

Toil and Trouble in Media-Land

By [DAVID A. STRAUSS](#)

Review of [THE FIRST AMENDMENT BUBBLE: How Privacy and Paparazzi](#)

Threaten a Free Press, by Amy Gajda

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The Obama Administration is said to have prosecuted more people for leaking classified information than all previous administrations combined. Journalists have noticed. “The Obama Administration is the greatest enemy of press freedom in a generation,” according to James Risen, the New York Times investigative reporter. Risen’s language is unusually strong, but the general theme is familiar among journalists. In a typical comment, Bob Schieffer, a CBS Washington correspondent, is quoted as saying: “Whenever I’m asked what is the most manipulative and secretive administration I’ve covered, I always say it’s the one in office now This administration exercises more control than George W. Bush’s did, and his before that.”

It seems unlikely that this Administration is just more authoritarian or paranoid than the one before it (which was in turn more so than the one before it, and so on), or that this President and Attorney General harbor a perverse desire to antagonize the New York Times and CBS. The much more plausible explanation is that the world has changed, and government officials have responded by becoming less tolerant of practices they might have lived with

before. A decade or two ago, internal discipline – firing or demoting employees who disclosed government secrets – might have been enough of a deterrent to leaks. Today the government thinks it needs the threat of a criminal prosecution. And while the Justice Department’s own guidelines require prosecutors to leave journalists alone whenever possible, the government has directed a few warning shots toward journalists, notably in a case involving Risen; it insisted at one point that Risen testify against a government employee who was being prosecuted for leaking to him. (After prevailing in court on the principle, the government ultimately backed off its pursuit of Risen.) But whether the government is right or wrong, things do appear to have changed. Whatever one thinks of their rhetoric, Risen et al. seem right to say that the government is being more aggressive about protecting its secrets than it has been in the past.

Amy Gajda’s subject, in *The First Amendment Bubble*, is not national security and government secrets but personal privacy and ordinary people’s secrets. The laws protecting privacy are, for the most part, enforced not by the government in criminal prosecutions but by individuals in lawsuits for money damages. But Gajda describes a parallel evolution. A generation ago, the courts hearing lawsuits claiming invasions of privacy routinely rejected those claims. In fact those courts often went out of their way to celebrate the press and the role it played in society. But now some people who claim to be exercising their First Amendment rights to freedom of speech and freedom of the press have pushed things too far, Gajda says. They invoke the First Amendment to shield grotesque

invasions of people's privacy and dignity. And there are signs of a backlash. Courts show increasing sympathy for people suing for violations of their privacy and, notably, are increasingly critical of the press in general.

This is the "bubble" of the book's awkward but descriptive title. The problem is not that "quasi-journalists," as Gajda calls them, will have to pay for their egregious conduct. The problem is, on the contrary, what will happen if those characters succeed too often in claiming the protection of the First Amendment. The result, she predicts, will be a reaction that jeopardizes legitimate and valuable journalism. Courts will decide that the problem is not just with the bad actors but with the First Amendment rights that they hide behind. "Claims for constitutional protection," she says, have become so excessive that "they are at risk of a calamitous collapse, jeopardizing all future protections."

In both areas – national security and privacy – journalistic practices that once seemed acceptable, even occasions for celebrating the value of a free press, have started to come under pressure; but why? National security, of course, has become a special priority post-9/11. But the government's increasingly aggressive approach to leaks cannot be traced simply to 9/11, and the parallel development described in this book, in an area that also involves secrets but has nothing to do with national security, suggests that other things are going on. In fact, in many ways, the changes that have affected government policy about

national security leaks are not that different from the kinds of things Gajda describes.

The first change, inevitably, is the technology. It used to be that leaking government secrets meant getting into secured file cabinets that held paper documents. Not many people could do that. Once they did, they had to copy the pages, laboriously and probably surreptitiously. That is how Daniel Ellsberg leaked the Pentagon Papers, a classified government history of the United States's involvement in the Vietnam War. The Supreme Court resoundingly upheld the newspapers' right to publish the papers; the Nixon Administration's harassment of Ellsberg was one of the things that disgraced it; and the Pentagon Papers episode has become the ur-text for leakers. But now, of course, you don't need to find and photocopy the physical papers page by page. Someone who has the right permissions, or can illicitly get them, can access government databases and download massive amounts of information, dwarfing the 47-volume Pentagon Papers, with the proverbial click of a mouse.

Similarly, it used to be that uncovering information about private individuals meant quizzing neighbors, or pawing through courthouse records, or hoping that a harried low-level government employee would mistakenly reveal confidential information, or just counting on being nearby with your bulky camera when someone committed an indiscretion. Now there is plenty of material about all of us available on the Internet, unless we take extraordinary

steps to prevent that, and sometimes even if we do. And every wannabe paparazzo has a cell phone with a videocamera in his pocket.

The other big change is in the nature of “the press.” When Ellsberg wanted an immediate, worldwide audience for the Pentagon Papers, the New York Times and the Washington Post were among the few places he could go. The editors of those newspapers decided whether they would publish the information. Then as now, they saw themselves as having a responsibility not to damage the national interest. They routinely consulted with government officials before publishing sensitive information and sometimes acceded to the government’s request that it be kept secret. Of course the editors’ view of the world was not exactly the same as the government officials’, but it wasn’t utterly different, either.

Today, of course, a self-anointed Ellsberg does not have to submit himself to the judgment of editors like that. Someone who has government secrets can propagate them, worldwide, more or less immediately, either without any intermediary or with an intermediary who will not feel the same obligation to try to take the government’s interests into account. It is easy to see why that might make the government much more aggressive about going after leakers.

Gajda emphasizes the parallel development in individual privacy cases: the proliferation of websites devoted to publishing lurid or embarrassing material, usually photographs, about unwilling individuals. A cell-phone video of someone unconscious on the floor, drunk and naked, can be broadcast to the

world. And, as Gajda shows, there is no sharp distinction between good media and bad media, so the problem can't be solved just by driving out of business websites that, say, specialize in revenge porn, or in displaying intrusive videos of celebrities, or of families who have just suffered a terrible loss. One of her examples of a frequent offender against decency is Gawker, a gossip-oriented website that also publishes information of legitimate public interest and that can sometimes claim, plausibly, to be more fearless in publicizing that information than more mainstream outlets.

More subtly, the economics of the media industry put pressure on everyone to cater to the lowest denominator. Gajda quite properly singles out the publication of mugshots, the photographs police take of people they have arrested. Mugshots are usually public records, available on public databases and therefore easily transferred to media websites. Even relatively respectable news outlets – the Chicago Tribune is one of Gajda's examples – have a regular feature with mugshots of recently arrested people. Sometimes you can click on the mugshot and find out more about the alleged offender – name, age, alleged offense. Each click, apparently, produces advertising revenue for the news outlet. The problem, of course, is that these people have just been arrested, not convicted of anything. But the mugshots invariably make them look like criminals, literally and figuratively. While some kind of attenuated case can be made for the news value of these displays, it is clear enough what is going on, and it does not have much to do with the highest ideals of journalism.

Gajda is a law professor who used to be a journalist, and in many ways this is a book written by a journalist for journalists. The book gives us story after story, drawn from court decisions that are not well known and from media websites – probably a couple hundred examples in all – to demonstrate its claim about the trend: a couple of decades ago, the celebration of the press, even when it was not clear that the newspapers or TV stations acted admirably; and then, as the press sank further and further into questionable practices (or simply into the muck), the incipient backlash in the courts’ rhetoric and, sometimes, their decisions. The plural of anecdote is not data, and all that, but in fact the collection of stories is effective, and it is hard to see how Gajda could have done better in supporting her claims about the arc of judicial attitudes toward the press.

Also, for people whose impressions about the law are formed by high-profile Supreme Court decisions – a group that probably includes most academics, journalists, and members of the reading public with an interest in these issues – the book is very useful because it gives a sense of what is going on in the day-to-day world of litigation and media practice. Supreme Court opinions define what the governing legal principles are, but the lawyers who advise media clients about what they can publish, and who recommend whether to litigate or to settle cases, have to pay attention to the kind of lower-visibility developments that are effectively catalogued in this book.

What is to be done about all of this? Gajda’s prescriptions take a back seat to her stories, but in the end she essentially wants to return to old-fashioned

journalistic virtues. Her touchstone is journalists' codes of ethics, as they are taught in journalism schools (and, she says, as they should be taught to journalists everywhere, and to general undergraduate audiences in college, too). She has no patience for the idea that everyone who posts something on the Internet is a journalist. Journalism is a profession, and while the law should provide some protections to journalists, those protections should be limited to the profession. Journalism is critically important, and newsworthiness is not a narrow category; but not everything is newsworthy, and journalists have an obligation to consider the harm as well as the good they might do with what they publish. The law should not try to enforce journalistic ethics, but it can provide some protection to people whose privacy or dignity is unjustifiably compromised. And journalists should stop invoking the First Amendment, and crying that repression is just around the corner, every time a court rules against some reckless blogger or lurid website.

All of this is sensible and admirable, and it is good to have it said by someone who is so clearly sympathetic to the journalists' mission. And, while Gajda does not say so explicitly, these ideas apply to national security secrets, as well as to ordinary people's privacy. Just as not everyone is a journalist, not everyone who gets hold of government secrets is the New York Times with the Pentagon Papers. Even the best journalists should remember that publicity can do harm as well as good. They should not act as if they are responsible only for the latter and not for the former.

But whether these prescriptions actually solve the problem is another matter. The technology, of course, cannot be undone: the Internet remains available to anyone, and the law will often be an ineffectual way of preventing or undoing the damage that the Internet can do, to public or private interests. Defining the category of real journalists who are entitled to special legal protections – against private lawsuits, or against government efforts to make them cooperate in investigations – is notoriously difficult: at what point does an avid blogger become a journalist? Many journalists take their ethics very seriously, and do police themselves and their colleagues; but getting page views is economically rewarding, and protecting individuals' privacy or the government's secrets is not.

More generally, responsible media outlets face a basic economic predicament: they bear their own costs, but they do not get fully rewarded for the benefits they confer on society by conveying information and stimulating debate. That predicament has always been a fact of life. It is why great newspapers were often owned not by profit-seeking firms but by families that were willing to make an economic sacrifice out of a commitment to a journalistic ideal of public service.

Gajda is, really, lamenting that elites like those families are no longer in control. The press used to be in the hands of people like her, who took their craft and their ethics seriously, who competed fiercely as journalists but could let the business side take care of itself. As the media environment becomes more

competitive, journalists don't have that luxury. They have to cater to, rather than shape, popular appetites. The displacing of elites as the economy becomes more open – and, for that matter, the analogous displacing of political elites as politics become more democratic – is a familiar story, one that has played out many times in history. Almost always it is good; but not always, and in this instance, at least, my sympathies are with Gajda. But good or bad, it is a very hard process to turn back.

For all of these reasons, both Amy Gajda and James Risen may have misidentified the threat. The problem probably isn't the law, either in the form of courts that are too willing to uphold privacy-related claims, or in the form of aggressive federal prosecutors. Any sustained effort to limit First Amendment rights will run into powerful ideological interests, on both sides of the political spectrum, as well as commercial interests – not just media companies, but firms that use the First Amendment as an engine of economic deregulation. In fact, as many commentators (including Gajda) have noticed, the Supreme Court in recent years has seemed exceptionally, even excessively, receptive to First Amendment claims. The problem is whether the media themselves will have the incentives and the capacity to do the job that they must do, and ought to do, in a free society. There is only so much the law can do about that.

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