

MAILYN J. R. FIDLER

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EDUCATION

Yale Law School JD 2020 Clinic Student Director (San Francisco Affirmative Litigation Project)	New Haven, CT
Oxford University Marshall Scholar MPhil in International Relations, 2016	Oxford, U.K.
Stanford University BA Science, Technology, & Society with Honors and Distinction, 2014 Second Honors in International Security Sterling Award (top 25 graduates in the School of Humanities & Sciences) Phi Beta Kappa (first election)	Stanford, CA

TEACHING INTERESTS

Primary interests: contracts, property, law and technology, criminal procedure

Additional interests: intellectual property, cybersecurity, privacy law, First Amendment, constitutional law, international law

PUBLICATIONS

Works In Progress

A Partial Property Rights Theory of the Fourth Amendment (job talk paper)

The reasonable expectation of privacy test for Fourth Amendment searches is subjective and conceptually ungrounded. This Article offers a new alternative: Fourth Amendment protection should be anchored in a flexible conception of property rights—what this Article terms a “situational right to exclude.” Such a view gets the privacy-protective results sought by supporters of the reasonable expectation test while matching the conceptual rigor of outdated property-based approaches.

- Presented at the 2021 Privacy Law Scholars Conference

Rethinking Trade Secret Discovery in Criminal Litigation (work in progress)

Courts generally apply trade secret discovery analyses imported from the civil context when a criminal defendant seeks discovery of potentially exculpatory information that is purportedly protected as a trade secret. This Article takes a docket-level approach to critiquing this process on conceptual and procedural grounds. It argues that trade secret discovery regimes for the criminal context should not be a direct translation of civil standards. Rather, they should be

altered to reflect lessened anti-competitive concerns and, most importantly, the principles underpinning criminal litigation—including the greater power of and attendant burdens on the state.

Law Review Articles

The New Editors: Refining First Amendment Protections for Internet Platforms, 2 NOTRE DAME J. EMERGING TECH. 241 (2021) (invited).

- Featured in the Legal Theory Blog
- Featured in the Media Law Prof Blog

Local Police Surveillance and the Administrative Fourth Amendment, 36 SANTA CLARA HIGH TECH. L.J. 481 (2020).

- Cited in Federation of American Scientists report on surveillance policy
- Blog post summary cited in testimony before the D.C. Council Committee on the Judiciary & Public Safety

First Amendment Sentence Mitigation: Beyond A Public Accountability Defense for Whistleblowers, 11 HARV. NAT'L. SEC. J. 214 (2020).

- Featured in CrimProf Blog
- Discussed at length in Heidi Kitrosser & David Shulz, *A House Built on Sand: the Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press*, 19 FIRST AM. L. REV. ____ (2021) (forthcoming)
- Cited in Amici Curiae Brief for Scholars of Constitutional Law, First Amendment Law, and Media Law, *United States v. Hale*, No. 1:19-cr-00059 at 25 (E.D. Va. filed July 22, 2021).

Regulating the Zero-Day Vulnerability Trade: A Preliminary Analysis, 11 I/S: J.L. & POL'Y FOR INFO. SOC'Y 405 (2015) (peer-reviewed) (now OHIO STATE TECH. L. J.).

Book Manuscripts

RULES AS RESISTANCE: CYBER POLITICS AND AFRICA'S QUEST FOR AUTONOMY (forthcoming, under contract with University of Wisconsin Press).

Book Chapters

Subaltern Cyber Stability: An African Case Study, in CYBER (IN)STABILITY (Robert Chesney, James Shires, Max Smeets, eds.) (forthcoming)

Government Acquisition and Use of Zero-Day Software Vulnerabilities, in CYBER INSECURITY: NAVIGATING THE PERILS OF THE NEXT INFORMATION AGE (Trey Herr & Richard Harrison eds.) (2016).

White Papers

Cross-Border Data Access Reform: A Primer on the Proposed U.S.-U.K. Agreement, BERKMAN KLEIN CENTER RESEARCH PUBLICATION NO. 2017-7 (2017) (with Tiffany Lin).

TEACHING EXPERIENCE AND ACADEMIC APPOINTMENTS

University of Nebraska College of Law **Lincoln, NE**

Adjunct Professor, Spring 2021

Teaching: Domestic Cybersecurity Law

Selected student reviews (full reviews available on request):

“Professor Fidler was very approachable.”

“The on-call system is perhaps the best I’ve encountered during the pandemic.”

“Fidler is constantly able to keep the conversation flowing and her welcoming demeanor is a stark contrast to the usual dread of being called on in class.”

“A wonderful course, challenging but fair, I’m very glad I took the course. Professor Fidler has a bright future in legal academia.”

Nebraska Governance & Technology Center, University of Nebraska-Lincoln

Visiting Faculty Fellow (2020-22)

Berkman Klein Center for Internet & Society, Harvard Law School **Cambridge, MA**

Fellow (2016-2017) and Affiliate (2017-present)

Center for Applied Cybersecurity Research, Indiana University **Bloomington, IN**

Fellow (2014-2016)

LEGAL EXPERIENCE

Hon. Robert Bacharach **Oklahoma City, OK**

U.S. Court of Appeals for the Tenth Circuit, 2021-2022

I will serve as a law clerk for Judge Bacharach beginning in the fall of 2021.

Reporters Committee for Freedom of the Press **Washington, D.C.**

Technology & First Amendment Fellow, 2020-2021

Drafted litigation filings in cases challenging sealed criminal dockets and surveillance records. Drafted amicus briefs in cases involving hacking laws, protester rights, and whistleblowers. Assisted litigation of a public records access case in tribal court.

Wilson Sonsini Goodrich & Rosati **Palo Alto, CA**

Summer Associate, Internet Strategy & Litigation Practice, 2019

Provided extensive research and drafting support regarding First Amendment, CDA §230 defenses for Google, Twitter against lawsuits alleging suppression of disfavored speech online. Audited social media company responses to law enforcement data requests. Prepared legal advice for U.S. companies regarding overseas law enforcement data requests.

San Francisco Affirmative Litigation Project

New Haven, CT

Clinic at Yale Law; Member, Spring 2018-Fall 2019; Student Director, 2019

Drafted litigation documents for the City's challenge to restrictive changes to the federal public charge rules. Conducted significant research for complaint in the City's challenge on First Amendment, APA grounds to overly broad HHS conscience rules for medical staff. Developed, pitched novel consumer protection lawsuit involving cybersecurity practices in the real estate industry; case approved for further development.

Knight First Amendment Institute

New York, NY

Legal Intern, Summer 2018

Drafted amicus letter brief for submission in federal district court arguing FBI whistleblower First Amendment rights should be recognized as mitigating factors at sentencing. Authored memos to co-counsel re First Amendment protections for military documentary film maker. Reviewed FOIA documents that informed a First Amendment challenge to the Department of Defense's Prepublication Review Process.

Bar Admissions: Illinois (Jan. 2021), District of Columbia (Aug. 2021)

ACADEMIC WORKSHOPS AND TALKS

Regional Cybersecurity Laws, Cybersecurity Law and Policy Scholars Conference, University of Minnesota Law School (Fall 2021).

Discussant, *The Approaches of Non-Western States to International Law and Cyber Operations*, NATO Cooperative Defense Center of Excellence (Fall 2021).

A Partial Property Rights Theory of the Fourth Amendment, Privacy Law Scholars Conference (Spring 2021).

Subaltern Cyber Stability, Leiden University (Spring 2021).

Subaltern Cyber Stability, Nebraska Governance and Technology Center Workshop (Spring 2021).

Guest lecture, *Cyber Threats and Legal Responses*, United States Military Academy West Point (Spring 2021).

Guest lecture, *Legal Threats to Press Freedom*, Northwestern Medill School of Journalism (Fall 2020).

Data as Property for the Fourth Amendment, University of Nebraska Law & Tech Junior Scholars Workshop (August 2020).

Local Surveillance, Berkman Klein Center for Internet & Society Cybersecurity Workshop (March 2019).

Local Surveillance, Tufts Graduate Student Symposium in Cybersecurity Policy (March 2019).

Panelist, *Government Hacking: Vulnerability Equities Process*, Stanford Law School (2016).

First They Came for Them, Then They Came for Us: Why Police Surveillance of Protesters Matters to the Rest of Us, Nieman Foundation for Journalism at Harvard University (2016).

Panelist, *Managing the Vulnerability Economy*, Belfer Cyber Security Project, John F. Kennedy School of Government, Harvard University (2016).

Panelist, *Press Freedom in Africa: How States Achieve Compliance with African Court and AU Standards, Online and Offline*, Columbia University Law School (2016).

Guest lecture, “Edward Snowden and Conscientious Objection,” University of Michigan (2016).

Regulatory Options for the Global Trade in Zero-Day Vulnerabilities, Second Annual Conference on Governance of Emerging Technologies, Arizona State University (2014).

Ubiquity, Interrupted? A Comparison of European, Chinese, and U.S. Governance of the Internet of Things as an Emerging Technology, First Annual Conference on Governance of Emerging Technologies, Arizona State University (2013).

OTHER INVITED TALKS

Invitation-only roundtable participant at “U.S. Government Cyber Attribution,” Atlantic Council (June 2021).

Trained NPR journalists in surveillance law (May 2021).

Expert Participant in Cybersecurity Ethics Workshop, funded by the Department of Defense, (July-August 2020).

Panelist at U.K. Foreign Policy in Changed World Conditions, House of Lords International Relations Committee Roundtable with Early Career Experts (invitation only) (July 2018).

Panelist at Bipartisan Cybersecurity Policy Workshop, U.S. Senate (invitation only) (November 2017).

Interviewed on Mozilla’s “IRL” podcast regarding police surveillance, August 2017.

Invitation-only roundtable participant at “MLATs in the Global South,” RightsCon, March 2017.

Invitation-only roundtable participant at “The Vulnerability Equities Process and the Underground Economy,” Center for Strategic and International Studies, March 2017.

Panelist at “The Vulnerabilities Economy: A Closer Look at How Software Vulnerabilities Shape Our Security for Better and Worse” at the Woodrow Wilson International Center for Scholars, 27 October, 2016, Washington, D.C.

Panelist at “African Frameworks on Internet Freedom – What are the Provisions? What are the Conflicts?” at the Forum on Internet Freedom in Africa 2016, 28 September 2016, Kampala, Uganda.

Panelist at “Transaction Declined: Can Activists, Industry, and Authorities Prevent Repressive Regimes from Buying Surveillance Technologies?” at Computers, Freedom, and Privacy 2015, 14 October 2015, Washington, D.C.

Panelist at “Real Digital Security: How to Modernize the EU’s Export Control Regime and Trade in Zero-Day Vulnerabilities” at an event hosted by the European Parliament, 30 September 2015, Brussels, Belgium. <http://www.marietjeschaake.eu/2015/09/real-digital-security-how-to-modernize-the-eus-export-control-regime-and-the-trade-in-zero-day-vulnerabilities/>.

Presented, “The Global Trade in Zero-Day Vulnerabilities: Human Rights Implications” to Amnesty International, 30 April 2015, London, United Kingdom.

Presented “Technical-Policy Governance Gaps: Findings from a Case Study on European Governance of the Internet of Things” to the EU-sponsored Internet of Things Forum 2012, November 2012, Bled, Slovenia.

BLOG POSTS

“Court Upholds Legal Challenge Under California Statewide Stingray Law,” Lawfare, 5 Jan. 2021, <https://www.lawfareblog.com/court-upholds-legal-challenge-under-california-statewide-stingray-law>.

“Four Obstacles to Local Surveillance Ordinances,” Lawfare, 4 September 2020 (with Lily Liu), <https://www.lawfareblog.com/four-obstacles-local-surveillance-ordinances>.

- “Fourteen Places Have Passed Local Surveillance Laws. Here’s How They’re Doing,” *Lawfare*, 3 September 2020, <https://www.lawfareblog.com/fourteen-places-have-passed-local-surveillance-laws-heres-how-theyre-doing>.
- “Disinformation Colonialism and African Internet Policy,” *Net Politics – Council on Foreign Relations*, 21 November 2019, <https://www.cfr.org/blog/disinformation-colonialism-and-african-internet-policy>.
- “Conscientious Objectors and Whistleblowers: Sentencing Should Recognize First Amendment Interests,” *Just Security*, October 2018, at <https://www.justsecurity.org/61125/conscientious-objectors-whistleblowers-sentencing-recognize-amendment-interests/>.
- “African Union Bugged by China: Cyber Espionage as Evidence of Strategic Shifts,” *Net Politics – Council on Foreign Relations*, 7 March 2018, <https://www.cfr.org/blog/african-union-bugged-china-cyber-espionage-evidence-strategic-shifts>.
- “In the U.S.-U.K. Deal, Both Sides Deserve Scrutiny.” *Just Security*, 9 August 2017, at <https://www.justsecurity.org/44020/u-s-u-k-deal-sides-deserve-scrutiny1/> (with Scarlet Kim).
- “The Weak Link in a Double Act: U.K. Law is Inadequate for Proposed Cross-Border Data Request Deal.” *Lawfare*, 11 July 2017, at <https://www.lawfareblog.com/weak-link-double-act-uk-law-inadequate-proposed-cross-border-data-request-deal> (with Scarlet Kim.)
- “PATCH: Debating Codification of the VEP.” *Lawfare*, 17 May 2017, at <https://www.lawfareblog.com/patch-debating-codification-vep> (with Trey Herr).
- “South Africa Introduces Revised Cybercrime Legislation, Acknowledging Criticism.” *Net Politics – Council on Foreign Relations*, 7 March, 2017, at <https://www.cfr.org/blog/south-africa-introduces-revised-cybercrime-legislation-acknowledging-criticism>.
- “Investigating Surveillance Around Standing Rock.” *Just Security*, 16 November 2016, at <https://www.justsecurity.org/34449/investigating-surveillance-standing-rock/> (with Collin Anderson).
- “Africans Want Cross-Border Data Access Reform, But They Might Get Left Out.” *Net Politics – Council on Foreign Relations*, 26 October 2016, at <http://blogs.cfr.org/cyber/2016/10/26/africans-want-cross-border-data-access-reform-but-they-might-get-left-out/>.

- “A Response to ‘The Tech:’ Continuing the Vulnerability Equities Process Debate.” *Just Security*, 13 September 2016, at <https://www.justsecurity.org/32883/response-the-tech-continuing-vulnerability-equities-process-debate/>.
- “The Vulnerability Equities Process Should Consider More than Intelligence Community Needs.” *Just Security*, 2 September 2016, at <https://www.justsecurity.org/32697/vulnerability-equities-process-intelligence-community/>.
- “Cyber Diplomacy with Africa: Lessons from the African Cybersecurity Convention.” *Net Politics – Council on Foreign Relations*, 7 July 2016, at <http://blogs.cfr.org/cyber/2016/07/07/cyber-diplomacy-with-africa-lessons-from-the-african-cybersecurity-convention/>.
- “The African Internet Governance Forum: Continued Discomfort with Multistakeholderism.” *Net Politics - Council on Foreign Relations*, 20 October 2015, at <http://blogs.cfr.org/cyber/2015/10/20/the-african-internet-governance-forum-continued-discomfort-with-multistakeholderism/>.
- “MLAT Reform: Thoughts from Civil Society.” *Lawfare*, 11 September 2015, at <https://www.lawfareblog.com/mlat-reform-some-thoughts-civil-society>.
- “The African Union Cybersecurity Convention: A Missed Human Rights Opportunity.” *Net Politics - Council on Foreign Relations*, 22 June 2015, at <http://blogs.cfr.org/cyber/2015/06/22/the-african-union-cybersecurity-convention-a-missed-human-rights-opportunity/> (with Fadzai Madzingira).
- “Proposed U.S. Export Controls: Implications for Zero-Day Vulnerabilities and Exploits.” *Lawfare*, 10 June 2015, at <http://www.lawfareblog.com/proposed-us-export-controls-implications-zero-day-vulnerabilities-and-exploits>.
- “Update: Changes to Export Control Arrangement Intended to Apply to Surveillance Technology, not Exploits, but Confusion and Ambiguity Remain.” *Just Security*, 19 February 2014, at <http://justsecurity.org/7276/update-export-control-arrangement-intended-apply-surveillance-technology-exploits-confusion-ambiguity-remain/> (with Jennifer Granick).
- “Changes to Export Control Arrangement Apply to Computer Exploits and More.” *Just Security*, 15 January 2014, at <http://justsecurity.org/5703/export-control-arrangement-apply-computer-exploits/> (with Jennifer Granick).

“Policy & Innovation in the Internet of Things: Findings from Europe and China.” *Google Policy By the Numbers Blog*, 2 January 2013, at <http://policybythenumbers.blogspot.co.uk/2013/01/policy-innovation-in-internet-of-things.html>.