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Panel III: The Future of the Press and Privacy

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PANEL III: THE FUTURE OF THE PRESS AND PRIVACY

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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."¹

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

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¹Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

– 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 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 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 a 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 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 a 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 Web sites. 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 Web site. 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 so much of their 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.

RECOMMENDED READINGS

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PANEL DISCUSSION EXCERPTS

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 twelve 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, "[W]ho 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 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.

Gajda: 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: . . . [T]o be balanced.

Gajda: . . . [A]nd 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.