and the information forfeited for access reveals a power dynamic inherent in a system built upon monetization through data collection. For marginalized groups and individuals who are flagged as unmonetizable (that is, those who will not generate revenue through response to advertising and other interactions that provide personal data on the internet), the costs of data collection are concrete and, often, a matter of life and death as monetization gives way to surveillance.

Further, the panel noted that the intersection of marginalized identities, including race, immigration status, and socioeconomic status, shape the experience of surveillance and oppression for various groups and individuals. Panelists discussed a range of harms including increased policing, forfeiture of state-protected healthcare and prenatal care, and various state interventions in families suffered by people of various marginalized identities. For undocumented individuals, technology has also allowed “the border” to be enforced anywhere and everywhere, posing a serious and pervasive threat to individuals and their families. While these harms are in grave need of redress, panelists urged law and policy-makers to resist the attraction of uniform solutions, encouraging contextual understanding, problem-solving tailored to communities, and commitment to expanding the circle of those discussing and seeking to solve these problems.

Part II

Categories of Control: The Regulation of Sexuality & Gender

The second panel discussed the tension between visibility and privacy regarding sexuality and gender, and the ongoing power struggle in this space. Panelists explained how LGBTQ+ individuals are hyper-visible in some ways but invisible in others, subject both to heightened surveillance and denial of civil rights. They noted that some laws, such as those expanding or eliminating gender designations on identification documents, could be beneficial. However, they cautioned that no approach is universally superior because the risk of violence—both digital and physical violence—varies across circumstances and mediums. For example, one panelist pointed out that a nonbinary ID could provoke discrimination or violence in a particular context, but secure safe navigation of public space in another context. Similarly, while some online communities are havens of support and inclusion, online exposure can be weaponized.

Rather than picking a side in a false dichotomy, panelists seemed to agree policymakers should instead evaluate any policy by asking a broader question posed by Anna Lauren Hoffman, “what are the terms of inclusion?” Such analysis entails awareness of which respective party bears the burdens and benefits of inclusion, as well as the ways in which an inclusion initiative structures the relationship between individuals in hierarchical power relations. Too often, powerful entities reap the economic, social, and political benefits of inclusion initiatives (or perceived inclusion initiatives) while LGBTQ+ individuals bear the burdens of attempting to put them into practice. Panelists identified a few first steps for development in law, policy, and caselaw that are necessary to challenge the existing oppressive power dynamic while supporting contextually-sensitive privacy, visibility, and safety, such as the Equality Act and decriminalization of sex work. However, they emphasized that these are only first steps, and ongoing work should prioritize autonomy, transparency, and accountability.

Part III

Privacy Through an African American Lens

Dr. Anita L. Allen, the Henry R. Silverman Professor of Law and Professor of Philosophy at the University of Pennsylvania, gave a keynote address advocating for a practical approach to defining privacy by reference to the problems that need solving and in pursuit of justice. She argued that the traditional top-down methodological approach to ensuring that privacy has a

coherent definition has left privacy law uniquely hobbled from seeking justice in the face of grave harms such as the murders of George Floyd and Breonna Taylor. Her approach instead tells the story of privacy by foregrounding the narratives of marginalized individuals and organizations who drive the development of privacy in order to view, understand, and attain the right to privacy. While the lens can and should be adjusted to foreground any marginalized identity, such as race, gender, or poverty, she explored the lens of the right to privacy for African American women. From the beginning, deprivation of privacy has been tied to slavery, and the development of civil rights progressed alongside and through privacy-based victories like that in *Loving v. Virginia* (1967). Dr. Allen also noted the reverse—privacy doesn't work the same way across different groups, and even strong privacy laws aren't strong for women of color. In this way, the use of narratives allows pragmatic definitions of privacy enabling the achievement of justice and other values, defining privacy by reference to the problems that need to be solved even when the story might strain a methodological definition of privacy.

Part IV

The Costs of Privacy: Surveillance of the Poor

The final panel examined the intersection between privacy and poverty, with speakers discussing violations by state and nonstate actors. Panelists discussed the problems raised by the configuration of privacy law as home (housing) centric, a dilemma raised by Tristia Bauman, Senior Attorney at the National Homelessness Law Center. As to state actors, this leads to privacy loss in the forms of data collection, surveillance, search, seizure, and prosecution for those experiencing homelessness, seeking public assistance programs, staying in shelters, or participating in housing programs. Panelists emphasized the resonance of these harms—the increased policing, surveillance, and enforcement upon select groups—with those explored by other panels and similarly called for a more expansive notion of what privacy law is, or at least what qualifies as a privacy-violation. Regarding private actors, panelists again emphasized that big data practices, such as predatory lending and exclusion from traditional goods like banks or job search results, burden low-income persons and communities on the subordinate side of the power dynamic in employment relationships, families, and society at large.

Echoing the themes of the day, the panel called for a nuanced and concrete consideration not only of harms, but of the data subject. However, U.S. privacy law currently labors under a “flattening” of a data subject into a white, cis-gender man which, together with a consumer protection paradigm, fails to reflect either the data subject as a real, marginalized individual or the tangible harm they suffer. Rather than pushing these stories to the margins, privacy discourse should bring the margins to the center. Panelists urged that this area needs an expansive approach and understanding of privacy and housing policies together, as well as an expansive understanding of direct and collateral harms and effects on way of life. More broadly, panelists concluded with a suggestion for a new discussion: that this single, “privacy-starved” area may not be so much its own privacy problem so much as one example in many explored throughout the conference, all of which suggest that problems labeled as “privacy,” “surveillance,” or “policing” problems actually stem from an overarching failure in the United States to develop infrastructure that provides basic positive rights.

Conclusion

As privacy law and the right to privacy come increasingly to the fore in public and legal discourse, awareness of the marginalized groups and individuals who suffer a lack of privacy, often in the form of surveillance, comes into sharp relief. This conference unpacked the ways marginalized groups are subject to disproportionate surveillance and suffer disparate harm when subjected to privacy violations. Far from abstract, intangible, or dignitary harms, these harms are material, concrete, and visceral. This reality calls for introducing expansiveness into privacy law—expansive inclusion of marginalized groups and individuals in discussion and policymaking, expansive understanding of what privacy law is and what perpetuates privacy violations, and expansive understanding of the shortcomings in our legal, social, and political infrastructure that manifest as privacy violations.

About Silicon Flatirons Center

Our Mission

Silicon Flatirons' mission is to elevate the debate surrounding technology policy issues; support and enable entrepreneurship in the technology community; and inspire, prepare, and place students in these important areas.

About the Privacy Initiative

Information privacy has emerged as one of the most vital, contested, and important areas of debate in technology law and policy. Silicon Flatirons regularly hosts events focused on information privacy and cybersecurity and trains students to become the next generation of lawyers, advisors, and policymakers in the field.

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