

# WHAT PEOPLE ARE SAYING



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**PRIVACY IN THE NEW MEDIA AGE**

JON L. MILLS

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*Credit: UF Levin College of Law Communication Department*

Jon L. Mills, distinguished law professor at the University of Florida, is a former dean of the Levin College of Law and a former Speaker of the Florida House of Representatives. His specialties are privacy and constitutional law, about which he has litigated high-profile cases and written many articles along with the book *Privacy: The Lost Right*.

**JON L. MILLS**  
**is available for interviews and appearances.**



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# Q & A with JON L. MILLS

author of

## Privacy in the New Media Age

### **When did you know that you wanted to write this book?**

I wanted to write this book since I represented the Earnhardt family. Theresa Earnhardt had just lost her husband in a dramatic and tragic accident that was treated as a global news. Some of the members of the news and mainstream media wanted access to his autopsy photos. The publication of those photos would not serve the public interest but would be a tragedy for their family. Privacy needs to be protected against some part of the press who would have disclosed those images. I also wanted to write this book because the media has been changing so rapidly since I wrote my last book on privacy in 2008.

### **Your roles at the University of Florida College of Law must keep you quite busy. How did you fit writing this book into your routine?**

Sometimes 5:00 a.m. is a good time to write. And, teaching a class on privacy is a great way to learn and to hear creative ideas from my students.

### **Is there a particular bill you supported during your ten years in the Florida State Legislature that you would say you are most proud of?**

From the perspective of this book, I am glad I co-sponsored the constitutional provision on privacy. It has made a real difference for individual rights in this state.

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**How do we determine which information is “private” and should be protected from public intrusion?**

Privacy is about dignity and liberty. There are some categorical answers like for financial or health information and family issues. I believe that in this new age of vast availability of information, there is hope for individual dignity. There are some signs that the law may be starting to catch on. The U.S. Supreme Court said a police search of a cell phone could be more intrusive than a search of a house.

**Opponents of privacy protection laws often argue that by choosing to be in the public spotlight, celebrities and politicians forfeit their rights to privacy. What would your response be to this argument?**

To a degree celebrities and politicians do give up certain privacy rights. Our first amendment principles allow a substantial margin for press intrusions particularly if they are about public issues and public figures. However, there are limits. Just because someone is a celebrity or a public official, the status does not give license to a blogger to steal personal information or to viciously slander. There are limits and I propose we draw a line that holds the media accountable for that type of misconduct.

**Police use social media platforms like Facebook to help solve crimes, often requesting that social media companies release information to them, such as pictures and posts from suspects’ profiles. Do you think social media sharing that is hidden by user-selected privacy settings should be legally protected?**

Some postings on social media are completely public and anyone who posts them should expect that they could be seen by anyone – including law enforcement. The courts have allowed some postings to be obtained by law enforcement or an opposing party in a lawsuit. If you are posting information to a group of people, you are giving up some of your privacy rights. Yes, you can limit access to a select group of friends, but there is no guarantee that they will not republish. Can you disclose information to a defined group and expect that it will not be viewed by others? I am sorry to say that the ultimate answer will depend on the facts in the particular circumstances.

**What part of their private lives do you think Americans would be most surprised to find out is not protected from intrusion by law?**

There are a lot of surprises for all of us. Someone may be watching your web browsing, your shopping habits, your location, your likes on Facebook, the emails you send, or your financial transactions. We live in a glass houses in this new media age. In fact, that is the name of the next book I want to write, “Glass Houses”.

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**What's the next best step in pushing for privacy laws?**

Increased awareness. They are going to be more intrusions by media and government. People will say enough is enough!

**What do you hope readers will take away from this book?**

Hope and fear. I want people to understand that our privacy is at risk from new technology and from intrusive individuals and institutions who sometimes call themselves "the media". We collectively need to fear the loss of dignity and privacy. But there is hope. Consciousness is high, thanks to Mr. Snowden. We're finally having a serious national discussion about striking the appropriate balance between privacy and security.

**What's your next big project?**

I am outlining a fiction book about an American family who lives a horror story based on privacy intrusions. And, none of the kinds of intrusions the fictional family will experience are at all fictional.

## Gatekeepers

Before the Internet, individuals had limited options to communicate their opinions. They could tell everyone they knew in their community, write a letter to the editor of the local newspaper, or send out a letter to everyone in the town. All these options are limited in scope or limited by the intervention of others. In the modern world, communicating information happens with little or no reflection and is instantly available to the entire world with one click of a button. There is no obstacle standing in the way of free communication.

Prior to the invention of the printing press, the average person was limited to oral communication and isolated written works.<sup>158</sup> These forms of communication were very limited in the fact that oral communication was constrained by the size of community and the level of interest in the gossip, and written works were very time consuming and costly to mass produce. The printing press, however, allowed the private market to quickly create books, newspapers, flyers, pamphlets, and other documents and distribute them to a wider audience.<sup>159</sup> But this new technology was not available to average persons, who were unlikely to have enough money to buy or operate their own printing press. Additionally, market forces were a barrier to entry, even for those who could afford to use the printing press, because few communities could support more than one newspaper. Another limiting factor of the printing press was that some governments required licenses to operate a press and imposed censors who had to approve the content of the paper prior to publication. Therefore, in order to publish their ideas, average individuals were faced with high printing and distribution costs. The larger the audience, the larger the distribution costs. In sum, even though the printing press revolutionized communication, only government officials, newspapers, universities, and the wealthy—who were capable of owning and controlling the presses—benefited from the new technology. Market forces and economic realities were still an impediment between the communicator and his audience. Those who did not have access to the new printing press could try to publish their ideas in the newspaper. However, this ability was limited by the gatekeeper, the editor of the newspaper.

With the advent of radio and television, the number of people who could receive information greatly increased, yet private gatekeepers retained control of the medium. These new forms of technology had limited value to average persons who could passively receive the new media but could not easily generate or transmit their own content.<sup>160</sup> Access to television and radio was limited by the number of airwaves available, the requirement of broadcast licenses, and the expense of acquiring and operating radio and television stations. Those who had the means and the license became the gatekeepers of this new technology by deciding what to broadcast and what not to transmit.

During most of the twentieth century, the average person had few affordable or effective means of mass communication.<sup>161</sup> One could give a speech or compose an idea using a typewriter, then photocopy that document and mail it to the intended audience. However, the ability to reach others was limited by practical and technical considerations such as distribution costs and logistical difficulties. The Internet changed all of that because for the first time the traditional gatekeepers played a less prominent role in information dissemination.<sup>162</sup> In the 1970s the personal computer was created. The personal computer enabled everyone to have access to the new technology and allowed individuals to quickly and easily produce high-quality printed content at home using their own equipment.

Historically, individuals who created a printed work would have to distribute that work themselves by paying postage costs, or try to disseminate their ideas through existing newspapers, radio, or television. However, the Internet allows the average person to distribute information directly to the reader with no added cost. Individuals could disseminate their ideas all over the world and could do so instantaneously. Additionally, the access barrier was low—involving only the relatively small cost of obtaining a personal computer and an Internet connection—which allowed a wider audience to use the medium. Compared to the printing press, television, and radio, the Internet and the personal computer allowed for greater access and the potential for a greater audience without the financial or editorial impediments of the more traditional media. Although a victory for free speech advocates, it is also a potential tool for defamatory and intrusive publications.

In addition to the lack of impediment in the form of logistical and economic barriers, the Internet lacks an editorial barrier that was a defining factor of the press when the First Amendment was drafted. At the time the First Amendment was ratified, the press was understood to be an institutional speaker, a crucial player in a democratic society.<sup>163</sup> “The institutional quality of the press reflects, in part, the typical process of judgment that accompanies the press’s speech, which is governed by the ethic of disseminating material deemed important for a public readership and selected by a process of reason and audience-oriented (and thus not strictly personal) judgment.”<sup>164</sup> Editorial judgment is the “independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes.”<sup>165</sup> On the Internet, there is no requirement of independent editorial judgment. No gatekeeper stands between the scorned lover and the entire global community.

Russell L. Weaver has pointed out that the Internet is a new type of media, different from the traditional press, because it is less controlled by traditional gatekeepers.<sup>166</sup> These gatekeepers have traditionally limited the ability of the average person to use new technologies to advance their ideas or political agendas by acting as an impediment between the speaker and the audience. Without the economic, logistical, or editorial barrier, the free flow of information on the Internet can occur without reflection or independent judgment. Free speech advocates would argue that more speech is good, while others would argue that without gatekeepers, the Internet’s potential for abuse is vast. Both sides are correct.

The WikiLeaks controversy illustrates how information can be spread through the new media, not just in lieu of gatekeepers but also in defiance of them. On July 25, 2010, more than seventy-five thousand classified military documents were posted on the WikiLeaks website; four months later, more than a quarter-million confidential diplomatic cables were published. While leading gatekeepers eventually published these confidential diplomatic cables, the controversy shed light on the rival forces that will dominate the future of media: traditional media, governments, and anti-gatekeeper organizations like WikiLeaks.