

FREEDOM OF THE PRESS IN THE TWENTY-FIRST CENTURY: AN AGENDA FOR THOUGHT AND ACTION

A Report from a Summit on Freedom of the Press in the
Twenty-First Century, University of Oregon, April 12, 2013

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Preface

At the behest of Kyu Ho Youm, then president-elect of the Association for Education in Journalism and Mass Communication (AEJMC), and under the auspices of AEJMC and the University of Oregon School of Journalism and Communication, 20 leading communication/media scholars, mostly members of AEJMC, gathered in Eugene, Oregon on April 12, 2013, for a summit on the future of a free press.

An opportunity for AEJMC and its members to play a leadership role in defining the terms of the debate over what “freedom of the press” means, where it applies, and what it requires, the summit provided a venue for a critical assessment of – among other key areas of inquiry – the history and future of the nexus between popular sovereignty and public expression. Looking beyond the First Amendment and other constitutional/statutory protections for a free press, the summit stood an invitation to explore the contradictions, tensions and paradoxes that characterize enduring and emerging discussions about the scope and purpose of free press claims.

The summit began and ended with a discussion among all 20 participants, but most of the day was devoted to four concurrent meetings, each focused on a distinguishable set of ideas and issues, and each limited to five participants. Each of these smaller discussions was assigned a discussion leader, who identified and distributed reading material, facilitated the discussion, and prepared a brief report summarizing the discussion and highlighting whatever consensus or conclusions the group reached. Taken together, these four reports, combined with excerpts from transcripts of the discussions, constitute this report on “Freedom of the Press in the Twenty-First Century: An Agenda for Thought and Action.” We hope that the presentation of this report at AEJMC’s annual conference in August 2013 in Washington, D.C., will enable other members of AEJMC to revisit, revise and otherwise continue the discussion we began in Eugene.

The summit and this report would not have been possible without the support of the University of Oregon School of Journalism and Communication’s superb staff: Colleen McKillip, Erika Vogt, and Kellee Weinhold.

Timothy Gleason
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Theodore L. Glasser
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Summit Participants and Organizers

David S. Allen is an associate professor in the Department of Journalism, Advertising, and Media Studies at the University of Wisconsin-Milwaukee, where he currently serves as department chair. His books include *Freeing the First Amendment: Critical Perspectives on Freedom of Expression* (1995), co-edited with Robert Jensen, and *Democracy, Inc.: The Press and Law in the Corporate Rationalization of the Public Sphere* (2005). His most recent research focuses on the management of public space and the control of dissent within American society. His article, “Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones,” was published in *Communication Law and Policy* in 2011. Allen received his Ph.D. from the University of Minnesota.

Mike Ananny is an Assistant Professor at the University of Southern California's Annenberg School for Communication & Journalism, an Affiliated Faculty with USC's Science, Technology and Society research cluster, and a Faculty Associate at Harvard's Berkman Center for Internet & Society. He studies the public significance, and sociotechnical dynamics, of networked news systems. He has held fellowships and scholarships with Stanford's Center on Philanthropy and Civil Society, the Pierre Elliott Trudeau Foundation, the LEGO Corporation, Interval Research; was a postdoc with Microsoft's Research's Social Media Collective; and has worked or consulted with LEGO, Mattel and Nortel Networks, helping to generate research concepts and prototypes for new product lines and services. He received a PhD from Stanford University (Communication), SM from the MIT Media Lab (Media Arts & Sciences), and BSc from the University of Toronto (Human Biology & Computer Science). He has published in a variety of venues including *Critical Studies in Media Communication*, *International Journal of Communication*, *American Behavioral Scientist*, *Television & New Media*, the *Handbook of Research on Urban Informatics*, and the Association for Computing Machinery's conferences on Computer-Human Interaction and Computer Supported Collaborative Learning. He is currently working on a book (under contract with MIT Press) on a public right to hear in the age of a networked press.

Tom Bivins is the John L. Hulteng Chair in Media Ethics in the School of Journalism and Communication at the University of Oregon where he is the head of the Communication Studies Major and Graduate Certificate Program in Communication Ethics. He has a BA in English and an MFA in Creative Writing, both from the University of Alaska, Anchorage, and a PhD in Telecommunications from the University of Oregon. He has worked in television and radio broadcasting, documentary film production, advertising, corporate public relations, and as a graphic designer and editorial cartoonist. He is the author of numerous articles on the mass media in academic and professional publications, and has written books on media ethics, public relations writing, publication design, advertising, and newsletter publication. He has three published children's books and a small book of poetry. He has also designed numerous web sites for education, business, and professional societies.

Clay Calvert is Professor and Brechner Eminent Scholar in Mass Communication at the University of Florida in Gainesville, where he also serves as director of the Marion B. Brechner First Amendment Project. He has authored or co-authored more than 115 law journal articles on freedom of expression-related topics. Professor Calvert is co-author, along with Don R. Pember, of the market-leading undergraduate media law textbook, *Mass Media Law, 18th Edition* (McGraw-Hill), and is author of the book *Voyeur Nation: Media, Privacy, and Peering in Modern Culture* (Westview Press). He received his J.D. with Great Distinction from the University of the Pacific's McGeorge School of Law and later earned a

Ph.D. in Communication from Stanford University, where he also completed his undergraduate work with a B.A. with Distinction in Communication. He is a member of the State Bar of California and the Bar of the Supreme Court of the United States.

Robert Drechsel is professor of journalism and mass communication at the University of Wisconsin-Madison, and holds an affiliated appointment in the Law School. He served as director of the School of Journalism and Mass Communication from 1991-98. His research has focused on tort and constitutional law affecting mass communication, and on various aspects of media coverage of courts. Most recently, the former has focused on the relationship between law, ethics and professionalism, the latter on local television and newspaper coverage of the justice system. Drechsel is the author of one book, *News Making in the Trial Courts*, and articles in a variety of legal and communication journals. His work has been cited by the United States Supreme Court. He has served as head of the Law Division of the Association for Education in Journalism and Mass Communication, and received AEJMC's Krieghbaum Under-40 Award for accomplishment in teaching, research and service. He is also a long-time member of the Wisconsin Freedom of Information Council, a statewide organization devoted to safeguarding citizens' access to government proceedings and records. Drechsel holds a Ph.D. in mass communication from the University of Minnesota. He joined the Wisconsin faculty in 1983.

Anthony L. “Tony” Fargo is an associate professor and director of the Center for International Media Law and Policy Studies at the Indiana University School of Journalism. He joined the IU faculty in 2004 after teaching positions at the University of Nevada, Las Vegas, and the University of Rhode Island. He earned his Ph.D. and M.A. in mass communication at the University of Florida and his B.A. at Morehead State University in his native Kentucky. His research focuses on the legal rights of journalists to protect confidential sources and, more recently, the right of individuals to communicate anonymously. His scholarly work has been published in *Communication Law and Policy*, *Free Speech Yearbook*, *Cardozo Arts & Entertainment Law Journal*, *Newspaper Research Journal*, the *Journal of Broadcasting and Electronic Media*, the *William & Mary Bill of Rights Journal*, the *William Mitchell Law Review*, the *University of Arkansas Little Rock Law Review*, the *Harvard Journal of Law & Public Policy*, *Journalism and Communication Monographs*, and the *Journal of Media Law* (UK). Fargo is vice president of the Indiana Coalition for Open Government and was the head of the Law Division of the Association for Education in Journalism and Mass Communication (AEJMC) in 2005-06.

Amy Gajda’s primary research interests relate to freedom of expression, privacy, and the First Amendment. Among other matters, her work explores the tensions between social regulation and protected expression in contexts ranging from academic speech to news reporting. She is at work on a book for Harvard University Press titled *The First Amendment Bubble: Legal Controls on News and Information in an Age of Over-Exposure* which builds in part upon her *California Law Review* article charting the growing assertiveness of courts in scrutinizing journalists' news judgment. Her first book, *The Trials of Academe*, was also published by Harvard. Professor Gajda has presented lectures and papers at law schools, journalism schools, and conferences in Europe, China, and throughout the United States. Her writings and broadcast work on law for non-academic audiences have won multiple awards. She is an associate professor of law at Tulane University School of Law and formerly taught at the University of Illinois where she had appointments in both the Department of Journalism and the College of Law. Before her teaching career, Professor Gajda worked as a

television news anchor and reporter. She is a member of the bars of Virginia, the District of Columbia, and Michigan.

Theodore L. Glasser is professor of communication at Stanford University, where he is also affiliated with the Modern Thought and Literature Program. For 14 years he directed Stanford's Graduate Program in Journalism. His books include *Custodians of Conscience: Investigative Journalism and Public Virtue*, written with James S. Ettema, which won the Society of Professional Journalists' Sigma Delta Chi award for best research on journalism and the Frank Luther Mott-Kappa Tau Alpha award for the best research-based book on journalism/mass communication; *Normative Theories of the Press: Journalism in Democratic Societies*, written with Clifford Christians, Denis McQuail, Kaarle Nordenstreng and Robert White, which also won the Frank Luther Mott-Kappa Tau Alpha award; *Public Opinion and the Communication of Consent*, edited with Charles T. Salmon; and *The Idea of Public Journalism*, an edited collection of essays. Glasser has held visiting appointments at the University of Tampere, Finland; as a Senior Fulbright Scholar at the Hebrew University of Jerusalem, Israel; and as the Wee Kim Wee Professor of Communication Studies at Nanyang Technological University, Singapore. In 2002-2003, he served as president of the Association for Education in Journalism and Mass Communication. Glasser received his Ph.D. from the University of Iowa.

Timothy W. Gleason has served as the dean of the University of Oregon School of Journalism and Communication since 1997. He won the School of Journalism's Marshall Award for Innovative Teaching in 1990. He has published two books and articles in law and history journals. He has professional experience as a photographer and reporter in the print media. The theory, history and practice of freedom of the press are the focal points of Gleason's research interests. He serves on the Board of Directors of Open Oregon and the Oregon Newspaper Publishers Association where he is active in advocating for strong public access to government records and meetings. Gleason is the recipient of the 2012 Scripps Howard Journalism Administrator of the Year award.

W. Wat Hopkins is professor of communication at Virginia Tech, where he teaches communication law and journalism courses. He has published three books and a number of articles on free speech topics. In addition, he is editor and co-author of a communication law textbook that is revised annually, and is editor of *Communication Law and Policy*, the scholarly journal published by the AEJMC Law Division. Hopkins is a founding member of the Virginia Freedom of Information Advisory Council and is a member of the board of directors and past president of the Virginia Coalition for Open Government. The advisory council was established by the Virginia General Assembly to advise the legislature and the governor on access issues. VCOG is a statewide, non-profit organization that advocates for open government. He spent the spring semester of 2010 as the Roy H. Park Distinguished Visiting Professor in the School of Journalism and Mass Communication at the University of North Carolina at Chapel Hill. He received his Ph.D. from the University of North Carolina.

Jane E. Kirtley is the Silha Professor of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota, and directs The Silha Center. She is an affiliated faculty member at the University of Minnesota Law School, and was a Distinguished Visiting Professor of Law at Suffolk University Law School (2004) and the Notre Dame London Law Programme (2012). Kirtley lectures frequently in the United States and abroad, most recently in Kyrgyzstan and Thailand. Her articles and chapters on media law, freedom of information, and ethics appear in scholarly publications and the popular

press, and her *Media Law* handbook, published by the U.S. State Department, has been translated into several languages. She was Executive Director of The Reporters Committee for Freedom of the Press for 14 years and practiced law in New York, Virginia and Washington, D.C. Honors include the Peter S. Popovich Award for Freedom of Information; the Edith Wortman First Amendment Matrix Foundation Award; the National FOI Hall of Fame; the National Scholastic Press Association's Pioneer Award; and the John Peter Zenger Award for Freedom of the Press and the People's Right to Know. Her J.D. is from Vanderbilt University Law School.

Jasmine McNealy is an assistant professor in the communication department of the S.I. Newhouse School of Public Communications at Syracuse University, where she teaches both graduate and undergraduate level classes in communication law. In fall 2013 she will join the University of Kentucky College of Communication and Information's Information & Communication Technology Program in the School of Library and Information Science. Her research focuses on the areas of privacy, new media, anonymity, intellectual property and telecommunication. McNealy is an active participant in the Association for Education in Mass Communication in which she was named one of the inaugural AEJMC Scholars for 2009-2010. She has been published in both law and communication journals such as *Communication Law & Policy*, *The University of North Carolina First Amendment Law Review* and *Media Law & Ethics*. McNealy previously taught at the Manship School of Mass Communication and the Paul M. Hebert Law Center at Louisiana State University, as well as the University of Florida. She earned her law degree and Ph.D. at the University of Florida, and her undergraduate degree in journalism and Afro-American studies from the University of Wisconsin.

Robert G. Picard is Director of Research at the Reuters Institute for the Study of Journalism in the Department of Politics and International Relations at University of Oxford, a research fellow at Green Templeton College (Oxford), and a fellow of the Royal Society of Arts. A specialist in media economics and policy, he is the author and editor of 27 books, including *Value Creation and the Future of News Organizations*, *The Economics and Financing of Media Companies*, *Media Clusters: Spatial Agglomeration and Content Capabilities*, *The Internet and the Mass Media*, and *Media Firms: Structure, Operations, and Performance*. He has been editor of the *Journal of Media Business Studies* and *The Journal of Media Economics*. Picard received his Ph.D. from the University of Missouri, Columbia, and has been a fellow at the Shorenstein Center at the John F. Kennedy School of Government at Harvard University. He has consulted and carried out assignments for governments in North America, Europe, Africa, and Asia and for international organisations including the European Commission, UNESCO, and the World Intellectual Property Organisation. He has been a consultant for leading media companies in North America, Europe, Asia, Africa, and Latin America.

Amy Kristin Sanders is an assistant professor at the University of Minnesota School of Journalism and Mass Communication as well as an affiliate faculty member at Minnesota's Law School. An award-winning journalist and licensed attorney, her research focuses on the intersection of law and new technology. Sanders regularly speaks about cyberspace law to journalism and civic groups, and her research has appeared in *Communication Law and Policy*, the *Federal Communication Law Journal*, the *Journal of Media Law and Ethics* and the *Duke Journal of Constitutional Law and Public Policy*. She is the co-author, along with T. Barton Carter, Marc A. Franklin and Jay B. Wright, of *First Amendment and the Fourth Estate* (11th edition). Her teaching responsibilities include undergraduate mass

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Thomas Streeter has been a faculty member of the Sociology Department of the University of Vermont since 1989. He has an undergraduate degree in Semiotics from Brown University and a PhD in Communication from the University of Illinois at Urbana-Champaign. He has also taught for the School of Cinema-Television at the University of Southern California, and for the Department of Communication Arts at the University of Wisconsin-Madison. He was a Member at the Institute for Advanced Study, School of Social Science, Princeton, NJ, in 2000-2001. *The Net Effect: Romanticism, Capitalism, and the Internet* (NYU Press, 2011) is a study of the role of culture in the social construction of internet technology. His award-winning *Selling the Air*, a study of the cultural underpinnings of the creation of the US broadcast industry and its regulatory apparatus, was published in 1996. He edited, with

Zephyr Teachout, a volume about the use of the internet in Howard Dean's run for President, called *Mousepads, Shoe Leather, and Hope*, published in 2007. He has published articles and chapters in outlets ranging from the *Cardozo Arts and Entertainment Law Journal* to the *Journal of Communication* to *Critical Inquiry*.

Erik Ugland is an associate professor and associate dean for graduate studies and research in the Diederich College of Communication at Marquette University. He teaches courses in media law, ethics and policy in both the College of Communication and the Marquette University Law School. Ugland earned his J.D. and Ph.D. degrees from the University of Minnesota where he was twice a fellow at the Silha Center for the Study of Media Ethics & Law. He was previously a research associate at both the Media Studies Center at Columbia University and the Freedom Forum World Center in Arlington, VA. Ugland is past head of the Media Ethics Division of the Association for Education in Journalism and Mass Communication (AEJMC) and a member of the Minnesota Bar. Ugland's research has been published in leading law reviews, including the *Ohio State Law Journal* and the *University of Pennsylvania Journal of Constitutional Law*, and in communication journals, such as *Journalism: Theory, Practice and Criticism* and the *Journal of Mass Media Ethics*. He has received several awards for both his research and teaching, including the Franklyn S. Haiman Award for Distinguished Scholarship in Freedom of Expression (National Communication Association) and Marquette University's highest teaching honor, the Rev. John P. Raynor, S.J., Faculty Award for Teaching Excellence.

Stephen J. A. Ward is the Burgess Professor of Journalism Ethics and founding director of the Center for Journalism Ethics at the University of Wisconsin-Madison. In July 2013, Ward becomes Professor and Director of the George S. Turnbull Center in Portland, of the University of Oregon. He is the author of the award-winning *The Invention of Journalism Ethics*, *Ethics and the Media*, and *Global Journalism Ethics*. He edited *Global Media Ethics: Problems and Perspectives*, which was published in March 2013 by Wiley-Blackwell Publishers. He is co-editor of *Media Ethics Beyond Borders: A Global Perspective*. Ward is associate editor of the *Journal of Mass Media Ethics*. His articles have appeared in such journals as *Journalism Studies* and *Ecquid Novi: African Journalism Studies*. In addition to his Twitter feed *MediaMorals*, he is media ethics columnist for leading publications, including the PBS web site, Media Shift. He is founding chair of the Ethics Advisory Committee of the Canadian Association of Journalists. Ward has a PhD in philosophy from the University of Waterloo, Ontario. He was a reporter, war correspondent, and newsroom manager for 14 years. He covered conflicts in Yugoslavia, Bosnia and Northern Ireland.

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Edward Wasserman became dean of the Graduate School of Journalism at the University of California, Berkeley, in January 2013. For the previous 10 years he had been the John S. and James L. Knight Foundation professor of journalism ethics at Washington and Lee University in Lexington, VA. He writes and speaks widely on matters related to media rights and wrongs, technological change, and media ownership and control. His academic specialties

include plagiarism, source confidentiality and conflict of interest. Since 2001 he has written a biweekly column on the media for The Miami Herald, which is distributed nationally by the McClatchy-Tribune News Service. He is a member of the executive board of the Association for Practical and Professional Ethics (APPE), the editorial advisory board of the Journal of Mass Media Ethics, and the board of advisors to the international Organization of News Ombudsmen (ONO). He has spoken to professional and academic groups throughout the United States and in Argentina, Brazil, China, Great Britain, India, the Netherlands, Canada, Sweden and China. Wasserman joined W&L in 2003 after a career in journalism that began in 1972. He worked for news organizations in Maryland, Wyoming, Florida and New York. Among other positions, he was CEO and editor in chief of American Lawyer Media's Miami-based Daily Business Review newspaper chain, executive business editor of the Miami Herald, city editor of the Casper (Wyo.) Star-Tribune, and editorial director of Primedia's 140-publication Media Central division in New York. Wasserman received his Ph.D. from the London School of Economics, where he studied media politics and economics.

Morgan Weiland is pursuing the first joint degree between Stanford's Communication Department and Stanford Law School. Her research focuses on the intersection of American journalism and digital media technologies, with a particular interest in how these changes do – and should – impact legal interpretations of the First Amendment. She is currently in the first year of her law program where she won the Gerald Gunther Prize for Outstanding Performance in Research and Legal Writing. She will be working as a legal intern at the Electronic Frontier Foundation (EFF) during the 2013 summer to pursue the legal nexus of digital media and public goods, like free expression. A Stanford Graduate Fellow and Student Fellow at the Center for Internet and Society, she works with Professor Ted Glasser in the Communication Department. Before coming to Stanford, Weiland was a Research Project Manager at Media Matters for America in Washington, D.C. Weiland has a BA with honors from Carleton College in Political Science and Cinema & Media Studies.

Kyu Ho Youm joined the School of Journalism and Communication in 2002 as the inaugural holder of the Jonathan Marshall First Amendment Chair. As a prolific communication law scholar, he has published a number of book chapters and research articles in a wide range of leading journalism and law journals. Youm's law journal articles on freedom of expression have been cited by American and foreign courts, including the House of Lords in Great Britain, the High Court of Australia, and the Supreme Court of Canada. In addition, his media law research has been used by American and international lawyers in representing their clients in press freedom litigation. A member of the Communication Law Writers Group, Youm has been involved in writing *Communication and the Law*, a major media law textbook in the United States. He has also contributed to *Media Law and Ethics* and *Media, Advertising, and Entertainment Law Throughout the World*. A native of South Korea, he has authored a book on Korean press law. Since 2008, he has been the Communication Law and Media Policy editor of the 12-volume *International Encyclopedia of Communication*. Currently, Youm serves on the editorial boards of a dozen leading law and communication journals in the United States, England, and Australia. He is active on Twitter. His tweeting has been noted in Forbes.com's "Eight Great Law & Technology Resources."

Introduction

Structural Influences and Legal Privileges

The “marketplace of ideas” and the “watchdog press” are two of the defining metaphors of our thinking about freedom of speech and of the press. Two of the First Amendment summit groups used different disciplinary approaches to raise questions about the viability of the modern marketplace and of a 21st century watchdog. Their writing and discussions help shape an important agenda for research using the full array of research approaches available to AEJMC scholars.

The first panel¹ brought a political economy approach to the question of the future of freedom of the press. The group examined the social, economic and technical changes in the 21st century information ecosystem. While the group recognizes the exciting benefits of the digital age, it also found that while these changes are “redistributing power,” they “are not eliminating systemic organization and control.” The group called for renewed research efforts by AEJMC scholars to explore the impact of these changes and for “reconsideration given to fundamental questions” about freedom of the press: To whom is that liberty given? To what end is it used? Under what conditions does it exist? Are there responsibilities associated with the freedom?

The group identifies the increasing concentration of the control of the channels of communication distribution in the hands of an ever smaller number of private corporate entities as a major concern and as an subject in need of significant research. How should we understand this shift of control from the public to the private sphere? What does it mean for our understanding of “a free press” when the public has less ability to influence free press policy and behavior through democratic processes?

Study of this change, the group suggests, “will require reconsideration of the fundamental conceptualizations, rationales, and language of freedoms of expression and freedom of the press.” Scholars should consider a number of changes that challenge our conventional understanding of freedom of the press including: the changing information and economic environment, changing notions of democracy and citizenship, private communication enterprises and economic power, and conflicts between intellectual property rights and free flow of information.

Scholars need to focus on:

- (1) How changes in the mass media financing model are altering the abilities of news and media enterprises to carry out democratic functions;
- (2) The extent to which digital expression and distribution of information contribute to and inhibit democratic functions; and
- (3) How new communication infrastructures and firms that provide critical functions alter power in media systems.

In addition, we should continue to explore the impact of living in a consumer culture on society, with special attention to the marginalization of groups and individuals. What does it mean for democracy in a world where expensive smart phones and data plans are seen as essential items and where access to information requires paid subscriptions to private information distribution systems?

Are freedom of expression and press freedom solely individual freedoms or do they carry social responsibilities as well. While not a new question, it takes on new urgency and importance in the current environment where, the group observes, “[t]he language of

¹ Robert G. Picard, University of Oxford; David Allen, University of Wisconsin-Milwaukee; Tom Streeter, University of Vermont; Janet Wasko; University of Oregon; and Morgan Weiland, Stanford University.

freedoms and their operationalization in law and policy are increasingly focused on individual and commercial expressive rights detached from responsibilities that might accompany them.”

Finally, the group challenges us to ask “whether the concept of the marketplace of ideas itself is applicable in an environment of information and participatory asymmetry.” Do we have the necessary conceptual and theoretical tools required to fully understand and make sense of the questions raised about freedom of the press in the 21st Century?

The group urges us to look to interdisciplinary approaches and to incorporate the “theories, approaches, and critiques emanating from political philosophy, economics, political economy, public policy, and critical legal studies.” Otherwise, they suggest, our work will “remain constrained by the social conditions and political economies of centuries past.”

The press privileges panel² focuses on the use of confidential sources and the long standing privilege in the law for journalists to not reveal sources under certain circumstances. This confidential source privilege is not new, but in the post 9/11 environment it faces significant challenges in the national security arena, and legislative efforts to create a federal shield law protecting the confidential sources privilege have hit substantial roadblocks.

The panel notes that few believe that the First Amendment creates an absolute protection for journalist to protect sources, while the vast majority view the privilege as being qualified with its limits being balanced by the public interest in protecting confidentiality, and by national security or other governmental interests. In the current climate, the group notes, many are hostile to the idea that a “press that often appears partisan, craven, or motivated solely by profit should enjoy special privileges not available to other individuals or businesses.”

This lack of trust or confidence in the media to serve the public interest is a significant factor in the public’s support for reporter’s privilege, and perhaps more important, it is a factor in legislative and judicial support for the privilege.

The panel is concerned with the influence of competitive and economic challenges on the legacy news media’s ability to demonstrate the level of accountability and transparency needed to change the public perceptions of journalists. Absent public confidence, it is hard to imagine broad support for a privilege.

In addition, even if there is public support, there is the increasingly complicated question of determining who is “the press”? In a world full of new types of communicators from “aggregators to bloggers to designers of search engines,” the group calls for a definition of journalist in which “the focus should be on function, not affiliation.”

Should the standard be so broad that it protects “anyone who gathers and vets information (or as some might say, “manipulates” it) for distribution to the public”? What the group calls the “I know journalism when I see it” approach.

Do essential criteria for being covered by reporters’ privilege include independence, serving as a public watchdog, and serving the public good?

Should powerful players in the new communication landscape -- Facebook, Twitter, Google and others – have access to the protections of reporters privilege? Do these entities act to promote the public’s right to know? The panel suggests that these corporate entities are more interested in promoting and sustaining a culture that does not encourage controversial speech.

² Jane Kirtley, University of Minnesota; Mike Ananny, University of Southern California; Anthony Fargo, Indiana University; Jasmine McNealy, Syracuse University; Edward Wasserman, University of California, Berkeley.

One of the most important observations in the panel's report is that "the underlying assumption that the media will act in the best interests of the public is the essential underpinning of the idea that the press should be entitled to certain privileges." The panel raises a serious concern about the sustainability of standards of journalism ethics with the decline of legacy news organizations where codes of ethics and other professional norms shape journalistic practice and the rise of new organizations that either have no knowledge of or interest in traditional journalism ethics or knowingly reject the concept of "journalist."

In this environment, the panel questions the viability of legal privileges. If we "are all journalists," can any privilege survive? The conclusion confirms the group's faith in both journalism and reporters privilege:

In the end, even in this era of economic and technological upheaval, the concept of who is "the press" remains remarkably timeless. Those whose goal is to facilitate the free flow of information are deserving of whatever privileges are necessary to fulfill that role. In the words of Justice William O. Douglas, "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.

The call to action for AEJMC scholars is to provide a conceptual framework that will allow us to sort out the complicated questions of what is journalism in the 21st century and how do we know who is a journalist?

If we consider the issues raised by the political economy and the privileges panels the power of disruptive technology becomes readily apparent. While concerns about the structure of media ownership and control over the means of distributing information are hardly new, in a digital world they take on even greater urgency and call for renewed study.

Perhaps the impact of disruption on journalist's legal protections and practices is even greater. Determining the appropriate scope of a reporter's privilege has challenged courts and legislatures for more than a century, but now the questions is even more complex and profound. Can any privilege survive in a world where the fundamental definitions of "journalism" and "journalist" are profoundly contested and in some corners simply rejected?

Privacy, Secrecy and the Limits of Openness

Questions of privacy and questions of secrecy share a concern for the tensions between concealment and revelation. If secrecy is the bigger and broader concept in the sense that all claims of privacy involve claims of secrecy but not all claims of secrecy involve claims of privacy, as Sissela Bok points out in her dated but still timely treatise on these matters,³ both sets of claims imply limits or restrictions on what is publicly disseminated. Both sets of claims, then, run counter to journalism's celebrated, though complicated, commitment to openness.

Journalism's commitment to openness should not preclude principles and policies aimed at protecting individual privacy, the privacy panel⁴ concludes, but the press and the public need to recalibrate privacy expectations in light of the recent and rapid computerization of communication. Can the public reasonably complain about an invasive press when a journalist quotes from a Facebook post? Indeed, are these posts public or private? Is a reporter's status as a "friend" – or a "friend" of a "friend" – a factor in determining the publicness of a post? Are a user's privacy settings a useful and relevant

³ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation*. New York: Pantheon, 1982.

⁴ Clay Calvert, University of Florida; Tom Bivins, University of Oregon; Amy Gajda, Tulane University; Amy Sanders, University of Minnesota; Stephen Ward, University of Wisconsin-Madison.

criterion for judging the privateness of a post? Conceptually, when do social media become public media? These and related questions point to new and unresolved issues concerning the difficulty of distinguishing between public and private. They also underscore the need for new or at least refurbished terms and concepts, a framework that better captures the meaningfulness – or meaninglessness – of efforts to carve out private spaces in an increasingly networked society.

As part of its call for a recalibration of privacy expectations, the privacy panel provocatively proposes an end to the familiar distinction between public and private individuals – and an end to the corollary proposition that the latter deserves greater privacy protection than the former. The privacy panel views this move as fostering “an egalitarian conception of privacy, perhaps with journalists and other information disseminators recognizing and self-policing a certain baseline of privacy that *all* individuals – be they politicians or private citizens – possess in the name of human dignity.” The panel report hints at a “public interest” standard that might be usefully applied to coverage of all individuals, public and private alike, though without mentioning that the Supreme Court once tried something like that in the area of libel law and quickly found it to be unworkable.⁵

Appropriately enough, the privacy panel report devotes substantial space to press-privacy disputes involving the “public disclosure of embarrassing facts,” an area of tort law described elsewhere as variously “stunted,” “surprisingly weak,” “an anachronism,” and “dead.”⁶ What put the tort on life-support? The press. Journalists exploited the “newsworthiness” defense by defining news tautologically, such that anything that appeared in the press was, ipso facto, newsworthy. Understandably wary of pitting privacy claims grounded in tort law against press freedom claims rooted in the First Amendment, the courts overwhelmingly deferred to the press and basically affirmed, as early as the 1940s, “the social worth of public curiosity and the right of the press to fulfill it, whether mundane, banal, or intrusive.”⁷

The privacy panel stands united in its call for “greater discussion of issues affecting privacy and the press.” But beyond the “educational modules” the panel proposes for “teaching about privacy and the press,” where would those discussions take place? Given that the press would for good reason prefer to steer clear of the state, including the judiciary – and, besides, given the Constitutional barriers to a viable public disclosure tort, so, too, would the public – where would readers, listeners and viewers go to adjudicate claims against the press for turning someone’s private life into a public spectacle? Or to be less adversarial about it, what venues exist for bringing the press and the public together for a serious and sustained discussion of these and other issues?

Unlike the privacy panel, the secrecy panel⁸ knows precisely where it wants to go for answers to questions about the proper balance between revelation and concealment: the state itself. The press can prod the state – and the public, through elections and other means, can do its best to impose its will on the state – but in the end only the state can enact the laws and policies that translate into the transparency that self-governance demands. Accordingly, the secrecy panel report calls on Congress, for example, to “amend the 1917 Espionage Act and other federal statutes that could be used to prosecute leakers and journalists who disclose

⁵ See *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

⁶ Samantha Barbas, “The Death of the Public Disclosure Tort: A Historical Perspective,” *Yale Journal of Law & the Humanities*, 22, 2 (2013): 171-215.

⁷ Barbas, p. 213.

⁸ Jeffery A. Smith, University of Wisconsin-Milwaukee; Robert E. Drechsel, University of Wisconsin-Madison; W. Wat Hopkins, Virginia Tech; Derigan Silver, University of Denver; and Erik Ugland, Marquette University.

secret information by adding *scienter* clauses that require an intent and likelihood to harm national security.”

More than a plea for new and better laws and policies, however, the secrecy panel report encourages governments at all levels to combat a culture of secrecy that has emerged over the years in response to “fighting world wars, communism, and terrorism.” Worried about the inevitability of excessive secrecy in a society that fails to articulate in principle and apply in practice the presumption of openness, the panel wants to “reverse the trend of government knowing more and more about the people and the people knowing less and less about the government.” Thus, the report invites “consistent and aggressive enforcement” of freedom of information laws, including “prompt compliance with requests for information” and an “independent body” dedicated to appeals.

Because the secrecy panel report focuses almost entirely on the dangers of secrecy in government, along with the press’s honorable struggle to keep the state open and responsive, it leaves unasked and therefore unanswered a question journalists themselves seldom raise: Does the press’s commitment to openness extend to the press itself? While panelists acknowledge that shield legislation, which they enthusiastically support, involves confidentiality, which is an aspect of secrecy, there’s no apparent appreciation of the irony of a press that wants to combat secrecy by demanding secrecy. More than that, there is no recognition of the collaborative role the press plays, often in support of secrecy, whenever the press enters a partnership with other centers of power, including the state, for purposes of advancing a mutually agreeable agenda. To take but one prominent example, in a 2005 exposé of President George W. Bush’s secretly authorized domestic spying program, *The New York Times* acknowledged, deep in its story, that after consulting with Bush administration officials, the newspaper decided to delay publication for a year; and the story that did appear had omitted some of the information the administration did not want disclosed. Byron Calame, then the *Times*’s public editor, reported a “loud silence” in response to questions he submitted to the newspaper’s editor and publisher, questions concerning not only how this story was handled but questions about what in general the *Times* regards as “allowable” secrecy.

To recycle a well worn but still apt question: Who is watching the watchdog?

Looking across the four reports, it occurs to us now that we might have included a fifth panel, one devoted to questions of press accountability. It’s been more nearly a quarter of a century since Lee Bollinger, now president of Columbia University and then dean of the law school at the University of Michigan, argued that journalists’ visceral attachment to autonomy positions them as adversaries of accountability. With dwindling interest in news councils, ombudsmen and other opportunities for the press to hear and respond to the public’s criticism and complaints about newsroom practices and performance, the situation is arguably worse today than it was then. Had we convened a fifth panel, we would have wanted it to explore the conditions for a renewed and reinvigorated commitment to a genuinely democratic press, an institution that safeguards democracy by practicing it – not by giving up its autonomy but by at least realizing that it owes the public a publicly accessible justification for what it does, a justification legitimized by a robust and open debate with the public it says it serves.

PANEL I

The Future of the Political Economy of Press Freedom

Robert G. Picard
University of Oxford

with

David Allen
University of Wisconsin-Milwaukee

Tom Streeter
University of Vermont

Janet Wasko
University of Oregon

Morgan Weiland
Stanford University

Freedom of expression and press freedom are influenced by economic and power arrangements in society and the information age is not altering that fundamental principle. The social, economic, and technical changes underlying information society are altering some existing structural arrangements and are redistributing power, but they are not eliminating systemic organization and control. These changes are affecting freedoms in different parts of communication processes and systems, making necessary new understanding and approaches to promoting and ensuring freedom.

The organization of media and communication systems and markets, their relations with the state and elites, the presence of dominant content producers and providers, the choices of content provided, the consumers to whom content is directed, and how it is delivered are all being affected by the fundamental changes in society. These are increasingly shifting the mechanism of control and influence over media from public to private spheres, reducing the ability of the public to influence it through democratically determined policy, and making public oversight of media and communication systems and operations more difficult.

Media systems and their content and the degree of freedom of expression and freedom of the press are reflections of dominant cultural elements in society. The concepts, as well as the language of freedom of expression and press freedom, emerged in response to historical structural arrangements dominated by the state and became a fundamental component of the democratic revolutions. They were primarily designed to provide protection against state impediments to citizens' expression, to permit challenges to state authority, and to break state-sanctioned monopolies on distribution of information. As time passed, the mass media model of communication in Western nations emerged partly because of those freedoms and because of the technological changes provided by the Industrial Revolution and economic changes in society created by wage earning and continual employment.

The mass media model was highly influenced by structural arrangements based in a market economy. Specifically, this model developed within the control of media proprietors and relied upon monetized labor, and was co-opted by institutional arrangements such as class, race, and gender. Further, it was subject to only a modicum of constraint by governmental policy operating within the nation-state system. Today, media and communication are undergoing transformations that are altering those structural arrangements through digitalization, globalization, and the development of intermediaries whose power often exceeds that of states. The digital age is changing who can communicate, what is communicated, and how. Although individuals, small enterprises, and civil society organizations are able to participate more readily, the structures of communication are influenced and controlled by infrastructure and systems that advantage dominant content providers and those with whom financial interests are shared.

The new institutional arrangement of the digital age is more democratic, i.e. participatory, than the past, but it is based on corporatism in which the participants and society have limited influence over the fundamental aspects of its operations, including decisions and practices that limit freedom of expression and press freedom.

Consequently, renewed attention to effects on expression and freedoms are required and new methods for pursuing and protecting freedoms will be necessary. This will require reconsideration of the fundamental conceptualizations, rationales, and language of freedoms of expression and freedom of the press. The contemporary environment is creating a number of challenges to these freedoms which is related to the changing information and economic environment, changing notions of democracy and citizenship, private communication enterprises and economic power, and conflicts between intellectual property rights and free flow of information.

Challenges raised by the changing information and economic environment

Scholars and social observers need to be cognizant of the significant changes occurring in society and how they affect the expressive freedoms. They need to focus on how changes in the mass media financing model are altering the abilities of news and media enterprises to carry out democratic functions, the extent to which digital expression and distribution of information contribute to and inhibit democratic functions, and how new communication infrastructures and firms that provide critical functions alter power in media systems.

Citizens-consumers use contemporary communication technologies for self-expression, participating in self-defined communities, and contributing to debates about developments in society. These technologies are important to the public as it pursues personhood, identity, and culture. The ascent of digital content distribution and social networks are creating powerful new arenas of communication that are governed by new power arrangements and without the traditions of democratic service that ostensibly played roles in legacy mass media because of their histories, cultures, and regulation. A shift in democratic responsibility from institutional media to amorphous digital communities is underway, but the mechanisms and consequences of that change are not yet fully understood.

The new digital environment is dominated by consumptive behavior in which individuals must consume hardware, software, and services from those firms controlling gateways and providing essential services. This leaves some members of society at the margins of information society. The technological structure of the new environment also creates significant new opportunities for surveillance of the public by governments and private enterprises. These have produced new mechanisms for social control and influence that did not previously exist.

Freedom of expression and press freedom were historically perceived as being accompanied by social responsibilities, but in the new environment the conceptualization of freedom appears to be narrowing to freedom to act without the moderating responsibilities, purposes, or requirements. The language of freedoms and their operationalization in law and policy are increasingly focused on individual and commercial expressive rights detached from responsibilities that might accompany them.

Challenges created by changing notions of democracy and citizenship

There is a need to carefully consider the impact of digitalization on the means of journalism and communication production, distribution, and consumption, as well as on freedom of expression and freedom of the press. We need to understand how digital technologies and their associated processes transform notions of citizenship and democracy, the roles of media and communication in the new conceptualizations of that social participation, and how the technologies and changes necessitate reconsideration of traditional conceptualizations of expression and press freedoms that support citizenship and democracy.

The systemic changes in the digital age affect notions of participation and the roles and functions of established social and political institutions. It is becoming clear that the emerging system is changing how the public conceives participation, democracy, and citizenship. The outcomes of these changes are unclear, so the opportunities for new participation and the threats of new constraints on participation require attention.

Challenges raised by private communication enterprises and economic power

The growth of powerful digital and telecommunication intermediaries requires consideration of the extent to which threats to freedom traditionally ascribed to government and political institutions are being relocated to private institutions and enterprises. The implications of this shift for democratic activity and the extent to which the marketplace of ideas can function with a limited number of amplified voices chosen by commercial entities with significant self-interests needs contemplation.

Consideration needs to be given to whether the concept of the marketplace of ideas itself is applicable in an environment of information and participatory asymmetry. Contemplation about the extent to which traditional conceptualizations of and policies for structural and source diversity and pluralism are appropriate in these new arrangements of enterprises and power is also essential. Continuing reliance on market and neoliberal approaches to communication developments appears to be narrowing the policy options for pursuing freedom of expression and press freedom in the digital age.

It should also be recognized that scale and scope have made some digital enterprises more powerful than many nation states and that some are operating in ways inimical to public interests. The inability of individual nation states to effectively address these development is concerning.

Challenges of conflicts between intellectual property rights and free flow of information

The significant expansion of the idea of information property and legal protections for them raise questions about the extent to which intellectual property rights (IPR) are interfering with flow of information and press freedoms. These raise fundamental questions about the extent to which the state has obligations to protect economic interests, to ensure informational needs of society are met, and to seek an optimal balance of those responsibilities.

The public good needs to play a greater role in discussions of informational property and fair use provisions, and IPR limitations may require greater scope and strengthening. Concurrently, difficulties in trading rights are becoming increasingly significant because of the scale of material protected by intellectual property rights. Efforts need to be undertaken to simplify and speed trading processes if the asserted benefits of information age are to be realized.

Preparing for the future

Issues related to freedoms of expression and of the press are inextricably intertwined with the political and economic foundations of society. The on-going changes to structural and power arrangements that are part of the contemporary transformations of communication and society require the attention of scholars and social observers. These changes are far reaching and alter relations among individuals, community, and society, affect concepts of democracy, property, and labor, modify identities and cultures, and change the functions and roles of capital, private enterprises, and nation states. The opportunities and threats that the new conditions pose need to be understood and examining them will force us to confront and question the conventions, rights and privileges, and institutional arrangements that are in place.

The future of freedom of expression and freedom of the press will very much depend on reconsideration given to fundamental questions whose answers are often taken for granted: To whom is that liberty given? Against what? To what end? Under what conditions? With what responsibilities? The future well-being of those freedoms will require consideration about what communication structures and conditions are necessary for those freedoms to be effectively employed and what protections are needed against continuing and emerging impediments to exercising those freedoms.

Undertaking those processes will require that greater attention be given to the theories, approaches, and critiques emanating from political philosophy, economics, political economy, public policy, and critical legal studies. Well-rounded educations in media and communication will increasingly need to incorporate perspectives from those fields lest perceptions and operationalization of freedom of expression and press freedom remain constrained by the social conditions and political economies of centuries past.

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Panel Discussion Excerpts

Robert G. Picard, University of Oxford; David Allen, University of Wisconsin-Milwaukee; Tom Streeter, University of Vermont; Janet Wasko; University of Oregon; and Morgan Weiland, Stanford University

Discussion on challenges raised by a changing information and economic environment

Picard: [T]he mass media model, which we assume to be normal has actually been with us for only 100, 125 years. And previously before the second half of the 19th century media were smaller -- did not have great distribution....And we did manage to have some democracy, democratic participation, prior to the mass media model. And all of a sudden we're arguing about mass media model as ...the model we have to have to preserve participation ...[T]he question becomes is that the crisis itself for democracy or is that only a crisis of working out how do we communicate? Now it's certainly a crisis for companies and for shareholders in those companies.

Weiland: I think we're assuming that there's a different political economic model that underpins this shift of these new technologies and the people who are engaging with them. But I don't necessarily think that's true.

Yes, we can describe this new domain as being built on affective labor. People are producing things and doing things in ways that are not -- they're not monetizing them in the ways that we traditionally think of....[F]urther, you have the individuals who are most prominent in this new space are themselves of a certain race, class and gender who are basically in the same echelon of power and the same -- they have the same type of echelon, position in society that those who were in power when the mass media model was dominant, they're the same people basically.

Streeter: [T]he fact that everybody talks about digital democracy does also say that people want democracy at points in their lives at certain moments and that that's actually hugely desired and not perceived as achieved.... It's good that people want the democracy. It's good that people want a kind of knowledge that's reliable and produced in what looks like a fair transparent way that's open in some sense.

Allen: [Does] this signal that there's some sort of a fundamental change between these individuals and the institution that's they work for and has this technology changed all of that

in some way workThat there's much far less of the those institutional affiliations or obligations and how we've actually come to actually see a lot of younger people have come to see that institutions are just sort of like incredibly limit to go their creativity and they want to be free from those.

Discussion on challenges created by changing notions of democracy and citizenship

Streeter: I think the word democracy is interestingly charged these days. Of course lots of people have different definitions.... People want self expression. They want freedom from others and freedom from coercion, which are not the same thing. And sometimes people want to be able to participate and have influence on decisions about their communities and their lives and the larger society.

Weiland: I guess I would press back a little bit on the -- I don't disagree with the idea that media forms do encourage certain types of democracy. But I think that that idea is a half step away from arguing that certain technologies require a certain type of engagement. And I would reject wholesale that kind of technological determinism.... So I don't have a definite answer to this but there's certainly a tension between individualistic uses and communitarian uses.

Streeter: [I]t's not like there are infinite possibilities. People are subject to systematic ideologies. There are still areas of social control, whether they're kind of velvet gloved sort of control or a more totalitarian or whatever. Choices are inherently limited.

Picard: But we're also saying to believe that [digital world is] not influenced or controlled in some ways is naive. But there are in fact these organizational aspects of it that direct it in certain ways. That people can still find ways to use to their own interests, what else is changing? Are we losing something in this process as well as gaining something? Or is it being -- operating in a different way? What are we gaining or losing here?

Weiland: There's so much going on when people are engaging back and forth it's more likely that you'll miss something, whereas in the prior model I would still argue that it was pretty much one way. People were just receiving information. But there was less information so presumably you were able to more easily walk away from that experience having some like set of things that you knew or that you understood. So my concern is that people are siloing themselves into... communities where they're only hearing the things they want to hear, and I'm worried people are kind of narrowing their attention in ways that maybe undermine democracy because they're only listening to the arguments that they want to hear. And they're able to do that, it's technologically afforded for because they're able to find the communities you want to participate in.

Weiland: [T]alking about the fourth estate assumes that there is an institution. And if we have -- which is not to say that it's wrong. But if we have a bunch of communities online, for example, that are siloing then perhaps the shift in responsibility from an institutional press which I don't think is going away but it's changing is to look at those communities and try to put together like here's a broad view. Here's a place where we can come together. Or here's a sampling of everything that's out there.

Picard: All of these changes all of these things that are altering the traditions of media as we've known them, creating new communities, new opportunities, we take that -- those changes and we go back to the issue of press freedom. Press freedom had always been freedom from something for something.

Weiland: But the lack of regulation online I think encourages more corporate control and that like going back to the net neutrality debate the key players in that debate were companies controlling the infrastructure who wanted to exercise more and more control over that space.

Picard: If you look at press freedoms historically and the reason we have it, it really came after the church and the state separated.... [W]hen the church was no longer a serious impediment in western society the state became the impediment because they grabbed the power and diminished the role of the church. So the state became the concern of people wanting to have more participation or less control over their lives, if you will the role of state's been changing and changing dramatically over the past 50 years it's been changing always. But we see it being diminished in some ways. And the role of companies not just as institutions but companies in the role of the state is growing larger, and some of them seem to be able to act with impunity, and some of them act as states.

Discussion on challenges raised by private communication enterprises and economic power

Picard: [W]orries about private enterprises and economic power had traditionally been around the issues of mowing you wills and individuals with private interests that might skew the press. Then it moved to corporate ownership as we began moving away from private ownership of means of communications to corporate owned. And now it's moving back to private and people are interestingly concerned about that. But then we also have the issues of what's happening now that we -- because we're coming more and more on large scale global infrastructures, and certain players being able to aggregate in a large scale nationally and internationally in a way that they had not been before, whether that becomes an issue here.... Are these new forms equaling some of the problems in terms of constraints of governments and political institutions in the past along the way.

Weiland: And I do think that one idea on this agenda is really a great way to get into this which is the marketplace of ideas. And I think that framework has at least legally been an economic justification for keeping the government out of speech and press.... And that -- in my mind the marketplace of ideas theory assumes that the truth will win out. There are enough voices engaging to compete so that you can really have some sort of end product that we can call lower case T truth and that competition would ultimately produce the best outcome which I think we could also question. But when you translate this idea of marketplace of ideas thinking into the online environment I think there's a very important problem, which is that there are market failures online. And one of the key market failures as is true in many instances is information asymmetry.... I think both from an economic point of view and a legal point of view it's incumbent to try to redefine to provide another justification that could replace the marketplace of ideas thinking or substitute it or augment it in some way.

Allen: I was sort of wondering if one of our questions or issues might be just its definitional ideas of freedom or press freedom and economic freedom of itself. Which is does that inherently mean that it's just free do you mean for the individual to do whether it's a corporation or a person to do whatever they want to do. I've been thinking a lot about this because it goes back to the basic ideas of property in the United States and if you go back and you read John Adams and Thomas Jefferson and the idea of property in their minds, there was a moral and ethical responsibility that came with the right to own property was not the right to do anything you wanted because they thought it would make you a better citizen. So there was a social obligation that was embedded in that idea of freedom. And I think in some ways the way we talk about freedom today and press freedom and economic freedom we forget about some of those obligations that I think are embedded in those notions and we ought to think about that.

Discussion on challenges of conflicts between intellectual property rights and free flow of information

Weiland: In addition to thinking about protecting economic interests and meeting information needs in terms of why we have intellectual property protections, think on the flip side of that there's a question of how do we meet the needs that citizens have to develop themselves as balanced, described in terms of developing their personhood and their sense of who they are...through mixing, through being able to appropriate and reappropriate material and in ways that some like particular with copyright and patent laws just don't allow.... So I think part of thinking through these questions is balancing the economic kind of classical economic rights of companies but also individuals' rights.

Picard: The basics of copyright law are that you protect copyright in order to have more material available to the public. And this secondary part, which is the social effects, is what nobody's talking about anymore. But it's actually the basis of the whole idea of copyright law

-- to make more material available. To make people -- creators more willing to create and thus to have social effects.

Streeter: [T]here was a tradition of legal realists who just said look property is just a bundle of rights and is indistinguishable from a privilege. Property is whatever we call it. They weren't talking about intellectual property just property in general.... So there's a way in which it's not whether something's public or private, but what do we want property to be in any circumstance? That it's practically speaking an infinitely flexible term and legal concept and that we can do a lot of different things with it. And so you tend to think of well either it's property or it's public but I think one can -- and people do quietly regulate the terms of property in ways that take into account the public interest.

Streeter: Property is anything we want it to be. So, sure, it's property but here's all the things. And it's compulsory licenses or copyright royalty tribunals and all these bizarre things that exist in the background that don't look at all like Lockean market exchange. You can do it that way. You can say these things are not property.

Allen: It's still that same old model and that's what I think is so important. That's why I think it's important for us to think about it from the other end as well as you know we say in here okay so to what extent do they have obligations to protect the economic interests and ensure - - there's that other part of it that I think we need to think about which is the inherent contradictions of what the citizen faces.

Streeter: So do we want to say fair use is a “use it or lose it” right. It needs to be protected. It's a valuable thing.

Streeter: An expansive interpretation, an expansive strong interpretation of fair use is something that is --

Weiland: It's also inevitable in a lot of ways because I don't want to be deterministic but people can do it and people will do it. You would really have to cut off function -- technological functionality to keep people from doing -- from appropriating things.

PANEL II

The Future of Privileges for the Press**Jane Kirtley**

University of Minnesota

*with***Mike Ananny**

University of Southern California

Anthony Fargo

Indiana University

Jasmine McNealy

Syracuse University

Edward Wasserman

University of California, Berkeley

The use of confidential sources by the news media is nothing new. Information gleaned from undisclosed sources can, and frequently does, contribute to public understanding of important issues. It can also violate privacy, harm someone's reputation, or undermine the right to a fair trial. In the post-9/11 environment, unauthorized release of classified information through the news media has prompted the Obama administration to renew attempts to force journalists to reveal the identities of their confidential sources on the ground that national security demands it. Balancing freedom of the press against these competing interests is never easy, except perhaps for First Amendment absolutists who believe that any government controls or sanctions on the press amount to censorship that curtails the free flow of information and jeopardizes the public's right to know. They regard any harm that results from such disclosures as inevitable, if unfortunate, collateral damage that is outweighed by the clear benefits that flow from the ideal of an independent and unfettered press.

Many people, however, do not think in those terms. They are hostile to the idea that a "press" that often appears partisan, craven, or motivated solely by profit should enjoy special privileges not available to other individuals or businesses. But if some special privileges for those who report the news may be necessary, desirable or even mandated by the Constitution in order to serve the public good, inevitably the question becomes: who can invoke these privileges? Who or what is "the press"? Scholars and legal practitioners in the United States have tried to discourage any branch of government from defining "the press" because doing so invokes the specter of licensing, which many contend violates the First Amendment. But if "the press" is to be accorded special privileges in law, there must be some criteria for determining who "the press" is.

The "mainstream" or "legacy" news media such as newspapers and broadcasters face so many competitive and economic challenges that it is reasonable to ask whether there is still any "press" left that is worth protecting or "privileging." However marginalized, media institutions with a recognized "brand" create at least the impression of some degree of

accountability, if not transparency, to the public. But new types of communicators, ranging from aggregators to bloggers to the designers of search engines who perform tasks that mimic the functions carried out by the traditional press, serve many more readers and viewers today. Any privileges that are recognized, therefore, must protect the processes of information dissemination that benefit the public interest, regardless of who carries them out. In other words, the focus should be on function, not affiliation.

Creating a laundry list of obligations or standards that could be used by governmental entities to define “the press” is problematic at best. The broadest and simplest approach would be to recognize that anyone who gathers and vets information (or as some might say, “manipulates” it) for distribution to the public probably qualifies for the designation. This could be framed as “I know journalism when I see it.” The *National Enquirer* may not go about its reporting in ways that satisfy everyone’s taste or morals, but it can do good journalism – at least at times. It should be seen as part of “the press.” Advocates or others who espouse a particular viewpoint would not be excluded from the definition, as long as their ultimate goal was to serve the public interest, however defined. On the other hand, because the privileges exist to facilitate journalism, an entity that fails to perform its journalistic functions might not be entitled to claim a privilege at all.

Those journalistic functions, at least in the United States, go beyond mere information gathering and distribution. During the latter half of the twentieth century, many news media in the United States challenged the status quo, uncovered corruption, advocated for change. Some provided the people with the information needed to right wrongs; others affirmatively sought expanded rights for the press in order to better fulfill their role as surrogate for the public and to carry out the journalistic mission. The courts responded by strengthening First Amendment rights and privileges in areas such as libel, privacy, access and prior restraints.

But the golden age of the press as perceived defender of the public’s rights and interests may be waning. Given the low esteem in which the institutional media are held, why would anyone would even seek to be designated as “the press”? Paradoxically, while the mainstream press struggles to remain afloat amid declining circulation and advertising revenue, some alternative forms of media seem to be adept at building loyal followings based on a perception that they are the “true” journalists who have not “sold out” to corporate or governmental influences. Accordingly, an essential criterion for being considered to be part of “the press” would seem to be independence, both real and perceived, from such influences. Serving the public good would be the highest priority for the press.

But in the new communications universe, do Facebook, Twitter or Google consider themselves to be the keepers of that particular flame? Are they steeped in a tradition that questions authority and pursues the higher calling of promoting the public’s right to know? The evidence to date might suggest otherwise. Although espousing a participatory culture designed to make the tent as big as possible – arguably, in order to attract as many readers or advertisers as possible – these companies establish rules of conduct and content designed to sustain that culture at all costs, even if it means sacrificing controversial but important speech in order to, for example, abide by the laws of oppressive regimes.

Defining the public good is also a problem. Are the best interests of the public served when journalists accept leaked classified documents from undisclosed sources who assert they are exposing government misconduct, but who the government claims violate national security? Do journalists have an obligation to act as the conduit for these whistleblowers? If so, should journalists have the right or the duty to conceal the identity of those individuals from the public and from the government? Should journalists be the guarantors of other people’s rights to anonymous speech?

With the advent of widely-available digital communications including social media, it could be argued that journalists are no longer necessary to disseminate news and opinion,

whether by an apartment-dweller who videotapes brawling youths on the street outside her building and posts the video on YouTube, or by the proverbial blogger in his pajamas ranting about the latest government outrage. But some of those nontraditional communicators may not have equivalent rights of access to information, to platforms, or to audiences as those enjoyed by the mainstream media under the law or by practice. Those traditional media still have an important role to play in gathering, authenticating and distributing information, as illustrated by the decision of Julian Assange of WikiLeaks to work with traditional news outlets like the *Guardian* and the *New York Times* in order to disseminate leaked government documents. Although their image may have been tarnished over time by their own ethical missteps as well as attacks from both the right and the left, the mainstream media retain a degree of trust and credibility that has yet to be earned by many media newcomers. The question is whether the exercise of rights or privileges is contingent upon the fulfillment of duties and obligations.

That underlying assumption that the media will act in the best interests of the public is the essential underpinning of the idea that the press should be entitled to certain privileges. The scope of those privileges could include enhanced rights of access to government proceedings and operations, protection from government electronic surveillance or searches, or, perhaps most importantly, testimonial privileges that would allow reporters to maintain editorial privacy by concealing the identity of sources from those who would seek to learn it. The courts and legislatures generally are reluctant to grant these special rights to the press, however.

Invoking such privileges can raise ethical issues as well. Should journalists lobby for or litigate to obtain them? Or does doing so amount to special pleading that compromises their independence, making them beholden to the whims of judges or legislators? When a reporter relies on confidential sources, whose interest does she serve? Is the press guilty of hypocrisy when it criticizes other institutions for lack of transparency, but claims the right to confidentiality for itself? How can readers judge the credibility or motives of those undisclosed sources? How does the journalist avoid becoming a tool for manipulation by others? Beyond the legal privileges of “fair report” or neutral reportage, do journalists have an ethical obligation to verify the accuracy of the stories they tell? Does the public have the right to expect the media to take responsibility for what they publish – to stand by their words, and their actions?

Or does any of this even matter? Whatever ethical standards the legacy media may have – and there are those who think that many ethics codes read like employee manuals, concentrating on conflicts of interest that are of little concern to the reader and of little relevance to the goal of truth-telling – the new media landscape includes many players who would reject those standards out of hand because they reject the idea of a specialized role for “the press.” They repudiate the concept of the press as the Fourth Estate because, if “the press” is to be an effective watchdog, it should not be any part of the Establishment. Its interests should be indistinguishable from those of the public it serves.

That ethical idea dovetails neatly into contemporary jurisprudence in the United States. As a rule, journalists and news organizations are subject to “generally applicable” laws – laws that do not single out the press for either special duties or penalties, but which apply across the board to anyone – unless a court concludes that application of the law would violate the news media’s First Amendment rights. For example, a reporter would not be exempt from the criminal consequences of violating a law prohibiting the hacking of telephones unless the legislature or court carves out an exception, as the Supreme Court did in 2001 in *Bartnicki v. Vopper*.⁹ In that case, the high court recognized that a journalist who

⁹ *Bartnicki v. Vopper*, 532 U. S. 514 (2001).

receives an intercepted recording of a conversation may be immune from suit or prosecution as long as the content of the recording involves a matter of public interest and the journalist himself had nothing to do with the illegal interception. A traditional news organization would presumably balance the competing interests, weighing the violation of privacy against the public's need to know the information, before deciding whether or not to publish it. Ethicists might conclude that the practice violates journalistic standards, even if it was technically legal. But to organizations like Facebook or Twitter, which are in the business of maximizing the circulation of content, does such a distinction make sense? Does it even occur to them to ask the question?

The future of privileges for the press is uncertain. Public support for special protections for those who carry out a journalistic function is often shallow and inconsistent. Skepticism about motives, bias, business and political agendas, and ethics, as well as concerns about balancing press freedom with national security, undermined efforts to enact a federal journalists' shield law in the first decade of the twenty-first century. It was impossible to reach agreement on the scope of such a privilege. And even if the contours of the privilege could be defined to everyone's satisfaction, to whom would it apply? Paradoxically, although the public embraces the explosion of new media platforms as a means of self-expression, it also retains an uneasy sense that the ever-growing tent of content creators and information disseminators who all enjoy First Amendment protection has become so unwieldy that any "journalists' privilege" would effectively extend to everyone, even criminals, child pornographers, and terrorists. After all, as Scott Gant argues, "We're all journalists now."¹⁰

Or are we? In the end, even in this era of economic and technological upheaval, the concept of who is "the press" remains remarkably timeless. Those whose goal is to facilitate the free flow of information are deserving of whatever privileges are necessary to fulfill that role. In the words of Justice William O. Douglas, "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."¹¹

Recommended Reading

David A. Anderson, "Freedom of the Press," *Texas Law Review* 80 (February 2002): 429-530.

Rodney Benson, "News Media as a 'Journalistic Field': What Bourdieu Adds to New Institutionalism, and Vice Versa," *Political Communication* 23:2, (2006): 187-202.

John Holmes, *Note by the Director: Is serious journalism still possible?* (Enstone, UK: The Ditchley Foundation, 2013): 1-12.

Minabere Ibelema, Larry Powell, and William R. Self, "Press Freedom as a Logistical Notion,"

Free Speech Yearbook 38:1 (2000): 98-115.

RonNell Andersen Jones, "Litigation, Legislation, and Democracy in a Post-Newspaper

¹⁰ Scott Gant, *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (NY: Free Press, 2011).

¹¹ *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

America,” *Washington and Lee Law Review* 68:2 (2011): 558-637.

Christopher Meyers, Wendy N. Wyatt, Sandra L. Borden and Edward Wasserman, “Professionalism, Not Professionals,” *Journal of Mass Media Ethics* 27:3 (2012): 189-205.

Michael Schudson, “Autonomy from What?” *Bourdieu and the Journalistic Field*, ed: Rodney Benson and Erik Neveu (Oxford, UK: Polity, 2005): 214-223.

Erik Ugland, “Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment,” *Duke Journal of Constitutional Law & Public Policy* 3 (2008): 113-189.

Selected Cases

Bartnicki v. Vopper, 532 U.S. 514 (2001)

Branzburg v. Hayes, 408 U.S. 665 (1972)

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)

Florida Star v. B.J.F., 491 U.S. 524 (1989)

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

New York Times Co. v. United States, 402 U.S. 713 (1971)

Red Lion Broadcasting Co. v. F.C.C., 395 US. 367 (1969)

Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979)

Panel Discussion Excerpts

Jane Kirtley, University of Minnesota; Mike Ananny, University of Southern California; Anthony Fargo, Indiana University; Jasmine McNealy, Syracuse University; Edward Wasserman, University of California, Berkeley

McNealy: I'm wondering if we could take an expansive view of the confidential sources, the umbrella of news gathering activity. Courts have said, particularly in the cases related to Daily Mail activities, when engaged in routine news gathering activities, then, you know, they'll probably be protected. However, they have specifically not defined what a routine news gathering activity is, perhaps for the best. We don't necessarily need judges telling -- or law clerks telling us what.

Kirtley: Here's a laundry list of what is routine.

McNealy: However, I think perhaps some guidance on things that look pretty routine or activities for which some kind of privilege should adhere may be a good thing. So is the use

of confidential sources a routine news gathering activity? Probably. Is the looking at -- you know, going into courtrooms or accessing courts? Is that a routine news gathering activity? Probably, since those are the cases we see a lot. Not that will be the sum total of all cases that will appear -- that news organizations will face, but perhaps looking at that kind of thing will help shape what privileges we want to protect.

Kirtley: I suppose the reverse of that is “Hacking telephones is not routine news gathering activity, at least in the United States.” So we wouldn't be arguing for a privilege for that. Even though there are a lot of journalists that would love to do that in United States with impunity, we can't call it routine. We don't sanction that for ethical reasons as well, not just because it doesn't always happen to be legal.

McNealy: Right.

Kirtley: I'm trying to deal with what Jasmine was saying without also basically setting up the Accepted Practices in Journalism statute. And then we have dueling experts testifying in the case. “Ethical journalists wouldn't do that.” “Sure they do. They do it all the time.” Do we need somebody saying this is acceptable, this is not? If you look at the SPJ code, it's aspiration, and has very few instances where it says flat out: Thou shall never fabricate. Minimize the use of confidential sources – but if you make a promise of confidentiality, don't break your promise. So it always gets me nervous if you try to cabin this too much in terms of a list. Whenever my class is reading the Florida Star case, heated discussions about the propriety of naming the sexual assault victim always follow. And I take them down the road of escalating the newsworthiness of the identity of the sexual assault victim. Florida Star is regarded as a privacy case, but ultimately the Court was having none of that, because of the way that the Florida Star got the information. They go to the cops press room and take a report away, and publish what's in it. What could be more routine than that? And yet a lot of people would say it was very unethical what they did even though it was done by accident.

Fargo: The one I have trouble with my students is the newspaper broke its own policy, and the students say that's where you should draw the line. And I go: It's not like they said, Let's break the policy today. They screwed up.

Kirtley: In Florida Star, they screwed up. Do you want to hold them legally liable for that, for making a mistake? Possibly you do. A lot of my students do. It takes us back to what's the role of ethical codes of conduct, whether they're limited to a particular news organization or whether they're formulated by an association of news organizations, such as the Radio Television Digital News Association. These are aspirational codes. They're not to be seen as creating a legal duty or obligation, and they should not be the basis of any kind of civil or criminal liability in themselves. So what's the point of them? And presumably, ethicists who argue in favor of them would say that they establish what the acceptable standards are within the profession, and we want to do it ourselves. We don't want any governmental body or quasigovernmental body doing it. To get the privileges, you've got to show that you're signing on to the standards.

Ananny: Also to independent actors, not only would they at any time subscribe to the standards, they would not subscribe to them purposely with the traditional mainstream

person. I think the case where they -- it's not that they're not following them, specifically choose not to because they reject the premises, and it's not for the society to then de-license those people or to prevent them from being there because they're still filling some function that serves a public interest as far as they're concerned.

Wasserman: That can be very unhelpful. There are a lot of codes that read like employee manuals, that have nothing to do with ethics.

Fargo: [At the Orlando Sentinel] we had a fairly lengthy section devoted just to Disney, what you can and can't accept, you can't accept a pass for your kid, and everything, and it was all logical, but every one of these is a little bit different. I always worried about that too.

Kirtley: I agree with you completely. And I have been struck when I look at a particular organization's code of ethics, that it spends pages and pages on conflicts of interest, most of which the public would think of as de minimus. We've been talking all day about the public interest. My question is: If the public were sitting at this table and were trying to articulate the privileges the press should have, what, if any, the obligations should be the flow from them? Obviously, we come from a very different point of view than the typical consumer of news and information.

Wasserman: Let me suggest one thing: Be mindful of the desire, the desire of the reporters to act independently of their own employer. I think there's a lot of mistrust. We've spoken as a press in a uniform whole under the thrall of --

Kirtley: I think that's a really important point. I notice when I go online and I'm reading the comments on many news stories, there are invariably rants to the effect that you're all part of this corporate interest and you don't care about the public at all. And it seems to be a pretty widely held view. I have my own thought about where that comes from, but that's probably beyond the focus of what you're talking about here.

Wasserman: It is interesting. You see it in that -- I follow the ethics world as I do, and the way standards seem to get set in this business. And generally it's adjudicated by management. There really is -- and the one sure capital offense in the news business is to embarrass your boss, and, you know, I don't see that as ethics-based. It's hard to codify. Which I teach the media ethics course in the fall, one of the tenets, act independently, of what or who. And traditionally, we -- in terms of government or other kinds of corporate interest, but not your own corporate interest. That was the talk I gave at your symposium, Jane.

Ananny: It's kind of simplistic. If the public were sitting around this table, many different flavors of public, which many different conditions they come together. So if the press thinks about itself as separate from the public, it doesn't recognize its constituting power to -- it sets up a false distinction between us, the press, and them the public. That actually doesn't really exist, I don't think.

Kirtley: I wonder if maybe some of the newer generation of media are more adept at the idea of creating a constituency of public support and buy in. Some of the alternative media have taken off and have a tremendously loyal following -- predicated on what? You're

independent? You haven't sold out to The Man. You don't have a tie to one of the six major communications companies. We love you because you're what we think a journalist ought to be, reporting without fear or favor, including those with corporate interests. How independent those groups really are is worthy of discussion and debate, but that may be at the heart of so much of this. If you're going to demand the title of journalist and the privilege of the press, the first prerequisite is independence, which does not necessarily mean lack of viewpoint or lack of agenda.

Ananny: I still want distinction between news gathering activities and news circulations and thinking about the journalist versus the press. Sort of arguing for this, should we include Google in the definition of the press, and Facebook, because they certainly look like an institutional context responsible for speech. Even sometime a more effective one for some demographics than other people. So separating out this notion of privilege from a reporters privilege or a news gathering privilege versus a privilege that might be more related to the circulation of speech, maybe there's a bifurcation. It's not Facebook, not in the content creation business, but they're in the circulation business. Is there a different set of criteria that we would apply to a privilege under circulation context versus production context?

Kirtley: I think the idea of circulation or dissemination can fall under the press clause, but it certainly falls under the speech clause. There's no question if you're doing that, you're speaking. If you're got information that you're giving out, you're speaking. Now exactly what privileges you enjoy as a consequence of it being speech, that's another discussion.

Wasserman: I agree. And information like Google, what privilege does it need? Where does privilege become an issue?

Ananny: We were talking about this public right to hear. Google. It's not going to let you know how its algorithm works, so it is going to go into the realm of proprietary business.

PANEL III

The Future of the Press and Privacy**Clay Calvert**

University of Florida

*with***Tom Bivins**

(University of Oregon)

Amy Gajda

(Tulane University)

Amy Sanders

(University of Minnesota)

Stephen Ward

(University of Wisconsin-Madison)

Intimate details about the sexual affairs, orientations, and proclivities of politicians. Decades-old misdeeds dredged up from a now-famous person's past. Images of the dead and dying, captured at the scene of a terrorist attack. Clips from a celebrity's stolen sex tape.

Which, if any, of these should the press publish?

The question, of course, is anything but new. The longstanding tension in the United States between personal privacy and press freedom was seminaly articulated more than 120 years ago by Samuel Warren and Louis Brandeis in their classic *Harvard Law Review* article, "The Right to Privacy."

Today, the friction is exacerbated by multiple forces and factors. Changes ranging from the generational to the technological, accompanied by shifting notions of what constitutes journalism, who constitutes the press, and the reality that anyone and everyone in the Internet era is a content creator wielding immense power to destroy another person's privacy, provide a propitious opportunity for law and ethics scholars within AEJMC, as well as the organization itself, to embrace new agendas related to the relationship between privacy and the press.

Definitional difficulties have long plagued the study, from both an ethical and legal perspective, of the relationship between privacy and the press. Privacy itself, of course, is a contested concept, with definitions ranging from the right to be left alone to the ability to engage in autonomous decision-making and to safeguard one's dignity. In turn, traditional concepts affecting the nexus between privacy and the press – newsworthiness (a defense to the legal cause of action known as public disclosure of private facts), the public interest, the public need and the public's right to know – occasionally are bandied about today by some journalists and others with little thought or care for what they really mean or once meant. When this occurs, such terms become mere empty vessels, devoid of real meaning, or what John Stuart Mill in *On Liberty* might have called "dead dogma." More rigorous and serious intellectual work on both explicating and justifying the continued use of such traditional

privacy-related concepts in a new media world thus is essential today. Definitional precision and justificational support thus are perhaps starting points for a new or reinvigorated agenda for privacy-and-press scholars.

For instance, the concept of “character” served as a justification for some journalists who covered details about the sexual lives of politicians and public officials such as Gary Hart and Bill Clinton in the 1980s and 1990s. But what really does “character” mean and, in turn, should character provide a sufficient ethical and/or legal rationale for exposing the intimate details of a person’s private life, be the person or a public figure or a private individual?

This second half of this query, in fact, raises another important issue for scholars in AEJMC to explore: Should the private/public distinction between individuals be abandoned and replaced by a presumption that everyone today is a public figure, recognizing and acknowledging there may be some differences in a person’s circumstances that might affect media practices, such as being a minor? At first blush, this might seem like a radical idea. But jettisoning the private/public dichotomy would seemingly foster an egalitarian conception of privacy, perhaps with journalists and other information disseminators recognizing and self-policing a certain baseline of privacy rights that *all* individuals – be they politicians or private citizens – possess in the name of human dignity. It would also seemingly shift the onus to all individuals to protect their own privacy interests, recognizing that they are presumptively public figures subject to everyone’s scrutiny. Similarly, scholars might ask whether the onus for protecting privacy concerns should shift depending on whether the press is operating in the public interest or in response to what the public finds interesting.

While U.S. law long has recognized that public officials and public figures voluntarily assume a certain level of risk that some aspects of their ostensibly private affairs are fair game for public consumption, it is increasingly difficult to draw clear lines between public and private persons in the Internet era. For instance, is it possible for an individual who might be characterized as an online, micro-level celebrity due to his or her self-revelatory proclivities to also be considered a real-world private person by professional journalists, citizen journalists and bloggers when it comes to deciding whether to reveal or conceal information about that individual?

We now live, after all, in a hyperly mediated world where people voluntarily and freely post information – some of it almost exhibitionistically – about themselves on online social media networks, all the while counting how many “Friends” and Twitter followers they have. Parsed differently and more provocatively, *is the desire of a person to share information and live connectedly on social media the same as being public person?*

For ethicists, this question also lays bare the difficulty of constructing an ethics of privacy in a world that is increasingly not private – a world where people live their lives publicly, a world where to be real is to be interconnected. Is it even possible to create an ethics of privacy that is applicable for everyone and anyone engaged in publishing, not just for professional journalists?

Surely any concepts and principles that are adopted in an ethics of privacy, whether they be traditionally problematic ones such as newsworthiness or new ones AEJMC scholars and others might develop, must be flexible enough to address the complexities of a living in a new media world. Adaptability of principles to technological changes and shifts in generational expectations of what should be (and what is) private seems essential. Scholars should also consider whether it is at all desirable or even possible to construct such concepts in way that is globally inclusive.

The use in the paragraph above of the phrase “AEJMC scholars and others” is purposefully chosen because the members of the “Privacy and the Press” panel are unanimous in their belief that AEJMC should encourage and facilitate greater discussions on

the topic of privacy and the press between the faculty of law schools and the faculty of journalism/communication schools. First Amendment academicians housed in colleges and schools of law should understand the interests and concerns of journalism and communication educators about the relationship between privacy and the press. Likewise, ethicists and legal scholars within AEJMC-affiliated programs must understand the perspectives and viewpoints of law school faculty who specialize in areas affecting press freedom. Cross-pollination is essential for a more complete understanding of the legal and ethical issues revolving around privacy and the press today.

Furthermore, the “others” with whom AEJMC media ethicists and legal scholars must interact include scholars with similar interests but who hail from different countries where expectations of, and safeguards for, privacy may be very different than they are in the United States. This is particularly important in an interconnected global-media environment where the disclosure of private information in one country via the Internet may well affect and harm an individual who resides in another nation.

For instance, the so-called “Right to be Forgotten,” which militates in favor of the erasure from the Internet of certain facts and data about an individual, recently has gained traction in the European Union. In the United States, however, the First Amendment’s protection of the press seemingly safeguards media outlets from being forced to remove or takedown information from their websites. Indeed, scholars within AEJMC must gain awareness of how concepts of and affecting privacy are relevant in a global media environment and, in turn, undertake study and consideration of how can global privacy concerns like the “Right to be Forgotten” and the laws of other nations might affect the practice of journalism in North America.

The Internet, of course, is a game changer when it comes to the potential damage done by privacy revelations, given the reach, permanence and accessibility of Internet-posted information. The members of the “Privacy and the Press” panel are unified in their belief that journalists, bloggers and other public communicators must weigh into their initial decision about whether to publish an ostensibly private fact the twin realities it will circulate in perpetuity once posted on the Internet and that it is easily retrievable.

Another privacy-and-the-press matter ripe for study and consideration is the role and relationship among journalists, ethicists, courts, and the public regarding privacy expectations and the articulation of principles affecting legal liability for the disclosure of private information. Should courts defer to the privacy and news judgments of the press, bloggers and/or others who routinely engage in the widespread dissemination of information to the public? Should courts defer to the privacy judgments of the public?

This last query, in turn, suggests that scholars should consider how to empirically measure senses of privacy that are actually held by the public and what the public considers to be in the public interest. For example, is counting the number of clicks on, or views of, a particular online news item involving what might seem to be a private fact a legitimate methodology for measuring public interest or newsworthiness? Should news organizations make use of formal or informal bodies, comprised of members of the public, to obtain their input about privacy concerns? Such bodies might serve as vehicles through which the public has the opportunity to articulate its notions of what should be private and what is newsworthy. Ultimately, ethicists and legal scholars must consider whether privacy concerns should be consumer driven, professionally driven or some combination of the two.

But it is more than just ambiguous notions of newsworthiness and the public interest on which there may be a disconnect between journalists and the public when it comes to privacy. In the legal theory of public disclosure of private facts, a plaintiff can only prevail if the publicity given to a private fact would be “highly offensive to a reasonable person.” Scholars should study what may be shifting notions of offensiveness; a public revelation that

once might have been considered, in legal terms, a “morbid and sensational prying” might not be considered so today.

Furthermore, to the extent that journalists and/or members of the public either do or should have a role in helping to articulate at least some of the privacy principles deployed by courts, the members of the “Privacy and the Press” panel are united in their belief that AEJMC has a duty to reach out to news organizations, public communicators, and informational consumers to encourage them to engage in greater discussion of issues affecting privacy and the press. In fact, AEJMC should consider taking the lead on developing educational modules for teaching about privacy and the press at every level, including middle schools and high schools.

As younger generations post information about themselves online and allow both private companies and the government to collect massive amounts of data from them, they must be aware of the concomitant risks and dangers to their own privacy. If privacy is a social, cultural, and legal construct that varies in definitions and expectations from generation to generation, then minors must become informed stakeholders in the debate about shaping the future of privacy.

A critical privacy-and-press issue for scholars to investigate and for news organizations to consider is the online revelation of private facts *not* by journalists themselves, but by individuals who post comments immediately following stories on a news organization’s website. It may be, for instance, that a news organization has deliberately withheld from an online story certain information that it considers privacy invasive. Yet, an individual who reads the online story might post a comment for all of the world to see that reveals the privacy-invasive fact. Thus, by supposedly facilitating an open forum for greater reader participation, journalists may be surrendering what power they still possess to police and protect certain privacy interests.

Ultimately, privacy is a moving target and expectations of privacy may prove cyclical. Younger generations that today live such much lives publicly may, as it were, want their privacy back someday. AEJMC should embrace the mission of educating the public about the interests that lie in the balance between privacy and the press.

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Panel Discussion Excerpts

Clay Calvert, University of Florida; Tom Bivins, University of Oregon; Amy Gajda, Tulane University; Amy Sanders, University of Minnesota; Stephen Ward, University of Wisconsin-Madison

Bivins: A general theme of respect for human dignity, which was pointed out by Kant quite a long time ago, has become part of what we think human dignity is – privacy is part of the concept of human dignity for many. It is related to how we understand ourselves as social beings and our various relationships that we have with other people and the idea of respect, which is encapsulated in a number of those articles from various constitutions and writings....

Basically if we accept, as Kant proposed, that autonomy is necessary for a moral life, then we open the door to the notion of privacy, because autonomy implies control over yourself and so it also implies control over your own privacy, the right to be left alone. So if you believe that human beings are, in fact, autonomous, then it follows that they deserve privacy, because it is part of autonomy. And the less autonomous you are, the less control you have over yourself – Kant's argument and a lot of other people's argument.

On Character as a Journalistic Rationale for Exposing Private Matters

Bivins: In my ethics class when I talk to students about this, I mention the Clinton-Lewinsky affair. And the argument at the time was that – journalists were still pretending to adhere to the notion that if a public official's private actions don't affect their public performance, then we needn't worry about it, but, of course, we know that is not true. They are going to run it anyway.

Gajda: I disagree, but you can go on. I know for a fact that a lot of – I mean, working as a journalist, I knew certain facts that I was not going to report involving politicians.

Bivins: Sure.

Gajda: So I think there are a lot of stories out there that are not being reported, and so I think it is unfair to sort of paint with this broad brush and say all journalists are going to go out there and report it, because they are not. And it is ethics that is keeping them from not reporting these things.

Bivins: I am not convinced that is completely true either. I spoke to two CBS correspondents – it must have been 12 years ago or more – one of them was following Jesse Jackson around. It was at some point where he was making this kind of furtive run for the presidency.

They were following Jesse Jackson around, and she said it was basically open knowledge he was having an affair with his secretary. Everybody knew it.

And a student said, "Well, why didn't you report that?"

And she said, "We all knew he didn't have a chance of being president, so it didn't seem really worthwhile."

And then another student said, "If someone else had broken the story, would you have gone with it?"

She said, “Of course. Why not?”

Gajda: They knew about Clinton, too, way before Gennifer Flowers and way before Lewinsky.

On Traditional News Media Following Stories Broken by Non-traditional Media

Sanders: I think...one of the biggest issues today is that the institutional media, in instances where they would have previously held back, are now covering things that they otherwise wouldn't cover because Gawker or some other entity breaks the story.

Bivins: That's right.

Sanders: I think that is a huge issue....

On Privacy and the News Media Allowing People to Post Comments Online

Gajda: I think that there is an issue with media that allow comments to stories – times where the story itself will withhold some information, but then comments are posted by readers afterward that will reveal information that the journalists purposefully left out of the story....

What I think is deeply intriguing is this notion of public comments after the story so that the newsroom can claim that they are still up on that high ethical mountain and it is just freedom of speech that gives the public the ability to comment on a story in a way that denigrates or invades the privacy of others.

On Gauging the Public Interest and Newsworthiness in Private Information and the Dispute Over Contested Concepts Like Public Interest and Public Need:

Gajda: What I think is really interesting...is the whole public interest – how we gauge public interest. What is possible now that wasn't possible before is that we have the ability to actually gauge public interest, which is in clicks on certain stories.

Ultimately I think that the courts are restricting journalists more on newsworthiness grounds, but very recently a federal court decided a case involving Gawker and a sex tape posted by Gawker of Hulk Hogan. There is full frontal nudity....

Hulk Hogan brought this claim against Gawker and the court went much further than it needed to. It discussed the newsworthiness and said basically, “who are we to decide what is newsworthy? If Gawker itself says that the sex tape is newsworthy, therefore, it must be newsworthy.”

So it was shockingly differential standard there. And interestingly, I looked two days ago to see how many people had viewed that sex tape, and four million people had.

And so I tend to agree...that sort of this public interest really isn't the right definition for newsworthiness, because I think that probably most mainstream media would not show that videotape, but I am sort of at a loss to come up with an adequate means of measurement.

Ward: There are two senses of newsworthy ambiguously playing around here. One, what I would call the empirical sense of newsworthy, just as a matter of fact what do people have an interest in. That is one definition.

But I think responsible journalists try to work with a normative definition that tries to insert norms – it's only newsworthy if it follows certain norms. The pressure, of course, is from the empirical side.

Gajda: Well, my worry is that if courts do latch on to public need or public injustice, then we will have many, many, many more cases that find for plaintiffs and leading, I think, to a much more timid press if we decide that public injustice is the standard....

If we look to need, I think a need is more rigid than public interest. And if we want judges to be able to find media not liable in these sorts of cases, we do need to be looking more at public interest as opposed to public need.

Ward: Okay.

Calvert: That is interesting.

Bivins: That also flops the direction – what I am looking for here – public need, you put the onus on the public. They in some way indicate their need.

Gajda: Right, which they can do now.

Bivins: In the way they can indicate their interest in the new sense of the term “interest,” but if you the use, as Stephen pointed out, the original sense of the public “interest” it puts the onus of the decision of the public interest on the journalist and not way around. So need puts it on the public – they decide their need and interest in the new sense. In the old sense of public interest, it is the journalists who make that decision, “Is this in the public interest or not?”

And lots of people do that. Lots of other professions think about the public interest in the sense of public need and like that. And it just it struck me that you are moving the decision point from one party to another party by using a different of word.

On Journalism Ethics Codes, Privacy and Legal Liability

Ward: The SPJ code, the code was always – at least by the people who created it – considered to be a balancing of principles. You don't just take privacy out and say that is all you have got to worry about. And I would put a lot of money on the fact that, in fact, what the writers of the code would put the emphasis on is seeking the truth and reporting it, the very first principle. Of course, there is a ranking of those principles.

Gadja: Yes.

Ward: So what I am saying is that there is a naive view of the code – that is the problem with giving interpretation of this over to a judge or to someone unless they are schooled a little bit in how ethical reasoning is supposed to work in these cases.

Bivins: Well, that is absolutely true. The idea of codes of any kind, codes of ethics, you know, the intention of the people who put the code together is really what you need to look at first the same way you would with a bill of rights, for instance. The idea that people who put these together often think of them not as rules but as guidelines –

Gajda: Right.

Ward: – to be balanced.

Gajda: ...and that is what SPJ did then. Immediately they added that asterisk: Oh, by the way, you can't use this against us because of the First Amendment.

Bivins: That line in *Pirates of the Caribbean*, "They ain't so much rules as guidelines."

Ward: I actually helped write the first code of ethics for the Canadian Association of Journalists, and I know the interpretation they have, and it is what you are talking about, the balancing. It is guidelines. It is aspirational, for all of the reasons we have mentioned – that they were worried about, people using it as a tool to fire reporters or legal action.

On Educating Others About Privacy and Newsworthiness

Sanders: The educational component can't be stressed enough, because it is not, in my opinion, just about educating citizen journalists and bloggers and others. It is also about educating consumers.

Gajda: Yeah.

Ward: The public.

Sanders: The public. And I think particularly when we are looking at something that an organization like AEJMC could do, there is a huge educational outreach component for our students as the next consumers of this information.

Because I grew up in a house where when my parents came home, they read the newspaper.... Now we have students and media consumers who no longer go to what we would think of as institutional media. So how do we then encourage them to demand good content from –

Ward: And to be able to distinguish it. And you have got to go back into high schools. You can't start teaching this, as you know, for undergraduates in journalism school.

Calvert: So another item on our agenda is reaching down into the education system, in terms of educating students at all levels about concepts related to privacy and norms of newsworthiness.

Sanders: And to flip that on its head, I think there is also the educational component about privacy. Anyone that interacts with high school students and college students knows that their notions of privacy are very, very different.

PANEL IV

The Future of the Press and Secrecy**Jeffery A. Smith**

University of Wisconsin - Milwaukee

*with***Robert E. Drechsel**

University of Wisconsin - Madison

W. Wat Hopkins

Virginia Tech

Derigan Silver

University of Denver

Erik Ugland

Marquette University

The idea that “knowledge is power” can be found in a Biblical proverb and in a statement by the philosopher-scientist Francis Bacon in the late sixteenth century. By the time James Madison and Thomas Jefferson were making the same connection in matters of government, Americans were creating a representative democracy with popular sovereignty and guarantees for freedom of expression meant to protect participation in the processes of self-government.

Rudimentary conceptions of a right to know can be seen in the founding documents of the United States. The eighteenth-century Americans who revolted against abusive British rule listed grievances in the Declaration of Independence that included the difficulty of gaining access to depositories of “public Records.” The Constitution they wrote requires the president to give “Information of the State of the Union,” Congress to publish journals of its proceedings, and courts to allow criminal defendants a “public trial.”

Four days after the First Amendment was ratified, Madison published an essay in the *National Gazette* that stressed the importance of maintaining a free press and other ways of influencing decisions. “Public opinion sets bounds to every government,” he said, “and is the real sovereign in every free one.” Discussing the need for education in 1822, Madison insisted that a self-governing people had to “arm themselves with the power which knowledge gives” or expect “a Farce or a Tragedy; or, perhaps both.” Secrets, which were understood to be limited to highly sensitive matters of military or diplomatic necessity, were few in the early republic and leaks were not prosecuted.

American officials developed a culture of secrecy while fighting world wars, communism, and terrorism. Atrocities, assassination plots, coups, incursions, black sites, detentions, “enhanced” interrogations, drone attacks, enormous surveillance operations, and even legal opinions have been covered up. People who exposed historical information or facts already known to enemies could lose their livelihoods and their freedom. Journalists could be harassed, spied on, and denied the knowledge needed to perform their constitutionally protected tasks. Since the attacks on September 11, 2001, as the *Washington*

Post reported in its “Top Secret America” series in 2010, national security activities have become so massive and so much has been classified that no one really knows how many people are involved, how many programs exist, how much is being spent, and how much effort is wasted.

Attempting to analyze immense amounts of information in time to be useful can be frustrating. Another exercise in futility is trying to contain information when more than 1.4 million Americans have top-secret clearance, cyber-warriors are constantly attacking, and legions of hacktivists are committed to confronting institutional power as a matter of civil disobedience. Courts have been reluctant to rule that leaked information is always protected by the First Amendment or that domestic surveillance operations have an unconstitutional “chilling effect” on expression.

Secrecy is a double-edged sword. Attempting to cut off access to facts that adversaries might want can slash the flow of information that is the lifeblood of democracy. Left without knowledge of what their servants in government are doing, citizens can become politically disengaged or groundlessly suspicious. Revelations about reprehensible actions performed in their name can foster resentment and cynicism. When not held in check by public opinion, the rule of law, or international norms, government authority loses its legitimacy. The concealed operations of a security-obsessed state inevitably include a variety of reckless and arrogant abuses of power that diminish moral stature and credibility. Democracy dies to the degree citizens cannot control or even understand the operations of their government.

Yet, few can seriously question the reality that some narrow exceptions to openness are necessary and legally acceptable at times. The most significant action most people ever take as citizens, voting, is conducted by secret ballot. Journalists themselves can expect confidentiality for their sources. But no amount of consensus about concealment should be regarded – or cynically misused – as a mandate for sweeping secrecy. Americans typically expect a transparent government that judiciously reserves its power to hide its activities for truly extraordinary situations.

In the absence of express requirements for openness or external checks, excessive secrecy is inevitable. In the unusual instances in which government officials are challenged to justify a lack of disclosure, their tendency is to rely on categorical rationales such as national security, public safety, due process, or privacy. Such concepts have social resonance, but are not automatically sufficient to support acts of suppression.

Exceptions to the general expectation of openness are usually based on dire warnings that turn out to be uninformed, illogical, or deliberately alarmist. The fears themselves, even when presented in good faith, are often illusory. Disclosure rarely has calamitous effects. Democracy requires a high degree of transparency that can involve some necessary risks or perhaps simply some ingenuity in avoiding harm.

Reconciling openness and secrecy is more complicated than merely fine-tuning doctrinal law; it is also a matter of significantly changing behavior. The most carefully worded law will accomplish little if those who implement it have been absorbed into a culture of secrecy. Officials who are supposed to serve the public have assumed broad powers to decide what citizens can know and even think. The federal government has a long history of resorting to repressive laws, loyalty oaths, access restrictions, censorship, propaganda, news management, and secrecy.

The volume of classified documents is exploding. A November 2012 report to President Obama from the Public Interest Declassification Board noted that federal agencies annually create petabytes of classified information, more than the amount of information that had been declassified in the previous seventeen years. At this rate, the report says, the

backlog of records awaiting declassification will grow exponentially. (Two petabytes is the equivalent of the contents of all U.S. academic research libraries combined.)

Such numbers suggest that the only hope for meaningful change is stopping over-classification before it occurs. Doing so will require that openness be the norm. Some will fear blame for any adverse results, but dangers also exist when citizens cannot scrutinize what is being done with the authority they ultimately possess. The workings of excessive secrecy regimes can frustrate even the most basic information gathering and generate aggressive efforts to track down and severely punish laudable whistleblowers.

Officials at all levels of government need to be committed to the principles of transparency that undergird the entire democratic system. They cannot do their work properly if they do not understand that public knowledge is clearly part of our constitutional ethos and an essential precondition of self-governance. They should neither be placed in a position of having to violate a law to provide information citizens should have, nor be conditioned to believe that they must constantly make balancing decisions that favor suppression over disclosure.

Restrictions on information need to be minimal. Otherwise, the power of knowledge is being usurped. Neglecting the need for openness is not an option. If we seek to be a transparent society in addition to a free-speech society, we must begin to treat all acts of secrecy as illegitimate unless they are proven genuinely necessary and authorized expressly by the people's representatives in government.

All government records, meetings, and actions ought to be routinely open to public inspection. Any exceptions ought to be clearly outlined by statute and judged by a standard akin to the one used by the Supreme Court to evaluate prior restraints. Specifically, any government system or act of secrecy ought to bear a *heavy presumption* against its validity. The burden must be firmly placed on the suppressors of information to justify their restrictions.

A first step for cultural change could be a legal change recommended by the Declassification Board report: provision of a stronger protection from punishment or retaliation for good-faith errors in classification that might lead to harm. Government employees must also be trained from the beginning about the value of transparency, not merely the importance of secrecy, and those at the top must model a commitment to openness. Change from the inside is essential at a time when the institutional press and its resources for fighting secrecy are shrinking.

Technology has brought a massive shift in the ways people can create and consume information. The "practical obscurity" of having difficulty in accessing information may be diminishing in some ways with the advent of electronic records, but hurdles remain when the custodians of government information refuse to comply with requests for materials that have not been disclosed.

Vast amounts of government information can be released or leaked with little editorial input. The ability of non-traditional media organizations to disseminate government secrets does not by itself mean that the public will gain useful knowledge. Society still needs the institutional press to make sense of information. Professional skills of summary and analysis have critical significance in a nation that possesses so much global military and economic strength.

A commitment to freedom of the press in the future must include a commitment to the free exchange of information, even information that leaders would prefer be secret. The disclosures associated with the Pentagon Papers case, the Watergate scandal, the Iran-Contra affair, and post-9/11 secrecy are examples of how the dissemination of buried facts can prompt needed debate and keep those in authority accountable to public opinion. The three

branches of government cannot always be relied upon to perform their checking functions in isolation.

The watchdog role of the press is severely limited when public servants are not allowed to divulge important information or journalists are not able to publish what they know without fear of prosecution. Therefore, the United States should provide better protection for whistleblowers who disclose classified information concerning fraud, waste, abuse, illegal activities, or violations of basic human rights and international law. Reporters should have their work protected by a strong federal shield law.

Congress should amend any sections of the 1917 Espionage Act and other federal statutes that could be used to prosecute leakers or journalists who disclose secret information by adding *scienter* clauses that require evidence of both an intent and likelihood of harm to national security. While the Espionage Act was only used three times in its first 92 years of existence to prosecute officials for providing information to the press, the Obama Administration has already used the law or the Intelligence Identities Protection Act of 1982 against at least seven government leakers and has not ruled out prosecuting journalists. The Espionage Act must be used only as intended—to prosecute true acts of espionage and attempts to “aid the enemy.”

Federal and state governments have enacted a matrix of laws and regulations designed to require substantial government disclosure. Those laws are of little use, however, without consistent and aggressive enforcement and a sufficient commitment of resources. The potency of open government laws is too unpredictable and too dependent on those in charge of their application. Government officials often go to great lengths to circumscribe the very tools used to hold them accountable.

Becoming a more transparent society requires a renewed commitment to the presumption of openness. Sufficient funds should be allocated for prompt compliance with requests for information. Appeals of any denials should be made swiftly by an independent body.

In a free and self-governing society, access to information must be the default. The information in the hands of officials belongs to the people who elect them and give them responsibilities. The people do not abdicate their governing authority. They retain their basic right of access to information.

Transparency is not the solution to every problem and may not always be required, but citizens must reverse the trend of government knowing more and more about the people and the people knowing less and less about the government. Officials who are subject to the check of public opinion are less likely to violate the standards they are expected to uphold.

Access to documents and decision-making processes is a prerequisite of a democratic society. A heavy presumption against government secrecy preserves the power of knowledge that the people must have.

Recommended Reading

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- Transforming the Security Classification System: Report to the President from the Public Interest Declassification Board, November 2012.
<http://www.archives.gov/declassification/pidb/>

Panel Discussion Excerpts

Jeffery A. Smith, University of Wisconsin-Milwaukee; Robert E. Drechsel, University of Wisconsin-Madison; W. Wat Hopkins, Virginia Tech; Derigan Silver, University of Denver; and Erik Ugland, Marquette University

Smith: Are there reasons for transparency that we don't know about or haven't thought about? It seems like there's been a lot of discussion about the topic for hundreds of years. Is there anything new under the sun?

Drechsel: What would be a list of the positive functions that transparency serves?

Smith: The public needs to have checks on power.

Drechsel: One of the first things that comes to my mind is also fairness. If you have access to documents that government keeps, you have a way of determining whether or not you're being treated fairly. Are my property taxes being assessed fairly compared to my neighbor's?

Smith: I guess that would fall under the category of checking value. You're pointing out, I think, an important reason for why we would have the checking going on, because we do want government to act in a fair way.

Silver: Just to play devil's advocate for a second, I think one of the arguments that people make in the readings that we had was that that is all fine and well in theory but it doesn't actually work. Sort of criticism of the marketplace of ideas that the marketplace doesn't work. I think one of the arguments is WikiLeaks has not made the average person any more

politically active than they were. So, do we want to make the argument against that and say yes it actually has? Or do we want to say even if it hasn't, it at least gives the people the opportunity to and so that's why it's a good idea unto itself regardless of what the actual outcome is.

Hopkins: And we need to recognize that there are disadvantages to transparency particularly in local government. Birchall points out that transparency can encourage self-censorship.

Ugland: Well, you can say the same thing about WikiLeaks, for example. Derigan is pointing out the idea that this torrential downloading of information doesn't necessarily lead to a more enlightened public, that the good of transparency is not self-executing, that somebody has to put it in context, somebody has to do something with it for it to be meaningful. But more to the point, it can have the opposite effect of what was intended in the sense that government then becomes less candid, more inward-looking, more closed off. They might then double-down on their efforts to prosecute leakers, to plug the holes. And so it's not just that our conception of the good of transparency is sometimes inflated. Sometimes it's completely the opposite of what we intend.

Silver: And sort of along those lines is executive privilege, the idea that the president's advisors will be more candid with him if they know that information is confidential.

Smith: Candor is one of the rationales, of course, for operating behind closed doors, but you have to wonder where is the responsibility to the public?

Ugland: I think one argument you can make is that government is just an extension of us, and to the extent that the government takes actions that we disagree with or certainly that we find to be illegal, immoral, ill-advised, if we're not aware of these things then we're made to be kind of unwitting and unwilling accomplices to the evil or ill-advised acts that are committed. Transparency is a way of enabling us to define for ourselves and to the rest of the world who we are.

Smith: In theory better decisions are made with transparency and more discussion. Are we getting into a marketplace of ideas concept there?

Silver: I think you want to talk about "better" because Fenster talks about this. It slows things down and it makes things difficult but that's the prerequisite of democracy.

Drechsel: I would use the word legitimacy, that it lends a sense, an aura of legitimacy to a decision. You may or may not agree with the decision, but it's tougher to question its legitimacy when you've been able to watch, hear, read progress.

Drechsel: Without being explicit about it, we have been hinting of a couple of underlying things. One is that you can't talk about a right to know without talking about people's obligations as citizens, because a right to know in and of itself is meaningless if people don't fulfill their roles of citizens in a representative democracy. And related to that is the whole question of what do we mean by representation in the first place? Maybe I'm not so bothered by drone strikes, let's say, if I voted for President Obama on grounds that, well, as a general matter I think he shares my values, and with confidence that he shares my values, then I trust him to do the right thing; as opposed to what I think somebody who represents me ought to be doing is to be constantly monitoring me and all of the other constituents to see what it is -- regardless of what that representative thinks is the right thing to do -- what is it that you want me to do? And that makes things messier, too, you know. In the former you might not care so much whether you get that memo. You might disagree after the fact with the implications of what's happened, in which case then next time you vote for somebody else. But you might care a lot more if you're expecting your representative to try to get a sense of what it is that most constituents want?

Smith: One of our purposes is to talk about what might be worth doing. Are there solutions for improving citizen awareness or getting people to be more concerned about their obligations as citizens?

Smith: The marketplace of ideas in a sense is involved in a lot of things we do every day. Jury trials are like a marketplace of ideas. Scientific method is basically a marketplace of ideas. So it's not really a strange notion. We have to accept the fact we're not always going to have perfect results but what else have we got?

Drechsel: And there are marketplaces of ideas and marketplaces of fact. That line has never been entirely clear to me. It's one thing to argue about who is right about a particular proposition but, you know, it's also important to have a marketplace where the raw material is available to formulate and justify whatever those ideas are.

Smith: These days we have interest groups and lobbyists, people whose job it is to argue things in public and especially in Congress. So they dig things up and they are doing the job journalists could do, in a sense, but they are not necessarily being objective about it.

Drechsel: But some of them don't have an agenda necessarily. So you know one of the most useful sources of, say, in Wisconsin campaign finance information is not the government accountability board that collects all this stuff in the first place but makes it incredibly complicated to access it, but rather, it's the Wisconsin Democracy Campaign, where they have taken it upon themselves to take all this data from the government accountability board and put into a form that's much more accessible and useful. I tend to think that when the best education occurs is when someone says I missed the boat here but these documents are available, this information is available, so next time the school board makes a bone-head decision, I know where I can go and I know where I can find information. It's not our job to force the horse to drink but it's the government's job to make water available, it's our job to encourage that this be available so that if I ever want to, I know I can find the information I need.

Silver: Isn't that what the court said in *Citizens United*? They said yes we know that decision might distort the marketplace but the solution to that is disclosure, is that we upheld the disclosure laws because transparency -- and they use the word "disclosure" not transparency - - but transparency can correct.

Drechsel: So is that sort of on our list of benefits of transparency? Because that's a good example: campaign finance disclosure. Maybe it's kind of a watch dog thing -- but it's valuable, as the court said. It's valuable because then you can make a judgment as to how to assess the argument that's being made and the communication that's being funded.

Silver: Is that self-government?

Ugland: Self-government. I think being just being able to make informed decisions.

Smith: Is that realistic to expect that somebody is going to find out who is behind a campaign ad and then that's going to affect their opinion about the content of the message?

Silver: I actually had a really interesting guest speaker come to class who has been involved in Colorado politics all the time and he was incredibly critical of *Citizens United*. I had never seen it this way. He says *Citizens United* actually got it backwards. What they have should have done, instead of allowing all independent expenditures and banning contributions, it should have allowed all contributions and completely banned independent expenditures, and it should have disbanded PACs because the ability of a citizen to figure out who runs "Americas for the American Way" -- because that's what all PACs are named. None of them are named "Big Oil PAC," they are named, "Americans for Energy Independence," -- it's ridiculous but if you only allow people to contribute under their corporate name and those contributions had to go directly to the politician, then the politician couldn't say, "I don't like that ad and I don't even know who is running that ad so don't associate with that ad." They would have had to run the ads themselves. Then you would associate the message with them and you would know exactly the corporation that was giving money to that individual through a contribution. I thought that was a really novel way to look at them. I had never considered that way.

Smith: Can you really realistically ban groups from expressing something?

Hopkins: That's part of the messy part.

Ugland: We don't have time to sort through that one either. I forget who was raising the initial point about whether or not it's realistic to expect the public to find this information. It's kind of what you were getting at Derigan.

Silver: Provide the water.

Ugland: But maybe it's enough that it's there and they are assured by the fact that it is there and that somebody can access it, that the politicians themselves or those who govern us will be more circumspect knowing that it's out there, but then again, there's this sort of charge to the press and all of us to make people care.

Silver: That was my other question. Does that sort of get back to this bigger issue of the whole point of this summit? The role of the press in the future. A journalist's job is no longer

to necessarily get the information because the information is super available. The journalist's job is to highlight what information is important. So in the age of WikiLeaks data dumps it becomes even more important for a journalist to say hold on, hold the phone. Yes, this is 10,000 pages of documents but here are the five that really matter. And I think Fenster even brings this up, he says the first data dumps of WikiLeaks were not successful. It took the press to mobilize the public's attention to focus on these issues. But again, we can't get the public to focus on these issues if the water is not even there.