

Into the Fray:

The Information Society Project

at Yale Law School

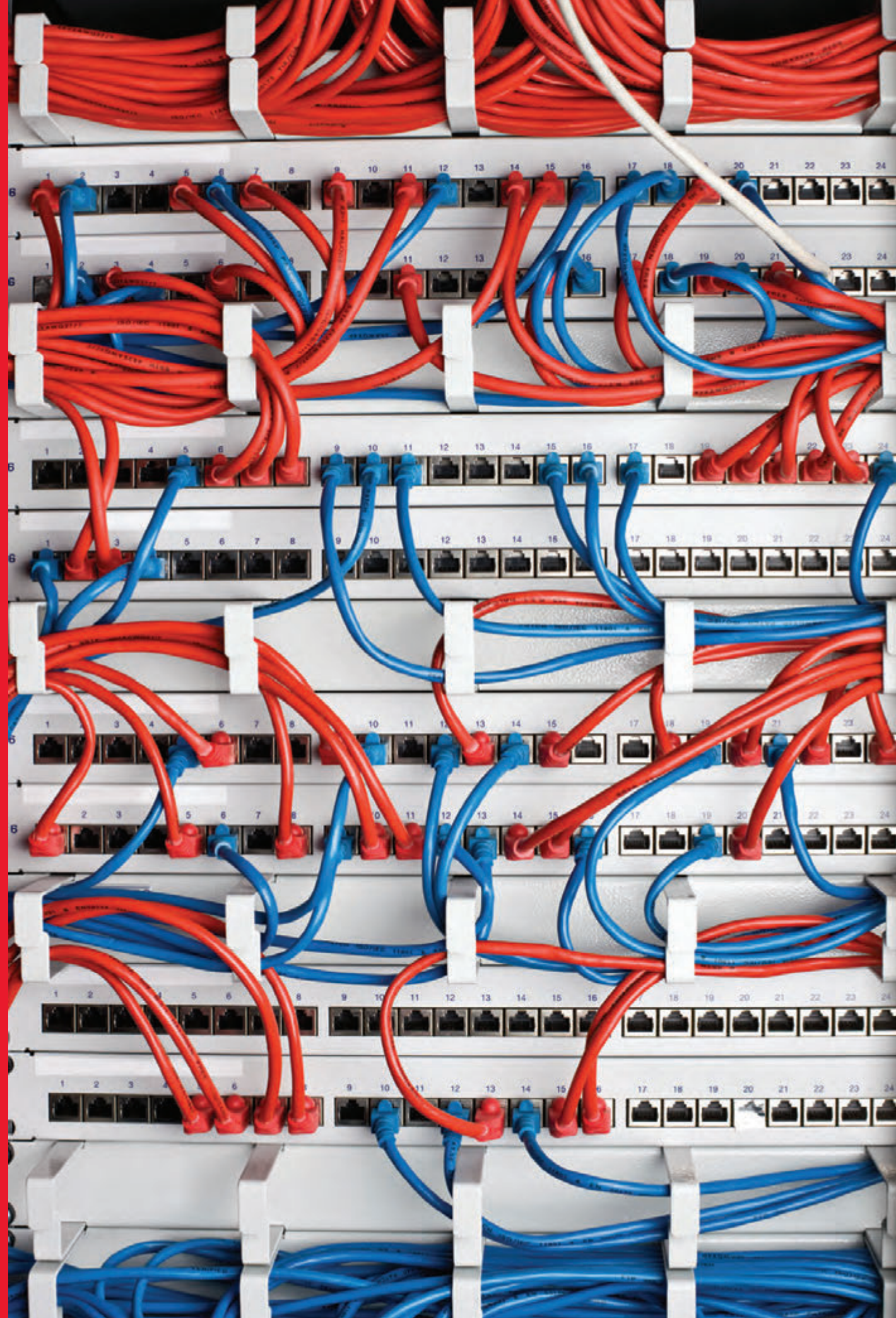
The ISP Appoints a New Executive Director and Continues Its Work at Frontiers of Information Technology, Law, and Society.



Bélair-Gagnon

Valérie Bélair-Gagnon tweets @journoscholar.

This June, the Information Society Project (ISP) at Yale Law School announced the appointment of Valérie Bélair-Gagnon as its new executive director. Formerly an ISP postdoctoral fellow and Knight Law and Media Scholar, Bélair-Gagnon's research focuses on emerging media, journalism, media law and policy, and media sociology. She has published widely on media, technologies, and law in academic journals and popular media, studying how technological change affects media norms and practices.



Portrait photographs by Harold Shapiro

Multiplying Intersections

Founded in 1997 by Professor Jack M. Balkin, the ISP is Yale Law School's intellectual center for the study of new technologies and their consequences for law and society. It has grown to include multiple initiatives: the ISP hosts the Knight Law and Media Program, the Program for the Study of Reproductive Justice, and the Abrams Institute for Freedom of Expression. It is home to the Media Freedom and Information Access Clinic as well as the Thomson-Reuters Initiative on Law and Technology, which convenes events and runs a speaker series. And through its work on Access to Knowledge and intellectual property reform, the Yale ISP collaborates with scholars around the world.

The ISP's newest initiative is Foreign Affairs in the Internet Age (FAIA), which addresses how the Internet Age affects foreign affairs law, and how globalization and foreign affairs affect the Internet.

This year, the ISP continues its tradition of cutting-edge conferences and special events. During October 17–18, a conference on "Public Health in the Shadow of the First Amendment" will study the complex constitutional issues at the intersection of medicine, public health, and the First Amendment. And throughout the fall the ISP will partner with the Tow Center for Digital Journalism at the Columbia School of Journalism for the speaker series "Journalism After Snowden," which is receiving generous funding from the Tow Foundation and the Knight Foundation.



Balkin



Listening Closely: Surveillance, Privacy, and the Search for Clarity in a Digital Age

The ISP's resident fellows draw from a richly connected intellectual community while working on projects at the frontiers of information technology and law. Two current fellows, Jonathan Manes '08 and Lauren Henry, share insights from their current research.

Jonathan Manes '08 is a Clinical Lecturer in Law and Abrams Clinical Fellow of the Information Society Project. He supervises student lawyers in the Media Freedom and Information Access Clinic, and engages in scholarly research on government secrecy, national security, free speech, and civil liberties.

Together with current and former ISP Fellows B. J. Ard '10, Nabiha Syed '10, Adrienna Wong '10, Vera Eidelman '15, Sam Kleiner '15, and Rebecca Wexler '16, Manes recently authored an *amicus* brief urging the Ninth Circuit Court of Appeals to strike down the statute that permits the FBI routinely to impose complete gag orders on recipients of national security letters. The *amicus* brief was filed on behalf of the Floyd Abrams Institute for Freedom of Expression and First Amendment scholars Bruce Ackerman '67, Jack M. Balkin, Jane Bambauer '06, former ISP Executive Director Margot Kaminski '10, Neil Richards, and David A. Schulz '78.

How transparent should the Foreign Intelligence Surveillance Court be—and why?

Last June, we learned that the NSA was collecting the details of every phone call placed in the United States and that it had been doing so for years. This indiscriminate tracking of Americans' calls appeared to violate laws enacted by Congress. It also raised grave Fourth Amendment concerns. Yet the program had been authorized since 2006 under an order of the Foreign Intelligence Surveillance Court (FISC) that adopted, in secret, an extraordinarily aggressive interpretation of federal law.

“Even members of Congress who voted to reauthorize the PATRIOT Act were shocked to learn that it had been interpreted to allow indiscriminate tracking of Americans' calls.”—Jonathan Manes



Manes

Few people dispute that intelligence agencies require some measure of secrecy in order to do their work. But it is equally plain that the public must be able to know the legal limits on those agencies' authority, and must be able to set such limits by law. The public loses this fundamental power to control its government if the law on the books can be radically reinterpreted by a secret court opinion issued after a secret court proceeding. But that is exactly what happened here. Even members of Congress who voted to reauthorize the PATRIOT Act were shocked to learn that it had been interpreted to allow indiscriminate tracking of Americans' calls.

Working with Media Freedom and Information Access Clinic co-director

David A. Schulz '78, and an extraordinarily talented team of students (Patrick Hayden '14, Max Mishkin '14, Brianna van Kan '15, Anjali Motgi '14, and John Langford '14), we filed a lawsuit demanding that the FISC disclose its opinions interpreting the laws in question. The lawsuit, which was filed jointly with the ACLU last June—only five days after the mass call tracking program was revealed—points out that the Constitution presumptively forbids secret judicial proceedings and that it is especially hostile to secret judicial opinions. This is just as true for the FISC, we argue, as it is for any other Article III court.

If it is emphatically the duty of the courts to say what the law is, then it is emphatically the right of the public to know what the courts say. We are urging the FISC to accept this principle, so that in the future the public will not have to wait years for an unauthorized leak in order to discover what the law actually is.

ISP faculty and resident fellows, often in collaboration with YLS students, have earned influential victories and contributed widely cited research in their respective fields at the intersection of information technology, law, and society. Below is a small sampling of recent accomplishments and ongoing work. For more information, visit www.yaleisp.org.

THE PROGRAM FOR the Study of Reproductive Justice filed an *amicus* brief that was influential in the fifth and deciding vote in the 2012 Supreme Court case *United States v. Jones*, in which the use of a GPS tracking device was interpreted as a search under the Fourth Amendment.

IN 2013, THE MEDIA Freedom and Information Access Clinic (MFIA) and the Floyd Abrams Institute for Freedom of Expression obtained a significant victory in the U.S. District Court (E.D.N.Y.) case of *Schwartz v. U.S. Drug Enforcement Administration* when the U.S. government consented to release videos of

a raid—in which 73 people were reportedly killed, including one American—conducted by Jamaican military forces at the behest of the U.S. government. MFIA represented Mattathias Schwartz, a journalist writing for the *New Yorker*.

IN THE PAST YEAR, ISP fellows published or placed pieces in numerous journals, including the *California Law Review*, the *Stanford Technology Law Review*, the *Texas Law Review*, the *University of Washington Law Review*, the *Virginia Law Review*, and the *Yale Law Journal Online*. ISP fellows have also written for a variety of popular media, such as the *Atlantic*, the *Guardian*, the *New York Times*, *Slate*, and the *Washington Post*.

MFIA, TOGETHER WITH the American Civil Liberties Union, recently filed a pair of motions arguing that the Foreign Intelligence Surveillance Court must disclose its opinions authorizing the bulk collection of telephone records and internet metadata [see opposite].

Lauren Henry will be joining the ISP as a Postdoctoral Associate in Law and Knight Law and Media Scholar in August 2014. She earned her BA from Yale and her JD from Harvard, where she served as an editor of the *Journal of Law and Technology*, as a law clerk at the Berkman Center for Internet and Society, and as a teaching fellow for the online course “Copyright” and for an online privacy seminar. She has worked for the Center for Democracy and Technology and the ACLU.

At the ISP, Henry is working on a range of projects, including a paper summarizing the lessons we can learn about administrative approaches to regulating privacy from the case study of Google Street View in Germany; a review of the existing case law on the current privacy common law; and a paper developing an approach to privacy as a hybrid interest between a right and property.

Is Privacy a Form of Property—and What Does it Mean for our Increasingly Digital Lives?

Under current law, private information is not ordinarily a form of property. Instead, privacy is a personal interest that individuals have to the extent that it is protected by law.

Before the Internet Age, most private documents and sensitive interactions were physically located in a home—and there-

fore, for many people, ownership of a home served to protect a private sphere. Now, with communication happening over the Internet, privacy law has been called upon to do more work than ever before because trespass law no longer acts as a protective hurdle to lawfully accessing personal information.

Some scholars have argued that private information should be considered property. Advocates for a privacy-as-property approach argue that if people had a property interest in their property, people would start from the position of having a clear right to exclude others from access to, and use of, their information. This would give individuals more control over their personal information.

Critics of privacy-as-property worry that people will thoughtlessly contract away their personal information while still feeling, mistakenly, that they have full rights to it. In this way, critics contend, if privacy were property, most individuals would end up with less control over their information than in the status quo. The technology industry, consumer advocates, and scholars must work towards coming up with clear, substantive privacy rules. Deciding the basic question of whether privacy is most usefully framed as property, a personal right, or some hybrid between the two is a crucial part of that process. *Y*

For more information about the ISP, visit www.yaleisp.org.



Henry