

2017

International Perspectives on Privacy and Free Expression: Concepts, Conflicts, Consequences

University of Michigan Law School

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MICHIGAN LAW
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International Perspectives on Privacy and Free Expression: Concepts, Conflicts, Consequences

FRIDAY, SEPTEMBER 22, 2017

South Hall 1225

University of Michigan Law School

events.law.umich.edu/privacy

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On behalf of the University of Michigan Law School, welcome to our conference, “International Perspectives on Privacy and Free Expression: Concepts, Conflicts, Consequences.”

Issues of privacy have never had so strong a claim on our scholarly consideration and practical concern. Every day, governments, institutions, and corporations make decisions that affect our privacy. Every day, each of us must decide how much of our privacy we will surrender. Every day, we find ourselves in increasingly urgent need of legal, policy, and normative answers to the questions that meteoric advances in technology have thrust upon us.

This conference contributes to the energetic and transnational dialogue currently going on about privacy: How do we define it? Is it a right, an interest, a value, or something else? Privacy against what? Privacy from whom? Is privacy necessarily in tension with free expression? Or is it often an essential predicate to it? How have different political regimes answered these questions? How do entities and individuals navigate those conflicting transnational approaches?

We are delighted that so many distinguished privacy scholars, policy makers, stakeholders, and journalists have agreed to participate in our panels and lead our discussions. We look forward to a deeply thoughtful conversation. We are pleased that you have chosen to join us and hope that you will contribute during the question and answer portions of our program.

I would like to thank the members of my planning committee—Elana Zeide, Gautam Hans, and Ashley Messenger—for their critical assistance in organizing this event. Special thanks also to Liz Barry for her help on numerous fronts. Finally, thanks to the University of Michigan Law School, the Office of the President of the University of Michigan, and Microsoft for their financial support.

Len Niehoff, '84

Professor from Practice

University of Michigan Law School

AGENDA

FRIDAY, SEPTEMBER 22

All sessions will take place in South Hall 1225 unless otherwise noted.

8:30–9:05 A.M. **Continental Breakfast**

9:05–9:15 A.M. **Welcome**

Len Niehoff, '84, *Professor from Practice, University of Michigan Law School*

SESSION I: PRIVACY: DEFINITIONS AND FOUNDATIONAL CONCEPTS

9:15–10:30 A.M. This session will explore a range of foundational questions: What is privacy? Should we think of it as a right or an interest? Is it exclusively individual and personal or does it have a collective dimension? Is privacy a value in itself? Or does its value rest in its promotion of other values, such as self-definition, autonomy, property, and/or dignity? Does it protect us against encroachments by the state, or by private actors, or both? How have different legal systems answered these questions?

MODERATOR **Len Niehoff, '84**, *Professor from Practice, University of Michigan Law School*

PANELISTS **Meg Leta Jones**, *Assistant Professor, Georgetown University Communication, Culture & Technology Program*

Kyu Ho Youm, *Jonathan Marshall First Amendment Chair, University of Oregon School of Journalism and Communication*

Ryan Calo, '05, *Assistant Professor of Law, University of Washington School of Law*

Kristen Thomasen, *Assistant Professor of Law, University of Windsor School of Law*

10:30–10:45 A.M. **BREAK**

SESSION II: THE INTERRELATION BETWEEN PRIVACY AND FREE EXPRESSION

10:45 A.M.—Noon This session will explore questions about the interrelation between privacy and free expression: Do rights of privacy and free expression inherently conflict or can they be harmonized? What qualifies as speech today? Do search engines engage in speech? Are data transfers speech? From a transnational perspective, how have different regimes answered these questions?

MODERATOR **Ashley Messenger**, *First Amendment Counsel, National Public Radio*

PANELISTS **Amy Gajda**, *Class of 1937 Professor of Law, Tulane University Law School*

Ronald Krotoszynski, *John S. Stone Chairholder of Law and Director of Faculty Research, University of Alabama School of Law*

Laura Lemire, *Privacy Attorney, Microsoft*

Neil Richards, *Thomas and Karole Green Professor of Law, Washington University*

Noon—1 P.M. **LUNCH**

1—2:15 P.M. **PRESENTATION**

“Journalistic Perspectives on Privacy Rights Here and Abroad”

A conversation with **Kainaz Amaria**, Editor, Vox Visuals; **Lynette Clemetson**, Charles R. Eisendrath Director of Wallace House and of the Knight-Wallace Journalism Fellows; **Mark Magnier**, China Economics Editor, *The Wall Street Journal*, and Knight-Wallace Journalism Fellow; and **Len Niehoff**, **’84**, Professor from Practice, University of Michigan Law School

2:15—2:30 P.M. **BREAK**

AGENDA

SESSION III: THE CONFLICTS IN CONTEXT: TRANSNATIONAL DILEMMAS FOR INDIVIDUALS AND ENTITIES—A COMPARATIVE ANALYSIS

2:30–3:45 P.M. This session will explore the on-the-ground dilemmas faced by entities and individuals as a result of the conflicts in transnational approaches discussed in the earlier panels. How do entities respond to the demands of inconsistent privacy regimes? How do individuals protect their privacy in the face of such conflicts? Do students—increasingly citizens of the world—have privacy concerns related to transnational data flow?

MODERATOR **Gautam Hans, '12**, *Clinical Fellow, University of Michigan Law School; former Policy Counsel and Director, Center for Democracy & Technology—San Francisco*

PANELISTS **Ashley Messenger**, *First Amendment Counsel, National Public Radio*

Michael Rubin, '00, *Partner, Latham & Watkins LLP*

Elana Zeide, *Associate Research Scholar, Princeton University Center for Information Technology Policy; Visiting Fellow, Yale Law School Information Society Project; and Affiliate, Data & Society Research Institute*

Peter Hustinx, MCL '71, *former European Data Protection Supervisor*

3:45–4 P.M. **CLOSING REMARKS**

4 P.M. **RECEPTION**

Lawyers Club Lounge (501 S. State St.)

Kainaz Amaria has always been keenly curious about everything and everyone around her. She loves meeting new people, entering unfamiliar situations, and listening to new perspectives. She has a BA in international relations and political science from Boston University and an MA in photography from the School of Visual Communication at Ohio University. In 2010, she was awarded a Fulbright Scholarship to Mumbai, India. Her images and multimedia collaborations have been recognized by contests including CPOY, Women in Photojournalism, the Atlanta Photojournalism Conference, the National Press Photographers' Contest, and the South Asian Journalist Association. She was named a Chips Quinn Scholar in 2007 and was a graduate teaching assistant at Ohio University. Recent clients include *Vogue India*, *The New York Times*, Reuters, National Public Radio (NPR), Radio Netherlands Worldwide, *GlobalPost*, *Marie Claire* (USA), *St. Petersburg Times*, *U.S. News & World Report, Inc. Magazine*, and *Condé Nast Traveler*. She joined the multimedia team at NPR in December 2011 and currently is based in Washington, D.C. When she is not behind the camera or the computer, she can be found surrounded by good friends, good food, and a ton of laughter.

Ryan Calo, '05, is the Lane Powell and D. Wayne Gittinger Assistant Professor at the University of Washington School of Law. He is a two-time recipient of the Phillip A. Trautman 1L Professor of the Year Award and a faculty co-director of the University of Washington Tech Policy Lab. His research on law and emerging technology has appeared, or is forthcoming, in numerous leading law reviews and technical publications. He has testified before committees of the U.S. Senate and German Parliament and has organized events on behalf of the National Science Foundation, the National Academy of Sciences, and the Obama White House. He has been a speaker at President Obama's Frontiers Conference, the Aspen Ideas Festival, and NPR's Weekend in Washington. *Business Insider* named him one of the most influential people in robotics. He is an affiliate scholar at the Stanford Law School Center for Internet and Society and the Yale Law School Information Society Project. He serves on numerous advisory boards, is a CoMotion Presidential Innovation Fellow for 2015, and a non-residential fellow at New American. He is a former associate at Covington & Burling LLP and clerked for the Hon. R. Guy Cole on the U.S. Court of Appeals for the Sixth Circuit. Prior to law school, he investigated allegations of police misconduct in New York. He holds a BA in philosophy from Dartmouth College.

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Lynette Clemetson is the Charles R. Eisendrath Director of Wallace House, home of the Knight-Wallace Fellowships for Journalists and the Livingston Awards for Young Journalists at the University of Michigan. She is a Knight-Wallace alum and came to the University from National Public Radio, where she was senior director of strategy and content initiatives, guiding projects across broadcast, digital and events. She spent several years as a magazine and newspaper reporter before moving into media strategy and leadership. In addition to her work as a domestic correspondent for *The New York Times* and *Newsweek* magazine, she also was an Asia correspondent for *Newsweek*, based in Hong Kong. A former director of content strategy at Pew Center on the States, she also was founding managing editor of the website TheRoot.com. She has a passionate interest in sustaining journalism in a variety of forms and supporting journalists in the pursuit of their craft.

Amy Gajda is recognized internationally for her expertise in media law, privacy law, and higher education law. She brings her background as an award-winning television, radio, and print journalist to her scholarly work navigating the tensions between social regulation and protected expression. Her scholarly articles on related matters have appeared in the *California Law Review* and multiple other legal journals, and she has presented her work at scholarly conferences around the world. Her most recent book, *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press* (Harvard University Press, 2015), explores judicial oversight of journalistic news judgment. An earlier book, *The Trials of Academe* (Harvard University Press, 2009), focused on academic expression on campus. She co-authored *Mass Media Law* (Foundation, 2016) and *The Law and Higher Education* (CAP, 2016), and published invited opinion pieces in *The New York Times*, *Slate*, the *New York Daily News*, and other national publications. She practiced law in Washington, D.C., before starting her teaching career at the University of Illinois. She has chaired the Association of American Law Schools' Section on Defamation and Privacy and its section on Mass Communication, and she led the Law and Policy Division of the Association for Education in Journalism and Mass Communication. She has been awarded the Felix Frankfurter Award for Distinguished Teaching, Tulane Law School's highest teaching honor.

Gautam Hans, '12, is a clinical teaching fellow in the Entrepreneurship Clinic at the University of Michigan Law School, with a focus on intellectual property and technology. His work and scholarship examine how individuals and new entities address the complex legal and policy issues involved with IP and technology regulation. He previously served as policy counsel and director at the Center for Democracy & Technology (CDT) in San Francisco, where he worked on a range of technology law and policy issues. He joined CDT in 2012 as the Ron Plesser

Fellow, based in Washington, D.C., focusing on privacy issues. A frequent speaker on technology issues relating to IP, privacy, speech, and security, he has been quoted in several media outlets, including *The Washington Post*, *The Wall Street Journal*, and the *Los Angeles Times*. His work has appeared in the *Michigan Law Review First Impressions* and the *Michigan Telecommunications and Technology Law Review*, and has been cited by the U.S. Supreme Court (in dissent). While at Michigan Law, he served as editor-in-chief of the *Michigan Telecommunications and Technology Law Review* and as a student-attorney in the Entrepreneurship Clinic and the Michigan Clinical Law Program. He earned his MS in information from the University of Michigan School of Information and his BA in English and comparative literature from Columbia University.

Peter Hustinx, MCL '71, served as the first European Data Protection Supervisor from January 2004 until December 2014. From 1991 until 2004, he was president of the Dutch Data Protection Authority, and from 1996 until 2000, he also was chairman of the Article 29 Working Party. He has been closely involved in the development of data protection law from the start, both at national and various international levels. He received law degrees in Nijmegen, the Netherlands, and in Ann Arbor. In July 2015, he received an honorary doctorate from the University of Edinburgh for his work in the field of information privacy and data protection.

Ronald Krotoszynski earned his BA and MA from Emory University and JD and LL.M. from Duke University, where he was articles editor for the *Duke Law Journal* and selected for Order of the Coif. He clerked for the Hon. Frank M. Johnson Jr. of the U.S. Court of Appeals for the Eleventh Circuit and was an associate with Covington & Burling LLP in Washington, D.C. Prior to joining the faculty at the University of Alabama School of Law, he served on the law faculty at Washington and Lee University and, prior to that, on the law faculty of the Indiana University School of Law—Indianapolis. He also has taught as a visiting professor at the Washington and Lee University School of Law, the Marshall—Wythe School of Law at the College of William and Mary, the Florida State University College of Law, and Brooklyn Law School. He has held appointments as a visiting scholar in residence at the University of Washington—Seattle School of Law, the Seattle University School of Law, and the Lewis and Clark School of Law.

Laura Lemire is an attorney in the regulatory affairs group of Microsoft Corporation's legal and corporate affairs department in Redmond, Washington. She advises on privacy and security matters worldwide and shapes policies and regulations for cloud service providers. She focuses on data protection issues impacting businesses. She advises on data handling and security requirements, incident response and breach notification, employee privacy, cross-border data

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transfers, and device management. She counsels on privacy issues related to mergers and acquisitions and sales and marketing activities. She also partners with engineers to shape the development of software and cloud services to meet existing and upcoming data protection regulations. At Microsoft, she develops the corporation's policy approaches to privacy and security matters. She reviews proposed legislation and regulations and drafts messaging and comments to legislative staff and regulators. She engages regulators, lawmakers, and privacy advocates, and also works with worldwide organizations to influence data protection standards. She most recently has provided counsel to Microsoft's cloud services, including Outlook.com, OneDrive, Office 365, Microsoft Azure, and Microsoft Intune.

Meg Leta Jones (previously Ambrose) is an assistant professor in the Communication, Culture & Technology program at Georgetown University, where she researches rules and technological change with a focus on privacy, data protection, and automation in information and communication technologies. She also is an affiliate faculty member of the Science, Technology, and International Affairs program in Georgetown's School of Foreign Service, the Center for Privacy & Technology at Georgetown Law Center, and the Brussels Privacy Hub at Vrije Universiteit Brussel. Her research interests include comparative information and communication technology law, engineering and information ethics, critical information and data studies, robotics law and policy, and the legal history of technology. *Ctrl+Z: The Right to be Forgotten* (NYU Press, 2016), her first book, is about the social, legal, and technical issues surrounding digital oblivion. Advised by Paul Ohm, she earned a PhD in technology, media, and society from the University of Colorado, Engineering and Applied Science. Prior to her PhD, she earned a JD from the University of Illinois College of Law, where she focused on technology and information issues. She has held fellowships and research positions with the NSF-funded Ecsite project in the University of Colorado Department of Computer Science, the Silicon Flatirons Center at the University of Colorado School of Law, the Harvard Berkman Center for Internet & Society, and CableLabs.

Mark Magnier is the Beijing-based China economics editor for *The Wall Street Journal*, where he oversees coverage of the world's second-largest economy and its seismic impact on Chinese society and the rest of the world. Before joining the *WSJ*, he worked at the *Los Angeles Times*: as New Delhi bureau chief, where he covered the Mumbai terrorist attack; as Beijing bureau chief, where he covered the Beijing Olympics and Sichuan earthquake; and as Tokyo bureau chief, where he covered the economic slide, the 2011 tsunami, and the Fukushima nuclear disaster. Along the way, he's camped with goats under Saddam Hussein's

bridges, covered suicide attacks and budding film industries in Pakistan and Afghanistan, and suffered through bad karaoke in North Korea. He holds a bachelor's degree, *cum laude*, from Columbia College and a master's degree from the Columbia Graduate School of Journalism.

Ashley Messenger serves as in-house counsel for NPR, specializing in issues that affect news gathering and dissemination. She also is an adjunct professor of journalism at the American University School of Communication, where she teaches Legal Aspects of Communication. She previously served as editorial counsel to *U.S. News & World Report*, in-house counsel for *Weekly Alibi* (Albuquerque, New Mexico), the McCormick Tribune Fellow at the Reporters Committee for Freedom of the Press, and litigation counsel in private practice. She also is a former radio talk show host.

Len Niehoff, '84, is a professor from practice at the University of Michigan Law School. His interests include civil procedure, constitutional law, ethics, evidence, First Amendment, higher education law, litigation strategy, media law, privacy, and the intersections between legal theory and theology. He is the author of more than 100 articles on a wide range of issues in these fields and of the recently published short treatise *Evidence Law* (Foundation Press, 2016). He has practiced law for more than 30 years and currently is of counsel to Honigman Miller Schwartz and Cohn LLP, where he leads the firm's appellate practice group. Numerous publications and organizations have recognized him as a distinguished litigator, appellate advocate, and media, First Amendment, and higher education lawyer. He previously taught at Wayne State University Law School and the University of Detroit Mercy School of Law. He received his BA and JD from the University of Michigan.

Neil Richards is an internationally recognized expert in privacy law, information law, and freedom of expression. He is the Thomas and Karole Green Professor of Law at Washington University School of Law, where he co-directs the Institute for Genomic Medicine and the Law. He also is an affiliate scholar with the Stanford Center for Internet and Society and the Yale Law School Information Society Project, a fellow at the Center for Democracy & Technology, and a consultant and expert in privacy cases. He serves on the boards of the Future of Privacy Forum and the Freedom to Read Foundation and is a member of the American Law Institute. He earned graduate degrees in law and history from the University of Virginia and served as a law clerk to both Chief Justice William H. Rehnquist of the U.S. Supreme Court and the Hon. Paul V. Niemeyer of the U.S. Court of Appeals for the Fourth Circuit. He is the author of *Intellectual Privacy* (Oxford Press, 2015). His many scholarly and popular writings on privacy and civil

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liberties have appeared in a wide variety of media. At Washington University, he teaches courses on privacy, technology, free speech, and constitutional law, and is a past winner of the School of Law's Professor of the Year award.

Michael Rubin, '00, is a partner at Latham & Watkins LLP, where he co-chairs the firm's privacy and data protection practice and specializes in Internet law and strategy. He routinely counsels emerging and established companies on novel issues of unsettled Internet and privacy law, and he represents them in complex regulatory investigations and class action litigation in the United States and around the globe.

Kristen Thomasen joined the Faculty of Law at the University of Windsor in January 2017 as an assistant professor. Her research focuses on the legal, social, and ethical implications of robotic technologies and artificial intelligence. She is completing her PhD from the University of Ottawa. Her thesis explores the implications of drone technology for privacy in public spaces in Canada. Her doctorate is supervised by Ian Kerr, Canada Research Chair in Ethics, Law and Technology at the University of Ottawa, and she is a recipient of a SSHRC Joseph-Armand Bombardier Canada Graduate Scholarship. In conjunction with this scholarship, she recently spent three months at the Tilburg Institute for Law and Technology in the Netherlands researching European approaches to privacy and drone regulation. Prior to starting her PhD, she clerked for the Hon. Madam Justice Rosalie Abella at the Supreme Court of Canada (2013–2014). She also clerked for the Alberta Court of Queen's Bench (2012–2013) and articulated with Alberta Justice in Calgary (2013). She is a member of the Law Society of Alberta (called in 2013). She holds a JD from the University of Ottawa, an MA from the Norman Paterson School of International Relations at Carleton University, and a BA (Hons.) from McMaster University. She sits on the national board of directors for the Women's Legal Mentorship Program.

Kyu Ho Youm joined the University of Oregon's 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 book chapters and research articles in a wide range of leading journalism and law journals. His articles on freedom of expression have been cited by U.S. and foreign courts and his media law research has been used by U.S. and international lawyers in representing their clients in press freedom litigation.

A member of the Communication Law Writers Group, he has been involved in writing *Communication and the Law*, and 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, as well. Since 2008, he has been the communication law and media policy editor of the 12-volume *International Encyclopedia of Communication*. He is a recipient of the Guido H. Stempel III Award for Journalism and Mass Communication at the Ohio University E.W. Scripps School of Journalism and has served as the Wee Kim Wee Visiting Professor at the Wee Kim Wee School of Communication and Information at Nanyang Technological University in Singapore, and as the distinguished global speaker of Yonsei University's BK21Plus program in Seoul, South Korea.

Elana Zeide is a visiting assistant professor at Seton Hall University School of Law, an affiliate at Princeton University's Center for Information Technology Policy, and a visiting fellow at the Yale Law School Information Society Project. Her work focuses on the implications of shifting from human to big data-driven decision-making in education and hiring. This includes issues raised by smart environment surveillance, algorithmic profiling, and predictive analytics that rely on artificial intelligence. She examines these emerging technologies in light of institutional and organization implementation, oversight protocols, and legal protection (or lack thereof). She also advises educators, companies, and policymakers on privacy and information practices in traditional schools, virtual learning environments, and the commercial sphere. She graduated from Yale University and New York University's School of Law. She worked as a litigation associate at Cravath, Swaine & Moore LLC and a legal analyst at Bloomberg LP before opening her own privacy, media, and technology law practice. She also taught classes on free speech and the First Amendment as a visiting professor at Yale University. Prior to becoming an attorney, she was a journalist and pop culture columnist in London and New York and earned an MFA in nonfiction writing from Columbia University's School of the Arts. She believes she is the only person to have both reported for and legally represented *The National Enquirer*.

