

A FREE IRRESPONSIBLE PRESS: WIKILEAKS AND THE BATTLE OVER THE SOUL OF THE NETWORKED  
FOURTH ESTATE  
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[I]t is very necessary that we should not flinch from seeing what is vile and debasing. There is filth on the floor, and it must be scraped up with the muck rake; and there are times and places where this service is the most needed of all the services that can be performed. But the man who never does anything else, who never thinks or speaks or writes, save of his feats with the muck rake, speedily becomes, not a help but one of the most potent forces for evil.

There are in the body politic, economic and social, many and grave evils, and there is urgent necessity for the sternest war upon them. There should be relentless exposure of and attack upon every evil man, whether politician or business man, every evil practice, whether in politics, business, or social life. I hail as a benefactor every writer or speaker, every man who, on the platform or in a book, magazine, or newspaper, with merciless severity makes such attack, provided always that he in his turn remembers that the attack is of use only if it is absolutely truthful.

Theodore Roosevelt, *The Man with the Muck-rake*, 14 April 1906

Wikileaks was born a century after President Theodore Roosevelt delivered the speech that gave muckraking journalism its name, and both hailed investigative journalism and called upon it to be undertaken responsibly. Four years after its first document release, in 2010, Wikileaks became the center of an international storm surrounding the role of the individual in the networked public sphere. It forces us to ask us how comfortable we are with the actual shape of democratization created by the Internet. The freedom that the Internet provides to networked individuals and cooperative associations to speak their minds and organize around their causes has been deployed over the past decade to develop new networked models of the fourth estate. These models circumvent the social and organizational frameworks of traditional media, which played a large role in framing the balance between freedom and responsibility of the press. At the same time, the Wikileaks episode forces us to confront the fact that the members of the networked fourth estate turn out to be both more susceptible to new forms of attack than those of the old, and to possess different sources of resilience in the face of these attacks. In particular, commercial owners of the critical infrastructures of the networked environment can deny service to controversial speakers, and some appear to be willing to do so at a mere whiff of public controversy. The United States government, in turn, can use this vulnerability to bring to bear new kinds of pressure on undesired disclosures in extralegal partnership with these private infrastructure providers.

The year of Wikileaks began with the release of a video taken by a U.S. attack helicopter, showing what sounded like a trigger-happy crew killing civilians alongside their intended targets. It continued with two large scale document releases from Iraq and Afghanistan, about which Defense

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Secretary Robert Gates wrote to the Senate represented that “the review to date has not revealed any sensitive intelligence sources and methods compromised by this disclosure.”<sup>1</sup> The year ended with the very careful release of a few hundred (as of this writing, it has risen to over 1900) cables from U.S. embassies in cooperation with five traditional media organizations. At the time of the embassy cable release, about two-thirds of news reports incorrectly reported that Wikileaks had simply dumped over 250,000 classified cables onto the net.<sup>2</sup> In fact, Wikileaks made that large number of cables available only privately, to the *New York Times*, *The Guardian*, *Der Spiegel*, *Le Monde*, and *El Pais*, and later to other media organizations. These organizations put their own teams to sift through the cables, and selected a few, often in redacted form, to publish. Wikileaks then published almost solely those cables selected by these traditional organizations, and only in the redacted form released by those organizations.<sup>3</sup> Of this release Secretary Gates stated: “Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.”<sup>4</sup>

Despite the steadily more cautious and responsible practices Wikileaks came to adopt over the course of the year, and despite the apparent absence of evidence of harm, the steady flow of confidential materials through an organization that was not part of the familiar “responsible press” was met by increasing levels of angry vitriol from the Administration, politicians, and media commentators. By the end of the year, U.S. Vice President Joseph Biden responded to the quite limited and careful release of the embassy cables by stating that Wikileaks founder Julian Assange is “more like a high-tech terrorist than the Pentagon Papers,”<sup>5</sup> leading to predictable calls for his assassination, on the model of targeted killings of Al Qaeda and Taliban leaders in Afghanistan, by Fox News commentators and Republican presidential candidate Sarah Palin.<sup>6</sup> *The New York Times*'s flagship opinion author, Thomas Friedman, declared Wikileaks one of the two major threats to a peaceful world under U.S. leadership, parallel to the threat of an ascendant China.<sup>7</sup>

The rhetorical framing of Wikileaks in the socio-political frame of global threat and terrorism, in turn, facilitated and interacted with a range of responses that would have been inconceivable in the

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1 Adam Levine, *Gates: Leaked documents don't reveal key intel, but risks remain*, CNN.COM (Oct. 16, 2010, 8:25 AM), [http://articles.cnn.com/2010-10-16/us/wikileaks.assessment\\_1\\_julian-assange-wikileaks-documents?\\_s=PM:US](http://articles.cnn.com/2010-10-16/us/wikileaks.assessment_1_julian-assange-wikileaks-documents?_s=PM:US).

2 See media analysis *infra*, text accompanying notes \_\_\_-\_\_\_.

3 See detailed description and sourcing *infra*, notes \_\_\_-\_\_\_.

4 News Briefing, Dep't of Defense, DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon (Nov. 30, 2010), available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4728>. Gates said at a Pentagon press briefing on the day of the release: “Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think -- I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments -- some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation. So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another. Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.”

5 *Biden Makes Case For Assange As A 'High-Tech Terrorist'*, HUFFINGTON POST (Dec. 19, 2010, 3:51 PM), [http://www.huffingtonpost.com/2010/12/19/joe-biden-wikileaks-assange-high-tech-terrorist\\_n\\_798838.html](http://www.huffingtonpost.com/2010/12/19/joe-biden-wikileaks-assange-high-tech-terrorist_n_798838.html) (“If he conspired, to get these classified documents, with a member of the US military, that's fundamentally different than if somebody drops in your lap, ‘Here David, you're a press person, here is classified materials . . . .’ I would argue that it's closer to being a high tech terrorist than the Pentagon Papers.”).

6 See *infra*, notes \_\_\_-\_\_\_ (describing comments of Bob Beckel, William Kristol, and Sarah Palin).

7 Thomas L. Friedman, *We've Only Got America A*, N.Y. TIMES, Dec. 15, 2010, at A31, available at <http://www.nytimes.com/2010/12/15/opinion/15friedman.html?partner=rssnyt&emc=rss>. See *infra*, notes \_\_\_-\_\_\_.

more factually appropriate frame of reference: such as what counts as responsible journalism, or how we understand the costs and benefits of the demise of more traditional models of journalistic self-regulation in the age of the networked public sphere. On the legal front, the Department of Justice responded to public calls from Senator Diane Feinstein and others and began to explore prosecution of Julian Assange under the Espionage Act; the military held (and continues to hold as of this writing) the suspected source of the leak in solitary confinement for over eight months, while the leading Republican presidential candidate, Mike Huckabee, called for his execution.<sup>8</sup>

The sociopolitical framing makes more comprehensible the vigilante responses in other subsystems of the information environment. Responding to a call from Senate Homeland Security Committee Chairman Joe Lieberman, several commercial organizations tried to shut down Wikileaks by denial of service of the basic systems under their respective control. Wikileaks' domain name server provider, EveryDNS, stopped pointing at the domain "wikileaks.org," trying to make it unreachable. Amazon, whose cloud computing platform was hosting Wikileaks data, cut off hosting services for the site, and Apple pulled a Wikileaks App from its App Store. Banks and payment companies, like Mastercard, Visa, PayPal, and Bank of America, as well as the Swiss postal bank, cut off payment service to Wikileaks in an effort to put pressure on the site's ability to raise money from supporters around the world. These private company actions likely responded to concerns about being associated publicly with "undesirables." There is no clear evidence that these acts were done at the direction of a government official with authority to coerce it. The sole acknowledged direct action was a public appeal for, and subsequent praise of, these actions by Senator Joe Lieberman. In that regard, these acts represent a direct vulnerability in the private infrastructure system and a potential pathway of public censorship. It is impossible to ignore the role that a diffuse, even if uncoordinated set of acts by government officials, beginning with the phrasing of Harold Koh's letter to Wikileaks from November 27<sup>th</sup>, cited by PayPal as its reason for closure, and through to various public statements and organizational actions, played in triggering the commercial services denial of service attack.<sup>9</sup> In combination, the feedback from public to private action presents the risk of a government able to circumvent normal constitutional protections to crack down on critics who use the networked public sphere. This occurs through informal systems of pressure and approval on market actors who are not themselves subject to the constitutional constraints. This extralegal public-private partnership allows an administration to achieve through a multi-system attack on critics results that would have been practically impossible to achieve within the bounds of the constitution and the requirements of legality.

Parts I and II tell the story of Wikileaks, the release of the documents, and the multisystem attack on the organization, the site, and Julian Assange by both public and private actors. Part III explains the constitutional framework, and why it is not, as a matter of law, sustainable to treat Wikileaks or Assange any differently than the *New York Times* and its reporters for purposes of prior restraint or ex post criminal prosecution consistent with the first amendment's protection of freedom of the press. Prosecution of Wikileaks or Assange will almost certainly falter under present first amendment doctrine. In the unlikely event that prosecution succeeds, it will only do so at the expense

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<sup>8</sup> Haroon Siddique & Matthew Weaver, *US embassy cables culprit should be executed, says Mike Huckabee*, THE GUARDIAN, Dec. 1, 2010, available at <http://www.guardian.co.uk/world/2010/dec/01/us-embassy-cables-executed-mike-huckabee>; Nick Collins, *WikiLeaks: guilty parties 'should face death penalty'*, THE TELEGRAPH, Dec. 1, 2010, available at <http://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html>.

<sup>9</sup> Cite to TAN sections on government comments Cliton speech; Koh letter, as well as organizational attack.

of making very bad first amendment law from the perspective of freedom of the press in the networked age. Part III concludes with what causes of action, if any, may be open for future members of the fourth estate against government officials who instigate extralegal attacks on critics, and what responses in private law, against the private partners in the public-private partnership, can to some extent replace the first amendment protections available against direct action by their public partners. Part IV explores the ways in which the Wikileaks case intersects with larger trends in the news industry. It describes the economic challenges faced by traditional media and the emerging pattern of the networked fourth estate. In particular, what we see is that the new, networked fourth estate will likely combine elements of the traditional news media with those of the new; that “professionalism” and “responsibility” can be found on both sides of the divide, as can unprofessionalism and irresponsibility. The traditional news industry's treatment of Wikileaks throughout this episode can best be seen as an effort by older media to preserve their own identity against the perceived threat posed by the new networked model. As a practical result, the traditional media in the United States effectively collaborated with parts of the Administration in painting Wikileaks and Assange in terms that made them more susceptible to both extralegal and legal attack. More systematically, this part suggests that the new, relatively more socially-politically vulnerable members of the networked fourth estate are needlessly being put at risk by the more established outlets' efforts to denigrate the journalistic identity of the new kids on the block to preserve their own identity.

As I write these words, the story is ongoing. It is too soon to tell how this specific debate will progress. The experience of the music industry suggests that the conflict over the shape of the fourth estate will continue well into the coming decade. It may well impose serious collateral damage on some citizen journalists. And it will likely end up with an improved watchdog function, reaching some accommodation between the more traditional representatives of the fourth estate, like the *New York Times*, and the more edgy, muckraking elements of the networked environment. As we will see over the course of looking at this one major event, each party will be sometimes responsible and sometimes irresponsible; sometimes professional, and sometimes not; each in its own special way.

## PART I: THE PROVOCATION: WIKILEAKS EMERGES AS A NEW ELEMENT OF THE FOURTH ESTATE

### A. *2006-2009: Award-winning site exposing corruption and abuse around the world*

Wikileaks registered its domain name in October of 2006, and released its first set of documents in December of that year.<sup>10</sup> The first two sets of documents related to Africa.<sup>11</sup> In December of 2006 the site released a copy of a decision by the rebel leader in Somalia to assassinate Somali government officials. In August of 2007, it released another document identifying corruption by Kenyan leader Daniel Arap Moi.<sup>12</sup> November of 2007 was the first time that Wikileaks published information relating to the U.S.: a copy of Standard Operating Procedures for Camp Delta, exposing a formal source outlining the details of how the Guantanamo Bay detention camp was run. In 2008 Wikileaks released

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<sup>10</sup> See the Wikipedia article. I use this source advisedly; following the citation lists in the article suggests that it is a particularly good entry point into the history of Wikileaks. *WikiLeaks*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikileaks> (last visited Feb. 23, 2011).

<sup>11</sup> *WikiLeaks Timeline*, THE GLOBE AND MAIL, Dec. 14, 2010, available at <http://www.theglobeandmail.com/news/technology/wikileaks-timeline/article1837131/>.

<sup>12</sup> *Id.*

a wide range of activities relating to illegal activities of public and private bodies. On the private side, these included a Swiss Bank's Cayman Islands account; internal documents of the Church of Scientology, and Apple's iPhone application developer contract, which had included an agreement not to discuss the restrictive terms. On the public side, it included U.S. military rules of engagement in Iraq permitting cross-border pursuit of former members of Saddam Hussein's government across the border into Iran and Syria,<sup>13</sup> an early draft of the Anti-Counterfeiting Trade Agreement (ACTA),<sup>14</sup> emails from Sarah Palin's Yahoo accounts while she was candidate for Vice President, and a membership list of the far right British National Party. Most prominently, Wikileaks released documents pertaining to extra-judicial killings and disappearances in Kenya, for which it won Amnesty International's New Media award in 2009.<sup>15</sup> Wikileaks also received the Freedom of Expression Award from the British magazine, *Index of Censorship* in the category of new media.<sup>16</sup> Its activity increased in 2009. The pattern of releasing information relating to a range of very different countries, and of potential corruption, malfeasance, or ineptitude continued, including oil related corruption in Peru, banking abuses in Iceland, and a nuclear accident in Iran.<sup>17</sup> Most prominent that year was Wikileaks's release of copies of e-mail correspondence between climate scientists, which was the basis of what right wing U.S. media tried to turn into "Climategate."<sup>18</sup> What seems fairly clear from this brief overview of activities prior to 2010 is that Wikileaks was an organization that seems to have functioned very much as it described itself: a place where documents that shed light on powerful governments or corporations anywhere in the world, or, in the case of the climate scientists' emails, on a matter of enormous global public concern, could be aired publicly.

#### B. March 2010: Leaking the 2008 Pentagon Report on the threat of Wikileaks

Things changed in 2010. In March 2010, Wikileaks released a 2008 Pentagon report arguing that Wikileaks is a threat, while recognizing the site as a source of investigative journalism critical of U.S. military procurement and its conduct in war.<sup>19</sup> The *New York Times*, describing Wikileaks as "a

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13 Eric Schmitt & Michael R. Gordon, *Cross-Border Chases From Iraq O.K., Document Says*, N.Y. TIMES, Feb. 4, 2008, at A10.

14 Mike Mesnick, *Debunking The Faulty Premises Of The Pirate Bay-Criminalization Treaty*, TECHDIRT.COM (May 23 2008, 6:21 PM), <http://www.techdirt.com/articles/20080523/1203101212.shtml>.

15 Press Release, Amnesty Int'l UK, *Amnesty Announces Media Awards 2009 Winners*, (Jun. 6, 2009), *available at* [http://amnesty.org.uk/news\\_details.asp?NewsID=18227](http://amnesty.org.uk/news_details.asp?NewsID=18227).

16 Press Release, *Index on Censorship*, *Winners of Index on Censorship Freedom of Expression Awards Announced* (Apr. 22, 2008), *available at* <http://www.indexoncensorship.org/2008/04/winners-of-index-on-censorship-freedom-of-expression-award-announced/>.

17 Wikileaks Timeline, *Globe and Mail*, *supra*, note 11, 2009 tab. The list includes: In January, telephone intercepts of Peruvian politicians and businessmen involved in an oil scandal; 6,780 Congressional Research Service reports in February; In March it released a set of documents belonging to Barclay's Bank; in July a report relating to a nuclear accident at the Iranian Natanz nuclear facility; In September it released internal documents from Kaupthing Bank of Iceland, showing what appeared to be self-dealing of bank owners.

18 See Ben Dimiero, *FOXLEAKS: Fox Boss Ordered Staff to Cast Doubt on Climate Science*, MEDIAMATTERS.ORG (Dec. 15, 2010, 8:08 AM), <http://mediamatters.org/blog/201012150004>; Andrew C. Revkin, *Climategate Fever Breaks*, N.Y. TIMES, (Jul. 7, 2010, 9:02 AM), <http://dotearth.blogs.nytimes.com/2010/07/07/gate-fever-breaks/>.

19 The report was originally available on Wikileaks itself. Since the assault on Wikileaks has made access to the site difficult, that particular report can more easily be accessed as of February 19, 2011, at: Army Counterintelligence Center, *Wikileaks.org—An Online Reference to Foreign Intelligence Services, Insurgents, and Terrorist Groups?* NGIC-2381-0617-08, Mar. 18, 2008, WIKILEAKS.ORG, 2 (2010) *available at* <http://www.scribd.com/doc/28385794/Us-Intel-Wikileaks>, or can

tiny online source of information and documents that governments and corporations around the world would prefer to keep secret,”<sup>20</sup> reported that the Army confirmed the authenticity of the report.<sup>21</sup> The Pentagon report provides significant insight into what Wikileaks was doing by 2008, and why the military was concerned about it. The Report was dated about six weeks after Wikileaks had published the document revealing the rules of engagement and permission for cross-border pursuit.<sup>22</sup> The Executive Summary opens with the words: “Wikileaks.org, a publicly accessible Internet Web site, represents a potential force protection, counterintelligence, operational security (OPSEC), and information security (INFOSEC) threat to the US Army.”<sup>23</sup>

Mixing its own assessments with Wikileaks self-descriptions taken at face value, the Report describes Wikileaks as founded by “Chinese dissidents, journalists, mathematicians, and technologists from the United States, China, Taiwan, Europe, Australia, and South Africa,”<sup>24</sup> and dedicated “to expose unethical practices, illegal behavior, and wrongdoing within corrupt corporations and oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa, and the Middle East.”<sup>25</sup> The Report clearly identified the potential status of Wikileaks as a journalistic outlet protected by the First Amendment, subject to potential legal threats over privacy, disclosure of classified materials, or libel.<sup>26</sup> As an example the report identifies a suit brought by the Cayman Islands branch of the Julius Baer Swiss Bank that shut down US access to Wikileaks documents, a judicial order later lifted. In what would become a prescient statement, the 2008 Pentagon report states: “Efforts by some domestic and foreign personnel and organizations to discredit the Wikileaks.org Web site include allegations that it wittingly allows the posting of uncorroborated information, serves as an instrument of propaganda, and is a front organization of the US Central Intelligence Agency (CIA). The governments of China, Israel, North Korea, Russia, Thailand, Zimbabwe, and several other countries have blocked access to Wikileaks.org-type Web sites, claimed they have the right to investigate and prosecute Wikileaks.org and associated whistleblowers, or insisted they remove false, sensitive, or classified government information, propaganda, or malicious content from the Internet.”<sup>27</sup> The Report states that “Wikileaks.org supports the US Supreme Court ruling regarding the unauthorized release of the Pentagon Papers by Daniel Ellsberg, which stated that ‘only a free and unrestrained press can effectively expose deception in government.’”<sup>28</sup>

The recognition of the journalistic role Wikileaks plays is clear in the discussion of several examples of Wikileaks publications, which the Report repeatedly describes as “news article[s]” and describes Julian Assange as the organization's “foreign staff writer.”<sup>29</sup> In the process of describing

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be downloaded as a .pdf file at: <http://www.wuala.com/WikiLeaks/new/us-intel-wikileaks.pdf/> (“Pentagon Report”).

<sup>20</sup> Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 17, 2010, at A18.

<sup>21</sup> *Id.*

<sup>22</sup> That report was apparently an early instance of collaboration between Wikileaks and a major news outlet; Assange explains that the report was published in collaboration with New York Times reporter Eric Schmitt. Assange Annotations, on file with author.

<sup>23</sup> Pentagon Report, *supra*, note 18, at 2.

<sup>24</sup> *Id.*, at 5. These are descriptions that largely appear to take Wikileaks' own self-description as true.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 9 (“The foreign staff writer for Wikileaks.org, Julian Assange, wrote several news articles, coauthored other

what the Report's authors' consider a risk of misinformation campaigns, they identify several articles that Wikileaks published that rely on leaked Pentagon documents about equipment deployed in Afghanistan and Iraq. A major part of the concern is that opponents of the U.S. could use some of this information, released in 2007, to plan attacks on U.S. troops. There is no mention of any evidence of such actual use or feasible action in the Report. Instead, the Report mentions several disclosures and arguments about weapons systems deployed in Iraq, and critiques of their high expense, low effectiveness, and in the case of chemical weapons, illegality.<sup>30</sup> It is harder to imagine a clearer case of investigative journalism critical of the Pentagon's procurement policy than when the report says: "The author of the above-mentioned article incorrectly interprets the leaked data regarding the components and fielding of the Warlock system, resulting in unsupportable and faulty conclusions to allege war profiteering, price gouging and increased revenues by DoD contractors involved in counter-IED development efforts. This article provides an example of how the leaked TOE information can be manipulated and misinterpreted to produce inaccurate information for a news article. (S//NF) The author of the article then argues that the US Army receives a poor return on its investment in counter-IEDs."<sup>31</sup> Note that the claim carefully avoids stating that the documents or data are false. The complaint is over interpretation of facts accepted as true. The report follows up with other items it calls variously "news article," or "report," related to abuses in Guantanamo Bay, based on the leaked Camp Delta Operating Procedures, and in one case states: "A variety of newspapers, wire services, and other news and media organizations wrote numerous articles based on the original Wikileaks.org news article and actual classified document posted to their Web site."<sup>32</sup>

The 2008 Pentagon Report, then, sees Wikileaks as a journalistic organization whose structure and organization make it dangerous to the U.S. military. A review of all news stories in the Nexis database in 2007 and 2008 reveals, however, that Wikileaks' analysis (as opposed to documents) was not reported on in media covered by that dataset; instead, the roughly 400 reports present during that period referenced the materials themselves, with occasional references to the brief overview offered by the site. There are only 10 mentions of the Assange over this period; none refer to the kind of writing the Pentagon Report identifies.<sup>33</sup> The absence of significant contemporaneous news reports on Wikileaks' or Assange's analysis, as opposed to the documents revealed, may reflect a lack of willingness of more traditional media to recognize the writing, but may also represent an overstatement in the Pentagon Report as to the importance of this aspect of the site's operation.

The Report locates the danger that Wikileaks presents in its nontraditional organizational structure: "Anyone can post information to the Wikileaks.org Web site, and there is no editorial review or oversight to verify the accuracy of any information posted to the Web site. Persons accessing the Web site can form their own opinions regarding the accuracy of the information posted, and they are

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articles, and developed an interactive data base for the leaked documents. In addition, other Wikileaks.org writers and various writers for other media publications wrote separate news articles based on the leaked information posted to the Web site.").

<sup>30</sup> *Id.* at 11-15.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 15.

<sup>33</sup> A search in Lexis-Nexis "News, All" database for articles published from Jan. 1, 2007 until Dec. 31 using the term "Wikileaks" yielded 407 results. A "focus" search for "Assange" yielded ten results.

allowed to post comments.”<sup>34</sup> This makes the site particularly susceptible to “misinformation, disinformation, and propaganda; or to conduct perception management and influence operations designed to convey a negative message to those who view or retrieve information from the Web site.”<sup>35</sup>

This characterization of the threat of excessive openness appears to be either a misunderstanding driven by the “Wiki” part of the name or deliberate mischaracterization. Promiscuous publication by anyone of anything was not the model that Wikileaks adopted, although that model was far from unheard of at the time. A contemporaneous report by the *Los Angeles Times* compares Wikileaks to another then-operating site, Liveleak: “LiveLeak has a simple editorial philosophy: Anyone can post anything that does not violate the site's rules. Essentially, no pornography and nothing overtly criminal.”<sup>36</sup> By contrast, “Wikileaks... goes out of its way to make sure the documents it posts are authentic, saying fewer than 1% of its newly posted documents 'fail verification.’”<sup>37</sup> From the vantage point of early 2011 this policy seems to have been consistently followed and remarkably successful. After over four years in operation Wikileaks has been blamed of many faults, but none of its significant postings were found to be inauthentic.

The report concludes with a recommendation for attacking the site: cracking down very heavily on whistleblowers so as to make Wikileaks seem less safe as a point of distribution: “Wikileaks.org uses trust as a center of gravity by assuring insiders, leakers, and whistleblowers who pass information to Wikileaks.org personnel or who post information to the Web site that they will remain anonymous. The identification, exposure, or termination of employment of or legal actions against current or former insiders, leakers, or whistleblowers could damage or destroy this center of gravity and deter others from using Wikileaks.org to make such information public.”<sup>38</sup>

### C. *April-October 2010: Collateral Murder, Afghanistan, and Iraq.*

April 2010 marked the beginning of a series of four releases of documents embarrassing to the United States government. All four releases are thought to originate from a single major transfer of documents, allegedly provided by a 22 year-old Private First Class in the U.S. Army, Bradley Manning.<sup>39</sup> The first release was a video entitled “Collateral Murder.” On July 12, 2007, two Apache

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34 Pentagon Report, *supra* note 18, at 2.

35 *Id.*

36 David Sarno *Burst of leaks getting slippery*, L.A. TIMES, Apr. 16, 2008, at E1

37 *Id.* Assange notes that this is an overstatement of inaccuracy; his annotations suggest that 1% of received documents fail verification, and are not posted, while no documents posted to date on Wikileaks have failed verification. Assange annotations, *supra*.

38 Pentagon Report, *supra* note 18, at 3

39 Wikileaks itself has provided no public statement about the source. Manning was charged by the Army only with the first release. Glenn Greenwald of Salon makes a powerful case that the evidence against Manning originates in a highly unreliable source. Glenn Greenwald, *The Strange and Consequential Case of Bradley Manning, Adrian Lamo and Wikileaks*, SALON (Jun. 18, 2010), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/06/18/wikileaks](http://www.salon.com/news/opinion/glenn_greenwald/2010/06/18/wikileaks). On the background story, see Chris McGreal, *Hacker Turns in US Soldier over WikiLeaks Iraq Video*, THE GUARDIAN, Jun. 8, 2010, at 15 Main Section, available at <http://www.guardian.co.uk/world/2010/jun/07/hacker-wikileaks-iraq-video-manning>. The underlying materials Greenwald discusses include: Kevin Poulsen & Kim Zetter, *Suspected Wikileaks Source Described Crisis of Conscience Leading to Leaks*, WIRED (Jun. 10, 2010), <http://www.wired.com/threatlevel/2010/06/conscience/>.



attack helicopters fired on a group of individuals in Iraq, killing about twelve. Among the dead were two Reuters employees: a photographer and an driver. Reuters tried to get access to the video footage from the helicopter itself, so as to investigate what had happened, and whether indeed there was a threat to the helicopters that would have explained the shooting. The U.S. government successfully resisted information requests for recordings of the events. Wikileaks made available both the full raw video and an edited version on April 5, 2010. In it, and its soundtrack, the helicopter pilots exhibit trigger-happy behavior, sounding as though they took pleasure in hunting down their targets, some of whom appear to be unarmed civilians. The video and its contents became front page news in the major papers.<sup>40</sup> The release of the video was swiftly followed by identification of Manning as the source of the leak, based on selectively-released chat messages he allegedly wrote to Adrian Lamo, a hacker convicted of felony hacking in 2004, who had longstanding contacts with a Wired Magazine reporter to whom he conveyed these chat messages.<sup>41</sup> As of this writing, Manning has been in solitary confinement for over eight months, denied pillows and sheets, and locked up in a cell for 23 out of 24 hours a day.<sup>42</sup> The treatment seems consistent with the Pentagon Report's emphasis on deterrence against potential sources of leaks as the core tactic to undermine Wikileaks.

The *Collateral Murder* video was released at a news conference in the National Press Club in Washington D.C. This was the first move that Wikileaks made toward the cooperation with traditional media that would mark its operation in the following eight months. At that early stage, however, Wikileaks was only using the established press as a mechanism for amplifying its message. The edited version of the video came under attack; *Fox News* in particular emphasized the claim that the video was edited to highlight the killed journalists, but not the presence of a person with a rocket-propelled grenade.<sup>43</sup> A careful review of both videos—the uncut original and the edited version—side by side suggests that the editing primarily did three things: first, it excluded many minutes of irrelevant periods where no action was taking place, just as any video journalist would do; second, it added context, through text slides, that gave information about the Reuters photographer and driver, as well as contemporaneous quotations from news reports to give context to what was being seen; and third, it emphasized shots that made the point about collateral damage: shots that emphasize that the Reuters cameramen's cameras were clearly visible, or that suggest that the children who were injured in the helicopter attack were visible from the helicopter's gun camera through the side window of the van in which they were sitting, a van that the helicopter shot so as to prevent its occupants from evacuating an injured individual that the helicopter crew clearly saw was unarmed,<sup>44</sup> possibly one of the Reuters employees. Both the edited and unedited versions show, with sound track, that there were at least two

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40 *WikiLeaks Posts Video of 'US Military Killings' in Iraq*, BBC (Apr. 6 2010), <http://news.bbc.co.uk/2/hi/americas/8603938.stm>; Chris McGreal, *Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians*, THE GUARDIAN, Apr. 6, 2010, at 2 Main Section, available at <http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack>.

41 Greenwald, *supra* note 36.

42 Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's Detention*, SALON (Dec. 15, 2010), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/14/manning/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/manning/index.html); Joshua Norman, *Bradley Manning, Alleged Wikileaks Source, in Solitary Confinement*, CBS NEWS (Dec. 15, 2010), [http://www.cbsnews.com/8301-503543\\_162-20025724-503543.html](http://www.cbsnews.com/8301-503543_162-20025724-503543.html).

43 Justin Fishel, *Military Raises Questions About Credibility of Leaked Iraq Shooting Video*, FOX NEWS (Apr. 7, 2010), <http://www.foxnews.com/politics/2010/04/07/military-raises-questions-credibility-leaked-iraq-shooting-video/>.

44 The helicopter circled the struggling, injured man, as one of the pilots is heard saying: "come on buddy, all you gotta do is pick up a weapon". Full video at 6:55-7:03.

individuals who had AK-47s; both the edited and unedited versions show, around the 2:30-2:42 minute mark of the full video, and minutes 4:05-4:17 of the edited version, that the pilot thought he saw an RPG peeking around a corner, and that is when he asked for permission to shoot, although in both versions it appears that the RPG may have been the zoom lens of one of the cameras used by the Reuters cameraman.<sup>45</sup> The editing did nothing to obscure any of this, or to highlight the possible mistake. There were several damning parts of the uncut version that were not included in the edited version,<sup>46</sup> and two ambiguous references to the RPG that might confirm that there was indeed one, but not necessarily that it was where the pilot thought it was.<sup>47</sup>

In July 2010, Wikileaks released a new cache of documents; these were war logs from the field in Afghanistan. The technique here represented a completely new model.<sup>48</sup> Before publication Wikileaks teamed up with three major international news organizations: *The New York Times*, *The Guardian*, and *Der Spiegel*. The major organizations were then given a period to verify the contents, analyze them, and prepare them for presentation; all four organizations published on the same day: Wikileaks, a much larger portion of the full database of documents; the news organizations, their analysis.<sup>49</sup> The reporting on these documents found nothing that, in broad terms, was not already publicly known: the degree to which the U.S. was deploying targeted assassinations against Taliban leaders; the large number of civilian casualties caused by drone attacks and other coalition activities. The drudgery of war, low levels of trust between U.S. and Afghan officials and forces; all these were on display. The precision and detail of the incident descriptions—such as the shooting of eight children in a school bus by French troops, or of 15 civilians on a bus by U.S. troops—added concrete evidence and meaning to a background sense of futility and amorphous knowledge of civilian casualties.<sup>50</sup> The

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<sup>45</sup> The full version is available at <http://www.youtube.com/watch?v=is9sxRfU-ik>. The edited version is available at <http://www.youtube.com/watch?v=5rXPrfnU3G0>.

<sup>46</sup> The edited version excludes the moment when the pilot hears that the ground troops have found a wounded girl and says “Ah, damn, oh well” in an aural shrug (Minute 17:11 of uncut version); similarly, an unrelated incident, fifteen minutes later and caught as part of the full cut, clearly displays the same gunship’s crew shooting hellfire missiles into a building just as an unarmed civilian walks by the house, and again describes in conversation among the pilots another missile hitting the same building as three apparently unarmed civilians walk through the rubble looking for survivors. Minute 34:00 *et. seq.* (at least some individuals walking into the building before that point appear unarmed.) These much more damning images were not part of the edited version, presumably because they were not part of the story about shooting the Reuters crew. An advocacy piece aiming to besmirch the United States military would clearly have highlighted those unambiguous examples of callous disregard for human life by the same gun crew, minutes after they had seen that they shot and injured two children in the course of trying to prevent the evacuation of an unarmed person they had injured in their prior volley.

<sup>47</sup> At minute 16:00 of the full video, the pilot reiterates seeing the RPG as the reason to ask for permission to fire; at minute 19:22-26 of that video, one of the ground troops is heard saying “I got one individual looks like he’s got an RPG round laying underneath him.”

<sup>48</sup> See David Leigh, *Afghanistan War Logs: How the Guardian Got the Story*, THE GUARDIAN, Jul. 26, 2010, at 2 Main Section, available at <http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-explained-video>.

<sup>49</sup> Assange explains that posting the materials included removing about one-fifth of the materials to prevent potential harm to individuals mentioned in them, processing to provide distribution and statistical analyses, and in particular that he himself identified the documents relating to one of the most significant finds, the description of Taskforce 373, a force that undertook targeted assassinations in Afghanistan. Assange annotations, *supra*, For a publication of this story see Nick Davies, *Afghanistan war logs: Task Force 373 – special forces hunting top Taliban*, THE GUARDIAN, Jul. 25, 2010.

<sup>50</sup> Nick Davies & David Leigh, *Afghanistan War Logs: Massive Leak of Secret Files Exposes Truth of Occupation*, THE GUARDIAN, Jul. 26, 2010, at 1 Main Section, available at <http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-explained-video>.

Afghanistan war logs release initially included about 77,000 documents; another 15,000 documents later followed after they were initially held back to allow time for Wikileaks to redact names of people who might be put in danger.<sup>51</sup> The release was treated with consternation by the Administration; the *New York Times* initial story quoted National Security Advisor General James Jones as saying that the U.S. “strongly condemns the disclosure of classified information by individuals and organizations which could put the lives of Americans and our partners at risk, and threaten our national security. WikiLeaks made no effort to contact us about these documents – the United States government learned from news organizations that these documents would be posted.”<sup>52</sup> Chairman of the Joint Chiefs of Staff, Admiral McMullen, was reported as having said that Wikileaks would have blood on its hands.<sup>53</sup> Following a full review, however, and in response to a direct request from Senator Carl Levin, Chairman of Senate Armed Services Committee, Secretary Gates later represented that “the review to date has not revealed any sensitive intelligence sources and methods compromised by the disclosure.”<sup>54</sup> McClatchy later quoted an unnamed Pentagon source confirming that three months later there was still no evidence that anyone had been harmed by information in the Afghan war logs released.<sup>55</sup>

In October, Wikileaks added one more major release. It consisted of war logs similar to those released in July, this time pertaining to the Iraq war. Here, Wikileaks posted close to 400,000 field reports from Iraq in what the BBC described as “a heavily censored form.”<sup>56</sup> The *New York Times* framed the documents as having relatively low significance: “Like the first release, some 77,000 reports covering six years of the war in Afghanistan, the Iraq documents provide no earthshaking revelations, but they offer insight, texture and context from the people actually fighting the war.”<sup>57</sup> Other news organizations framed the reports quite differently. *Der Spiegel* entitled the reports “A Protocol of Barbarity.”<sup>58</sup> The BBC used the headline: “Huge Wikileaks release shows US 'ignored Iraq torture'.”<sup>59</sup> Regardless framing differences, the core facts established by the reports were agreed: Iraqi civilian casualties were higher than previously reported; the US military was well aware that Iraq's military and police were systematically torturing prisoners, and while discrete units intervened to stop

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logs-military-leaks; C. J. Chivers et al., *View is Bleaker than Official Portrayal of War in Afghanistan*, N.Y. TIMES (Jul. 25, 2010), <http://www.nytimes.com/2010/07/26/world/asia/26warlogs.html>.

51 Eric Schmitt, *In Disclosing Secret Documents, WikiLeaks Seeks 'Transparency'*, N.Y. TIMES, Jul. 26, 2010, at A11.

52 *The War Logs Articles*, N.Y. TIMES, (Jul. 25, 2010), <http://www.nytimes.com/2010/07/26/world/26askthetimes.html>. [[I think a better source is: <http://www.pbs.org/newshour/rundown/2010/07/the-morning-line-leaked-afghanistan-field-reports-to-shape-political-war-debate-at-home.html>. YB]

53 See Adam Levine, *Top military official: WikiLeaks founder may have 'blood' on his hands*, CNN July 29, 2010, <http://www.cnn.com/2010/US/07/29/wikileaks.mullen.gates/index.html>; A BBC report attributed a similar statement to Defense Secretary Robert Gates. Adam Brookes, *Huge WikiLeaks Release Shows US 'Ignored Iraq Torture'*, BBC (Oct. 23, 2010), <http://www.bbc.co.uk/news/world-middle-east-11611319>.

54 Adam Levine, *Gates: WikiLeaks Don't Reveal Key Intel but Risks Remain*, CNN.COM (Oct. 16, 2010), [http://articles.cnn.com/2010-10-16/us/wikileaks.assessment\\_1\\_julian-assange-wikileaks-documents?\\_s=PM:US](http://articles.cnn.com/2010-10-16/us/wikileaks.assessment_1_julian-assange-wikileaks-documents?_s=PM:US).

55 Nancy A. Youssef, *Officials May be Overstating the Danger from WikiLeaks*, MCCLATCHY (Nov. 28, 2010), <http://www.mcclatchydc.com/2010/11/28/104404/officials-may-be-overstating-the.html>.

56 Adam Brookes, *Huge Wikileaks Release Shows U.S. Ignored Torture*, BBC (Oct. 23, 2010), <http://www.bbc.co.uk/news/world-middle-east-11611319>.

57 *The Iraq Archive: The Strands of a War*, N.Y. TIMES, Oct. 23, 2010, at A1.

58 Hans Hoyong et al., *A Protocol of Barbarity*, SPIEGEL (Oct. 25, 2010), <http://www.spiegel.de/international/world/0,1518,724026,00.html>.

59 Brookes, *supra* note 55.

these on the ground, there was no systematic effort to stop the practice.<sup>60</sup> The Pentagon denounced the release as a “travesty” and demanded the return of the documents.<sup>61</sup> Secretary of State Clinton was quoted as saying “We should condemn in the most clear terms the disclosure.”<sup>62</sup>

This round of document release was also done by release to media outlets first, but one way in which this round was different was the introduction of personal attacks on Julian Assange. The day after the release, the *New York Times* published a derogatory profile of Assange, entitled: “*Wikileaks Founder on the Run, Trailed by Notoriety.*” The opening paragraph conveys the tone of the piece:

“Julian Assange moves like a hunted man. In a noisy Ethiopian restaurant in London’s rundown Paddington district, he pitches his voice barely above a whisper to foil the Western intelligence agencies he fears. He demands that his dwindling number of loyalists use expensive encrypted cellphones and swaps his own the way other men change shirts. He checks into hotels under false names, dyes his hair, sleeps on sofas and floors, and uses cash instead of credit cards, often borrowed from friends.”<sup>63</sup>

All the elements of the profile of an untrustworthy, shifty character are presented in a breathless tone. Here perhaps is the first textual evidence of the major transition in the perception of Wikileaks in mainstream U.S. Media. In March, the *Times* had described Wikileaks as The Little Engine That Could of new media muckraking journalism.<sup>64</sup> By mid-December, Wikileaks would come to be described by Tom Friedman on the *Times*' op-ed page as one of two threatening alternatives to a strong, democratic America, alongside an authoritarian China<sup>65</sup> In between these two, the *Times*'s profile of Assange marks the transition point.

#### D. *The Last Straw: The Embassy Cables*

November 28 ushered in the next document release. This release was more careful and selective than any of the prior releases. Apparently, the caution came too late. The release of the final batch was followed by a massive escalation of attacks on Wikileaks as an organization and website, and on Assange as an individual. It is the mismatch between what Wikileaks in fact did in this final round and the multi-system attack on it that drives the need for a deeper explanation.

The release of the State Department embassy cables (confidential internal communications from embassies to Washington) was the most professionally-mediated, conservatively-controlled release

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60 For example, Sabrina Tavernise & Andrew W. Lehren, *Detainees Fared Worse in Iraqi Hands, Logs Say*, N.Y. TIMES, Oct. 23, 2010, at A8,

61 “Mr. Morrell, of the Pentagon, told the BBC that the leak was a “travesty” which provided enemies of the West with an ‘extraordinary database to figure out how we operate’. He said the cache of documents contained ‘nothing new’ with regards to fundamental policy issues. And he once again asked Wikileaks to remove the documents from the web and return them to the Department of Defense.” Brookes, *supra* note 55.

62 *Id.*

63 John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES, Oct. 24, 2010, at A1.

64 See Strom, *supra* note 19 (“a tiny online source of information and documents that governments and corporations around the world would prefer to keep secret.”).

65 Friedman, *supra* note 7.

Wikileaks had undertaken. The document set included 251,287 cables.<sup>66</sup> Unlike the previous document releases, this time Wikileaks worked almost exclusively through established media organizations. It made the documents available to *the Guardian*, *Der Spiegel*, *Le Monde*, and *El Pais*; the *Guardian* made the documents available to the *New York Times*.<sup>67</sup> Wikileaks also sought advice from the US State Department, just as the *New York Times* had, to aid in redaction and to help it avoid causing damage. Unlike the State Department's response to the traditional media organizations, Wikileaks's letter was met with a strongly-worded letter from the department's legal advisor, Harold Koh, stating "We will not engage in a negotiation regarding the further release or dissemination of illegally obtained U.S. Government classified materials" and demanding that Wikileaks simply not publish anything, return all documents, and destroy all copies in its possession.<sup>68</sup> This, despite the fact that the date of the letter is one day before revelation, and the text of the letter explicitly states that the State Department knew of and consulted with the mainstream news organizations that were about to publish the materials, and therefore that if Wikileaks were to return all the materials, the other media entities would have the freedom and professional obligation to publish the materials. The claim of illegality, coupled with a demand for return of the documents, appears to reflect drafting that is backed out of the Espionage Act that applies to one who "willfully retains [any document which] [the possessor has reason to believe could be used to the injury of the United States] and fails to deliver it on demand to the officer or employee of the United States entitled to receive it."<sup>69</sup> This legal strategy appears to have followed the model already set by the Pentagon during the Afghan war logs release.<sup>70</sup> Later reports from Wikileaks's media partners support the observation that the Obama Administration treated Wikileaks as in a fundamentally different category than the newspapers.<sup>71</sup> The site then proceeded to make publicly accessible on its own site cables that had been published by at least one of these media organizations, in the redacted form those outlets published.<sup>72</sup> Despite the actual care and coordinated release model that Wikileaks in fact practiced, over 60% of print news reports at the time explicitly stated that Wikileaks had released thousands (usually over 250,000) of documents, and another 20% implied that it did so.<sup>73</sup> In fact, over the course of the first month and more, the site released a few hundred documents, limited almost exclusively to those published and redacted by other organizations.

The contents of the overwhelming majority of cables released ranged from the genuinely important (e.g., Saudi and Gulf state support for a US led attack on Iran to prevent proliferation;

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66 *US Embassy Cables: the Background*, BBC (Nov. 29, 2010), <http://www.bbc.co.uk/news/world-us-canada-11862320>; Scott Shane, *Keeping Secrets Wikisafe*, N.Y. TIMES, Dec. 12 2010, at WK1.

67 Shane, *supra* note 61; David Leigh, *How 250,000 US Embassy Cables Were Leaked*, THE GUARDIAN, Nov. 28, 2010, at 2 Main Section, available at <http://www.guardian.co.uk/world/2010/nov/28/how-us-embassy-cables-leaked>.

68 Letter from Harold Hongju Koh to Jennifer Robinson, attorney for Julian Assange (Nov. 27, 2010), available at: [http://media.washingtonpost.com/wp-srv/politics/documents/Dept\\_of\\_State\\_Assange\\_letter.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Dept_of_State_Assange_letter.pdf).

69 18 U.S.C. 793(d).

70 Pentagon spokesman Geoff Morrell used language very similar to that which would be used by the State Department's legal counsel a few months later, claiming that the documents threaten our forces and Afghan civilians, and demanding their return. DoD New Briefing August 5, 2010. <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53001>.

71 See *infra*, note 149; Bill Keller, *Dealing with Assange and the WikiLeaks Secrets*, N.Y. TIMES, Jan. 30, 2011, at MM32; Marcel Rosenbach & Holger Stark, *An Inside Look at Difficult Negotiations with Julian Assange*, SPIEGEL (Jan. 28, 2010), <http://www.spiegel.de/international/world/0,1518,742163,00.html>.

72 Brett J. Blackledge & Jamey Keaten, *Respected Media Outlets Collaborate with WikiLeaks*, ASSOCIATED PRESS (Dec 3, 2010), <http://abcnews.go.com/Business/wireStory?id=12302107>; Shane, *supra* note 46.

73 See *infra*, text accompanying notes \_\_\_.

Yemeni acquiescence in U.S. bombing on its own territory; U.S. spying on UN staff; US intervention in Spanish, German, and Italian prosecution processes aimed at US military and CIA personnel over human rights abuses of citizens of those countries; the known corruption and ineptitude of Afghan President Hamid Karzai) to the merely titillating (Libyan leader Muammer Gadaffi's Ukrainian nurse described as “voluptuous blonde”). Although none broke ground in a way that was likely to influence U.S. policy in a fundamental way, this was not always true of other countries.<sup>74</sup> The most ambitious speculations, in *The New York Times* and *Foreign Policy*, suggested that Wikileaks cables' blunt descriptions of the corruption of Tunisian President Ben Ali helped fuel the revolution that ousted him in January.<sup>75</sup> Whether anything so fundamental can indeed be attributed to the embassy cables leak is doubtful, but the sheer range of issues and countries touched and continuous media attention for two months make it undeniable that the Wikileaks cable U.S. embassy cable release was a major news event that captured headlines all over the world for weeks, providing a steady flow of small to mid-sized revelations about the U.S. in particular and the world of high diplomacy more generally. It was a major scoop, or, as the *Guardian* put it proudly, “the world's biggest leak.”<sup>76</sup>

Despite the generally benign character of the cables, one cable, one response to a cable, and one threat to release all raise particular concerns about potential damage. The cable that raised the greatest concern was a February 2009 cable listing “Critical Foreign Dependencies Initiative List,” which listed specific facilities whose disruption would harm U.S. interests.<sup>77</sup> These ranged from a Manganese mine in Gabon and undersea communications cables in China, to a pharmaceutical plant in Melbourne, Australia or a Danish supplier of pediatric form insulin.<sup>78</sup> Unlike the overwhelming majority of cables this one appears to have been released initially by Wikileaks.<sup>79</sup> The argument against this release, made at the time by the U.S. government, was that it offered a target list for terrorists seeking to disrupt critical global supplies by rendering critical dependencies transparent.<sup>80</sup> The second cable, or rather

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74 Lists of the relevant cables are maintained by several news organizations. One that tracks releases by a wide range of organizations is The Guardian. See *WikiLeaks Embassy Cables, The Key Points at a Glance*, THE GUARDIAN (Dec. 7, 2010), <http://www.guardian.co.uk/world/2010/nov/29/wikileaks-embassy-cables-key-points>. A shorter list is maintained by the BBC. See *At a Glance: Wikileaks Cables*, BBC (Dec. 18, 2010), <http://www.bbc.co.uk/news/world-us-canada-11914040>.

75 Scott Shane, *Cables from American Diplomats Portray U.S. Ambivalence on Tunisia*, N.Y. TIMES, Jan. 16, 2011, at A14; Elizabeth Dickinson, *The First WikiLeaks Revolution?*, FOREIGN POLICY (Jan. 13, 2011), [http://wikileaks.foreignpolicy.com/posts/2011/01/13/wikileaks\\_and\\_the\\_tunisia\\_protests](http://wikileaks.foreignpolicy.com/posts/2011/01/13/wikileaks_and_the_tunisia_protests).

76 David Leigh & Luke Harding, *WikiLeaks: Strained Relations, Accusations – and Crucial Revelations*, THE GUARDIAN, Feb. 1, 2011, at 16 Main Section, available at <http://www.guardian.co.uk/world/2011/jan/31/wikileaks-embassy-cables-publication>.

77 See BBC summary, *At a Glance: Wikileaks Cables*, BBC (Dec. 18, 2010), <http://www.bbc.co.uk/news/world-us-canada-11914040>; Cable: 09STATE15113 2009-02-18 23:11 2010-12-05 21:09 SECRET//NOFORN Secretary of State, Request for Information: Critical Foreign Dependencies (Critical Infrastructure and Key Resources Located Abroad), available at <http://213.251.145.96/cable/2009/02/09STATE15113.html#par15> (last visited Feb. 19, 2011).

78 In his annotations to the February 8 version of this paper, Assange explains that the “News value of this cable was twofold 1) to further show that US diplomats were being illegally used to conduct foreign spying (it is explicitly stated in the cable to keep such inquiries secret from the host government), and 2) to reveal “assets” the US might fight a war over or otherwise use its diplomatic muscle to control.”

79 In his annotations to the February 8 version of this paper, Assange reports that this release was done in coordination with the *Times* of London, rather than with one of the five main organizations collaborated on the release. I have not been able to ascertain independently the exact timing of the London Times’ publication of its version.

80 *WikiLeaks publishes list of worldwide infrastructure ‘critical’ to security of U.S.*, MSNBC.COM, [http://www.msnbc.msn.com/id/40526224/ns/us\\_news-wikileaks\\_in\\_security/](http://www.msnbc.msn.com/id/40526224/ns/us_news-wikileaks_in_security/) (last updated Dec. 6, 2010, 7:16 AM ET).

response to a cable, included a reference to Zimbabwe Prime Minister Morgan Tsvangirai's private support for sanctions against the Mugabe regime in Zimbabwe, providing an excuse for the Mugabe regime to explore prosecuting Tsvangirai for treason.<sup>81</sup> It appears that this cable, like the majority of cables, was published at the same time (and likely in coordination with) *the Guardian*.<sup>82</sup> Furthermore, it is unclear whether use of the cable as an excuse by a repressive regime to prosecute or threaten its lead opponent is equivalent to revealing names of unknown human rights workers, much less undercover operatives, who would not otherwise be known to the regime. Finally, in anticipation of the pressure, arrest, and potential threats of assassination, Julian Assange threatened to release a “poison pill,” a large cache of encrypted documents that is widely replicated around the Net and that would be decrypted, presumably with harmful consequences to the U.S., should he be arrested or assassinated. This latter of the three events is the one most foreign to the normal course of democratic investigation and publication.<sup>83</sup> Depending on the contents of the file, it could be a genuinely distinct, threatening event, and publication of the decryption key may be an appropriate target for suppression consistent with first amendment doctrine that permits constraining disclosure of “the sailing dates of transports or the number and location of troops.”<sup>84</sup> It is doubtful, however, that the contents of the insurance file would fall under that category, assuming that the entire set of cables is not fundamentally different from those that were released and recognizing that none of the cables were classified in top-secret categories.

## PART II: THE RESPONSE: A MULTI-SYSTEM ATTACK ON WIKILEAKS

The response to the Wikileaks embassy cable release in the U.S. was dramatic and sharp. The integrated, cross-system attack on Wikileaks, led by the U.S. government with support from other governments, private companies, and online vigilantes, provides an unusually crisp window into the multi-system structure of freedom and constraint in the networked environment, and helps us to better map the emerging networked fourth estate. Its failure provides us with insight into how freedom of action is preserved primarily by bobbing and weaving between systems to avoid the constraints of those subsystems under attack and harness the affordances of those that are out of reach of the attacker.

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81 David Smith, *Morgan Tsvangirai faces possible Zimbabwe treason charge*, THE GUARDIAN, (Dec. 27, 2010), <http://www.guardian.co.uk/world/2010/dec/27/wikileaks-morgan-tsvangirai-zimbabwe-sanctions?INTCMP=SRCH>.

82 The cable was posted to The Guardian on December 8, 2010 at 21:30 GMT. See *US embassy cables: Tsvangirai tells US Mugabe is increasingly 'old, tired and poorly briefed'*, THE GUARDIAN, (Dec. 8, 2010, 21:30 GMT), <http://www.guardian.co.uk/world/us-embassy-cables-documents/241595>. It was posted to Wikileaks that same day, within thirty minutes, see *Cable #09HARARE1004*, WIKILEAKS, (Dec. 8, 2010, 22:31 GMT), <http://213.251.145.96/cable/2009/12/09HARARE1004.html>. (Assange confirms that the release was coordinated and simultaneous. Assange annotations, *supra*. The release appears to fall within the practice of following the judgment of the mainstream media organizations rather than releasing independently.)

83 In his annotations to the February 8, 2011 version of this article, Assange explains:

“This is absolutely false. I have never used “poison pill”, nor ever made a threat. I have stated on many times that we have distributed backups, to insure that history will not be destroyed. If we are not in a position to continue publishing ourselves, we, in understanding the significance of history, will release the passwords to these backups of future publications to ensure that others can take up the work. The disincentive is not of a threatening nature, but rather to make mass arrests, sabotage or assassinations pointless exercises in prior restraint.”

This annotation suggests no misunderstanding. The term “poison pill” implies a measure taken by a potential target to hostile action to make itself toxic to the predator consuming it (originally, a shareholder plan intended to dilute the holdings of the winner in a hostile corporate takeover battle in the 1980s so as to make takeover unprofitable). This appears to be the implication of this explanation as well.

84 *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

The response also highlights the challenges that a radically decentralized global networked public sphere poses for those systems of control that developed in the second half of the twentieth century to tame the fourth estate, to make the press not only “free,” but also “responsible.” Doing so allows us to understand that the threat represented by Wikileaks was not any single cable, but the fraying of the relatively loyal and safe relationship between the United States Government and its watchdog. Nothing captures that threat more ironically than the spectacle of Judith Miller, the disgraced New York Times reporter who yoked that newspaper's credibility to the Bush Administration's propaganda campaign regarding Iraq's weapons of mass destruction in the run-up to the Iraq War,<sup>85</sup> using Fox News as a platform to criticize Julian Assange for neglecting the journalist's duty of checking his sources and instead providing raw cables to the public.<sup>86</sup> The criticism is particularly ironic in light of the fact that despite all the attacks on the cables release, the arguments were never that the cables were inauthentic.

It is important to emphasize that the myriad forms of attack on Wikileaks that I describe in the coming pages are unlikely to represent a single coordinated response by an all-knowing Administration bent on censorship. Mostly, they appear to represent a series of acts by agents, both public and private, that feed into each other to produce an effect that is decidedly inconsistent with the kind of freedom of the press and freedom of speech to which the United States is committed. That no distinct attack pattern that I describe clearly violates Wikileaks's constitutional rights *as against the state* is no salve; indeed, it is precisely the vulnerability to destructive attacks, none of which is in itself illegal, but that together effectively circumvent the purposes of constitutionality and legality that requires our attention.

#### A. *Sociopolitical Framing: Situating Wikileaks in the Frame of the War on Terror*

The political attack on Wikileaks as an organization and on Julian Assange as its public face was launched almost immediately upon release of the cables. Their defining feature was to frame the event not as journalism, irresponsible or otherwise, but as a dangerous, anarchic attack on the model of the super-empowered networks of terrorism out to attack the U.S. The first salvo was fired by Secretary of State Hillary Clinton, who stated “Let's be clear: This disclosure is not just an attack on America's foreign policy interests. . . . It is an attack on the international community—the alliances and partnerships, the conversations and negotiations, that safeguard global security and advance economic prosperity.”<sup>87</sup> The trope of an attack on the international community provided the backdrop for a series of comments aimed at delegitimizing Wikileaks and locating it in the same corner, in terms of threats to the U.S., as global terrorism. This was the backdrop for Vice President Biden's statement that Wikileaks founder Julian Assange is “more like a high-tech terrorist than the Pentagon Papers,”<sup>88</sup> This

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85 See, Jack Shafer, *The Exorcism of the New York Times*, SLATE, (Oct. 20, 2010), <http://www.slate.com/id/2128429?nav=wp>.

86 Scare's Blog, *Judith Miller Criticizes Julian Assange For Not Verifying Sources*, VIDEO CAFÉ, (Jan. 2, 2011, 7:59 AM), <http://videocafe.crooksandliars.com/scarc/judith-miller-criticizes-julian-assange-not>.

87 Glenn Kessler, *Clinton, in Kazakhstan for summit, will face leaders unhappy over Wikileaks cables*, WASH. POST, (Nov. 30, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/11/30/AR2010113001095.html>.

88 “If he conspired, to get these classified documents, with a member of the US military, that's fundamentally different than if somebody drops in your lap, “Here David, you're a press person, here is classified materials... “I would argue that it's closer to being a high tech terrorist than the Pentagon Papers.” (agreeing more with Senator Mitch McConnell's statement about Wikileaks than with critics who said this is like the Pentagon Papers.) Vice President Joseph Biden on Meet the Press, 12/19/2010. [http://www.huffingtonpost.com/2010/12/19/joe-biden-wikileaks-assange-high-tech-terrorist\\_n\\_798838.html](http://www.huffingtonpost.com/2010/12/19/joe-biden-wikileaks-assange-high-tech-terrorist_n_798838.html).



assessment was not uniformly supported by the Administration. Defense Secretary Robert Gates called the public response “overwrought,” and concluded with: “Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.”<sup>89</sup> Echoing this sentiment, the German Interior Minister described the revelations as “annoying for Germany, but not a threat.”<sup>90</sup> These measured voices did not prevail in the first few weeks after the disclosures began.

The invitation by Secretary Clinton and Vice President Biden to respond to dissemination of its confidential information as an assault on our national pride and integrity, on par with terrorism, was complemented by calls to use the techniques that the U.S. has adopted in its “War on Terror” against Julian Assange or Wikileaks as a site. Bob Beckel, Fox News commentator who had been a Deputy Assistant Secretary of State in the Carter Administration and had been campaign manager to Walter Mondale, said “A dead man can't leak stuff... This guy's a traitor, he's treasonous, and he has broken every law of the United States. . . . I'm not for the death penalty, so . . . there's only one way to do it: illegally shoot the son of a bitch.”<sup>91</sup> This proposal was met with universal agreement by the panel on the program.<sup>92</sup> Republican Representative Pete King, then-incoming Chairman of the House Homeland Security Committee, sought to have Wikileaks declared a foreign terrorist organization.<sup>93</sup> Right wing commentators picked up this line. William Kristol wrote in the *Weekly Standard*: “Why can't we act forcefully against WikiLeaks? Why can't we use our various assets to harass, snatch or neutralize Julian Assange and his collaborators, wherever they are? Why can't we disrupt and destroy WikiLeaks in both cyberspace and physical space, to the extent possible? Why can't we warn others of repercussions from assisting this criminal enterprise hostile to the United States?”<sup>94</sup> He concludes with the remarkable statement: “Acting together to degrade, defeat, and destroy WikiLeaks should be the first topic discussed at today's White House meeting between the president and the congressional leadership.”<sup>95</sup> Sarah Palin linked to this commentary on her Twitter feed, and on her Facebook page

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<sup>89</sup> Gates said at a Pentagon press briefing on the day of the release:

Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think—I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets.

Many governments—some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation. So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another. Is this embarrassing? Yes. Is it awkward? Yes.

Transcript, *DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon*, U.S. DEPARTMENT OF DEFENSE, (Nov. 30, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728>.

<sup>90</sup> Holger Stark and Marcel Rosenbach, *SPIEGEL interview with German Interior Minister*, SPIEGEL ONLINE INTERNATIONAL, (Dec. 20, 2010), <http://www.spiegel.de/international/germany/0,1518,735587,00.html>.

<sup>91</sup> *Follow the Money*, FOX BUSINESS NEWS, (Dec. 6, 2010), available at [http://www.huffingtonpost.com/2010/12/07/fox-news-bob-beckel-calls\\_n\\_793467.html](http://www.huffingtonpost.com/2010/12/07/fox-news-bob-beckel-calls_n_793467.html).

<sup>92</sup> *See id.*

<sup>93</sup> Michael O'Brien, Republican wants WikiLeaks labeled as terrorist group, *The Hill*, Nov. 29, 2010 08:38 AM ET, <http://thehill.com/blogs/blog-briefing-room/news/130863-top-republican-designate-wikileaks-as-a-terrorist-org>,

<sup>94</sup> William Kristol, *Whack Wikileaks*, THE WEEKLY STANDARD, (Nov. 30, 8:25 AM, 2010), [http://www.weeklystandard.com/blogs/whack-wikileaks\\_520462.html](http://www.weeklystandard.com/blogs/whack-wikileaks_520462.html).

<sup>95</sup> *Id.*

stated that Assange “is an anti-American operative with blood on his hands. His past posting of classified documents revealed the identity of more than 100 Afghan sources to the Taliban. Why was he not pursued with the same urgency we pursue Al Qaeda and Taliban leaders?”<sup>96</sup> By the end of the first decade of the twenty-first century, these statements show that we in the U.S. know quite well what do to terrorists or suspected terrorists. Whether one uses the euphemisms of “targeted killings,” “extraordinary renditions,” and “enhanced interrogations,” or simply calls things by their names—assassination, kidnapping, and torture—these practices have become a standard, if controversial, part of the U.S. arsenal in its war on terror since the early days after September 11<sup>th</sup>. While the Obama administration has renounced torture, it has embraced targeted killings as a legitimate part of its own war on terror,<sup>97</sup> and chosen as a matter of stated policy to turn a blind eye to the illegality of the Bush Administration's torture program.<sup>98</sup> As a result, these continue to be options that can be publicly proposed by major public outlets and speakers. They remain part of the legitimate range of options for discussion.

It is unthinkable that the U.S. will in fact assassinate Assange. But the range of actions open to both government and non-government actors is in important ways constrained by our understanding of the social frame, or social context in which we find ourselves.<sup>99</sup> The legal options that the Justice Department thinks about when confronted with a case of a journalist who publishes sensitive materials are fundamentally different than those it thinks about when it is developing a prosecution strategy against terrorism suspects. The pressure to cut off payment systems flows is fundamentally different when considering whether to cut off payments to a politically odious group, and those considered in connection with cutting off payments to a terrorist organization. It is very difficult to understand the political and market dynamics that could have led to the decision by Mastercard and Visa to cut payments off to Wikileaks except on the background of the framing efforts that located Wikileaks in the same rubric as the Taliban, rather than the same rubric as the *New York Times* or *The Progressive*.<sup>100</sup>

#### B. *Media misinformation and misdirection*

Traditional media outlets provided substantial support for the Administration's framing by exaggerating the number of cables and implying a careless approach to their release. A study of major print newspaper stories that mentioned the quantity of cables during the first two weeks after the November 28<sup>th</sup> release shows that a substantial majority of newspapers stated as fact that Wikileaks had

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96 Peter Grier, *Wikileaks' Julian Assange, Does Sarah Palin Think CIA Should 'Neutralize' Him?* CHRISTIAN SCIENCE MONITOR, (Nov. 30, 2010), <http://www.csmonitor.com/USA/Politics/The-Vote/2010/1130/WikiLeaks-Julian-Assange-Does-Sarah-Palin-think-CIA-should-neutralize-him>.

97 Harold Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

98 As the President put it explicitly in response to questions about investigating the torture of Spanish citizens at Guantanamo, “I'm a strong believer that it's important to look forward and not backwards, and to remind ourselves that we do have very real security threats out there.” Sam Stein, *Obama On Spanish Torture Investigation: I Prefer To Look Forward*, THE HUFFINGTON POST, (Apr. 16, 2009), [http://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture\\_n\\_187710.html](http://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture_n_187710.html) (reporting on an Interview with President Obama, CNN EN ESPAÑOL (Apr. 15, 2009)).

99 See generally IRVING GOFFMAN, *FRAME ANALYSIS* (1974).

100 Howard Morland, *The H-bomb Secret*, THE PROGRESSIVE, Nov. 1979, at 3, available at <http://www.progressive.org/images/pdf/1179.pdf>; *United States of America vs. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979).

“released,” “published,” or “posted on its site,” “thousands” or “over 250,000” cables.<sup>101</sup> About 20% of the stories in major newspapers were clear and accurate on the question of how many cables were released at that time, and how vetted and redacted those cables published were. Typical of this type of story are *Chicago Tribune* and *Los Angeles Times* reports from November 30: “WikiLeaks released 272 diplomatic cables from a trove of more than 250,000. The remainder are to be dribbled out for maximum impact, group members say.”<sup>102</sup>

The existence of a substantial minority of accurate reports underscores the degree of misleading information published in the majority of stories during the initial period after release, when public perceptions of Wikileaks and Assange were being framed. Reports categorized as being unambiguously misleading included sentences such as “WikiLeaks showed relatively little such discretion in its online posting of more than 250,000 diplomatic cables,”<sup>103</sup> or “thousands of State Department cables, just released by WikiLeaks, were providing a glimpse into what U.S. diplomats really thought.”<sup>104</sup> Sixty-eight out of 111 stories coded made these kinds of claims. Another 20 stories were more ambiguous. These used characterizations that were truthful but easily misinterpreted as describing a full release.<sup>105</sup>

Reporting of the events at the time suggests not so much a conspiracy but confusion and lack of clarity about the facts. Some papers published reports that contradicted each other from one day to the next, sometimes even in the same edition. For example, on November 29, 2010, the *Chicago Tribune* published three stories: in one it accurately said that hundreds of thousands of cable were “obtained” by Wikileaks,<sup>106</sup> in another it misstated “more than 250,000 U.S. diplomatic cables *released* Sunday by the Web site WikiLeaks,”<sup>107</sup> and in a third it ambiguously wrote “The online whistle-blower site WikiLeaks *began publishing* more than 250,000 diplomatic cables from U.S. embassies around the world Sunday.”<sup>108</sup> On November 30, 2010, *The Christian Science Monitor* misleadingly referred to “hundreds of thousands of cables released by Wikileaks,”<sup>109</sup> but in other stories used a more ambiguous phrasing<sup>110</sup> and an accurate description.<sup>111</sup>

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101 The data was collected from the Lexis-Nexis database on January 29, 2011. The date range searched was November 28 to January 14. The dataset was “Major Newspapers.” The search string was purposefully broad: “wikileaks w/25 ((thousands or 250,000) /7 cables).” The resulting 353 reports were manually coded to exclude non-US publications; and then identified as “thousands” or “250,000” released; “correct: or “ambiguous.”

102 Paul Richter, U.S. tries to contain damage; WikiLeaks cables reverberate in global hot spots, *CHI. TRIB.*, Nov. 30, 2010, at C12; U.S. rushes to reassure edgy allies, *L.A. TIMES*, Nov. 30, 2010, at A1.

103 Editorial, *Undiplomatic tales: On the Wikileaks revelations*, *S.F. CHRON.*, Nov. 30, 2010, at A17.

104 *Clinton treads carefully in leading massive damage-control campaign*, *WASH. POST*, Nov. 30, 2010, at A13.

105 The Associated Press in particular was careful not to say that 250,000 cables were released, but rather to frame the story as Wikileaks “began publishing” the 250,000 documents. This was true at the time, but was coded in this study as “ambiguous” relative to the much clearer stories explaining the limited nature of the release. *See, e.g.*, David Stringer, Associated Press, *British court grants bail to WikiLeaks' Julian Assange*, *SAN JOSE MERCURY NEWS*, Dec. 14, 2010.

106 *Leak: Afghan president's brother loves Lakeview*, *CHI. TRIB.*, Nov. 29, 2010, at C3 (correctly categorized in the data set).

107 *Cable leaks: U.S. urged to hit Iran; Latest WikiLeaks release also says U.S. envoys spied on counterparts*, *CHI. TRIB.*, Nov. 29, 2010, at C1 (incorrectly categorized in the dataset as “thousands”).

108 *Return of WikiLeaks: White House says new round of document releases puts lives at risk*, *CHI. TRIB.*, Nov. 29, 2010, at 3 (categorized as ambiguous).

109 *'We Cannot Deal with These People': WikiLeaks Shows True Feelings on Guantánamo*, *CHRISTIAN SCIENCE MONITOR*, Nov. 30, 2010.

110 Sara Miller Llana, *Ecuador and Venezuela compete to praise WikiLeaks' Julian Assange*, *CHRISTIAN SCIENCE MONITOR*,

Capturing the treatment of television is less comprehensive and much can be missed. Conclusions about television coverage are more tentative. An identical search of transcripts available in the Nexis database suggests that Fox News and CBS News consistently misreported on the number of cables released. For example, *CBS Evening News* included a statement that “Assange and WikiLeaks deny that their publication of 250,000 State Department cables put the lives of spies or diplomats at risk;”<sup>112</sup> *CBS New Sunday Morning* show stated “A week after publishing those thousands of secret U.S. diplomatic cables, WikiLeaks is struggling to stay online;”<sup>113</sup> and *The Early Show* included the statement “Those classified cables over two hundred and fifty thousand of them were released by the whistle-blowing website WikiLeaks. In a move that White House calls reckless...”<sup>114</sup> NBC had a more mixed record. *The Nightly News* stated: “Now to the latest on Wikileaks. One week after the release of hundreds of thousands of State Department cables, after companies in this country and France took down the Wikileaks Web site, Sweden and Switzerland became the main access points. As for the man behind Wikileaks, he says he continues to receive death threats.”<sup>115</sup> Three weeks later, however, the *Today* show explicitly stated that “WikiLeaks has so far released less than 1 percent of the classified.”<sup>116</sup> ABC had fewer reports, but on *Good Morning America* of December 1<sup>st</sup> stated that “We’re gonna turn now to more fallout from the WikiLeaks release of thousands of diplomatic cables.”<sup>117</sup> CNN had many more reports, and, like the print newspapers, included descriptions regarding the number of cables actually released ranging from precise reports to claims of profligate release.

A second dimension of media coverage that merits note is the relatively heavy emphasis on the sexual molestation charges against Assange in Sweden. It is not difficult to understand why media outlets that need to sell copy would add sex and violence to politics and diplomacy. The Swedish prosecution made for a salacious story too reminiscent of what Bill Keller, executive editor of the *New*

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Nov. 30, 2010 (“The Venezuelan president seems to seize every chance to criticize the United States, and he didn’t miss a beat by praising the “bravery” of controversial website WikiLeaks - which is releasing a cache of 250,000 classified US diplomatic cables - and calling for the resignation of US Secretary of State Hillary Clinton.”). That is, *Christian Science Monitor* continued to use the “this hurts America” frame.

111 Ariel Zirulnick, *WikiLeaks: What the world is saying*, CHRISTIAN SCIENCE MONITOR, Nov. 30, 2010 (“The latest WikiLeaks trove of 250,000 diplomatic cables, obtained in advance by five news outlets, has generated enough fodder in the US alone to occupy American readers. But people all over, from Germany to Lebanon to Australia, are also talking about the sometimes troubling, sometimes mundane cables that WikiLeaks founder Julian Assange is gradually releasing for public consumption.”).

112 *CBS Evening News, Saturday Edition* (CBS television broadcast Jan. 8, 2011).

113 *Sunday Morning* (CBS television broadcast Dec. 5, 2010).

114 *The Early Show* (CBS television broadcast Nov. 29, 2010).

115 *NBC Nightly News* (NBC television broadcast Dec. 5, 2010).

116 *Today* (NBC television broadcast Dec. 24, 2010).

117 *Good Morning America* (ABC television broadcast Dec. 1, 2010).

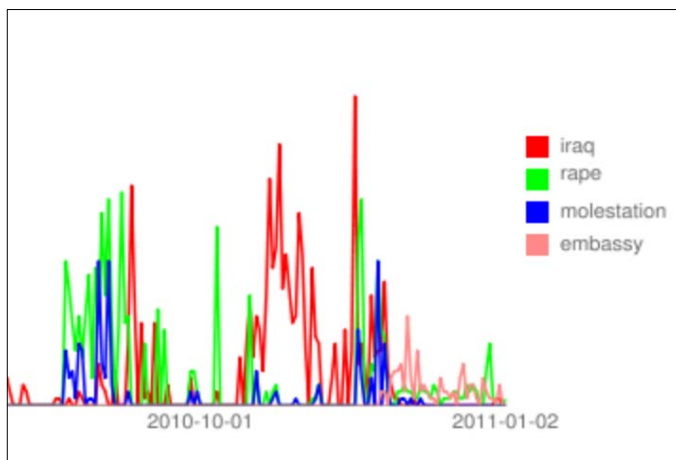


Figure 1: Frequency of terms used in stories mentioning Wikileaks  
August 2010-January 2011

*York Times* would later call “a missing Stieg Larsson novel”<sup>118</sup> to pass up. One need not hold the position that there was a conspiracy involved in reporting on the rape investigation to see that it is what formed the foundation for the depiction of Assange as a “hunted man.”<sup>119</sup> At an aggregate level it is possible to observe an interference pattern created by the rape or molestation charge in media coverage of Wikileaks. The interference pattern is neither perfectly matched nor completely effective, but is clearly identifiable in a timeline of the frequency, in 25 top mainstream media outlets in the U.S., of the terms “Iraq,” “embassy,” “rape,” and “molestation” in stories that mention “Wikileaks” between August 2010 and January 2011.<sup>120</sup>

### C. Direct legal action: Espionage Act, Computer Fraud and Abuse Act, and conspiracy

Within a week of the initial release of the cables, Democratic Senator and Chairman of the Senate Intelligence Committee Diane Feinstein called for Assange's prosecution under the Espionage Act of 1917.<sup>121</sup> The call for using the Espionage Act of 1917 is a remarkable exercise in historical amnesia. It is consistent, however, with the wording of both the Pentagon's response in August and the State Department's letter in November.<sup>122</sup> The Act was the primary legal tool developed in what was “one of the most fiercely repressive periods in American history.”<sup>123</sup> Efforts by judges, most

118 Bill Keller, *Dealing With Assange and the Wikileaks Secrets*, N.Y. TIMES, (Jan. 26, 2011) [http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?\\_r=2&adxnnl=1&ref=global-home&pagewanted=all&adxnnlx=1296126172-2rQw0P2MEyzJ5ewVG0VG4g](http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?_r=2&adxnnl=1&ref=global-home&pagewanted=all&adxnnlx=1296126172-2rQw0P2MEyzJ5ewVG0VG4g).

119 John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES (Oct. 23, 2010), <http://www.nytimes.com/2010/10/24/world/24assange.html>.

120 Data collected and analyzed using MediaCloud. See <http://www.mediacloud.org/>.

121 Diane Feinstein, *Prosecute Assange under the Espionage Act*, WALL ST. J. (Dec. 7, 2010), <http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html>.

122 See *supra*, notes 68-70 and test accompanying notes (describing how the language used in both the Pentagon and State department documents, concerning threat to US forces, illegality of origin, and demand for return are consistent with laying the foundations of the elements of an offense under the Espionage Act against a person possessing documents.)

123 GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIMES FROM THE SEDITION ACT OF 1789 TO THE WAR ON TERRORISM* 153 (2004).

prominently Learned Hand in *The Masses* case,<sup>124</sup> to constraint its use to preserve press freedom failed, and courts of appeals followed the approach that the government had the power to punish publication of materials that had a “natural and probable tendency” to produce the result that the Act was intended to prevent.<sup>125</sup> Under the Act, Rose Pastor Stokes was convicted to ten years imprisonment for saying in a public meeting “I am for the people and the government is for the profiteers;”<sup>126</sup> although her conviction was overturned on appeal.<sup>127</sup> Others were not as fortunate. A film director, Robert Goldstein, received a 10 year term for producing a movie about the Revolutionary War that portrayed not only the Midnight Ride, the signing of the Declaration of Independence, and Valley Forge, but also the Wyoming Valley Massacre, showing British soldiers bayoneting women and children.<sup>128</sup> The trial court found that these depictions “may have a tendency or effect of sowing ... animosity or want of confidence between us and our allies.”<sup>129</sup> Goldstein's 10 year prison term was not overturned, but was later commuted by Woodrow Wilson.<sup>130</sup> Eugene V. Debs would have to wait for President Warren G. Harding to be released, alongside other “political prisoners” prosecuted under the Act during the World War I.<sup>131</sup> As a matter of law, parts of the Act are indeed on the books. As a matter of constitutional culture, invoking the Espionage Act against an act of public expression is more akin to calling for the prosecution of dissenters under the Sedition Act of 1789. News reports suggest that the Justice Department is considering prosecution, but likely under a theory of conspiracy to violate one of several other provisions, like the Computer Fraud and Abuse Act.<sup>132</sup> As I discuss in Part III, this path of attack is effectively blocked by the first amendment. Here, in painting the dimensions of attack on Wikileaks I note only the most obvious form of government action: prosecution, subject to the requirements of legality, due process, and constitutional protections for free speech.

D. *Will no one rid me of this turbulent priest?*  
*Denial of service attacks by an extralegal public-private partnership*

1. *Technical infrastructure denial of service:*

Beginning a few hours after the release of the first embassy cables, the Wikileaks site came under a distributed denial of service (DDoS) attack.<sup>133</sup> A pattern of denial of service attacks continued over the next few weeks. It is difficult to pin down whether these attacks came from government

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124 *Masses Pub. Co. v. Patten*, 244 F. 535, 542-543 (S.D.N.Y. 1917).

125 See STONE, *supra* note 120, at 171 (quoting *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919)).

126 STONE, *supra* note 120, at 171-172.

127 *Stokes v. United States*, 264 F. 18, 26 (8th Cir. 1920).

128 STONE, *supra* note 120, at 173.

129 *Id.* (citing *United States v. Motion Picture Film “The Spirit of ’76”*, 252 F. 946, 947-948 (D. Cal. 1918)).

130 *Revive “Spirit of ’76”, Film Barred in 1917*, N.Y. TIMES, July 14, 1921, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F50D14FD3C5A1B7A93C6A8178CD85F458285F9>. See also Timothy Noah, *The Unluckiest Man in Movie History*, SLATE (Jun. 13, 2000), <http://www.slate.com/id/1005493/>.

131 *Harding Frees Debs and 23 Others Held for War Violations*, N.Y. TIMES, Dec. 24, 1921, available at <http://query.nytimes.com/gst/abstract.html?res=9B0DE2D71539E133A25757C2A9649D946095D6CF>.

132 Charlie Savage, *Building A Case for Conspiracy by Wikileaks*, N.Y. TIMES (Dec. 16, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9B0DE2DF123CF935A25751C1A9669D8B63&ref=charliesavage>.

133 Charles Arthur, *WikiLeaks Under Attack: The Definitive Timeline*, THE GUARDIAN (Jan. 8, 2011), <http://www.guardian.co.uk/media/2010/dec/07/wikileaks-under-attack-definitive-timeline>. [hereinafter “Guardian Chronology of Attacks”].

bodies, and if so, whether from one of the countries fearing embarrassing revelations or from the United States.<sup>134</sup> News reports about the initial set of attacks emphasized the self-congratulatory tweets of a hacker who took the name “Jester” and claimed responsibility for some of these attacks: because Wikileaks is “attempting to endanger the lives of our troops, 'other assets' & foreign relations.”<sup>135</sup> The sheer scale of the attacks, on the one hand, and the technique adopted by the Jester, which was not DDoS, on the other hand, suggest that the Jester was merely taking responsibility for the acts of other sources of attack that have not been identified or reported upon, at least in the early stages using a relatively small number of machines located in Russia, eastern Europe, and Thailand.<sup>136</sup> In describing any DDoS attack, identifying the culprits is extremely difficult, if not impossible. What is quite clear is that one response Wikileaks adopted was to move its data to Amazon's cloud hosting services, where it would be safe from such attacks because of the sheer size and sophistication of the hosting site.<sup>137</sup> This move, in turn, made it vulnerable to a new threat.

On December 1 Senator Joe Lieberman, Chairman of the Senate Committee on Homeland Security, launched a different kind of denial of service attack. Lieberman released a statement in which he stated: “I call on any other company or organization that is hosting Wikileaks to immediately terminate its relationship with them. Wikileaks' illegal, outrageous, and reckless acts have compromised our national security and put lives at risk around the world. No responsible company - whether American or foreign - should assist Wikileaks in its efforts to disseminate these stolen materials.”<sup>138</sup>

The response to Lieberman's call was swift and wide ranging. That same day, Amazon, which hosted Wikileaks' embassy cables on its cloud computing platform, removed Wikileaks' content.<sup>139</sup> Amazon denied that it had acted under government pressure, but its own denial notice clearly stated that it made a judgment that the content did not belong to Amazon, was likely damaging, could not have been properly redacted, and therefore violated the company's terms of service.<sup>140</sup> In other words,

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<sup>134</sup> The 2008 Pentagon report identified China, Israel, and Russia as having developed and deployed denial of service attack capabilities against terrorist or dissident websites. Pentagon Report, *supra*, at 7. In his annotations to the February 8, 2011 version of this paper, Assange expresses the belief that the scale of the attack, together with the fact that “There is almost no-one in the capable computer underground that is opposed to WikiLeaks on political or philosophical grounds” supports the inference that the attacks were state-based.

<sup>135</sup> Nathan Olivarez-Giles, *'Hacktivist' Takes Credit for WikiLeaks Attacks via Twitter*, L.A. TIMES (Nov. 30, 2011) <http://latimesblogs.latimes.com/technology/2010/11/hacktivist-takes-credit-for-wikileaks-attacks-via-twitter.html>.

<sup>136</sup> See Ethan Zuckerman, *If Amazon has silenced Wikileaks . . .*, MY HEART'S IN ACCRA (Dec. 01, 2010), <http://www.ethanzuckerman.com/blog/2010/12/01/if-amazon-has-silenced-wikileaks/>; Craig Labovitz, *Wikileaks Cablegate Attack*, ARBOR NETWORKS (Nov. 29, 2010), <http://asert.arbornetworks.com/2010/11/wikileaks-cablegate-attack/>; Craig Labovitz, *Round 2 DDoS against Wikileaks*, ARBOR NETWORKS (Nov. 30, 2010), <http://asert.arbornetworks.com/2010/11/round2-ddos-versus-wikileaks/>.

<sup>137</sup> Zuckerman, *If Amazon has silenced Wikileaks*, *supra* note 132.

<sup>138</sup> Guardian Chronology of Attacks, *supra* note 130.

<sup>139</sup> Ewen MacAskill, *WikiLeaks Website Pulled by Amazon after US Political Pressure*, THE GUARDIAN (Dec. 2, 2010), <http://www.guardian.co.uk/media/2010/dec/01/wikileaks-website-cables-servers-amazon>. Most readers will know Amazon from its ecommerce site; Amazon is also a major provider of consumer-grade cloud computing platform services, and Wikileaks was using its platform to host the cables.

<sup>140</sup> Amazon Web Services, <http://aws.amazon.com/message/65348/>: “It’s clear that WikiLeaks doesn’t own or otherwise control all the rights to this classified content. Further, it is not credible that the extraordinary volume of 250,000 classified documents that WikiLeaks is publishing could have been carefully redacted in such a way as to ensure that they weren’t

Amazon was making precisely the determination that a government official making a decision to impose prior restraint would have to make. Because the company apparently acted without direct order from the government this decision is unreviewable by a court. Given what we know of the materials as they have come out to this point, there is little likelihood that an official order to remove the materials would have succeeded in surmounting the high barriers erected by first amendment doctrine in cases of prior restraint. The fact that the same effect was sought to be achieved through a public statement by an official, executed by voluntary action of a private company, suggests a deep vulnerability of the checks imposed by the first amendment in the context of a public sphere built entirely of privately-owned infrastructure.<sup>141</sup>

The next private infrastructure to deny service to Wikileaks was everyDNS, the registration company that provided domain name service to Wikileaks. The company ceased to point the domain name “wikileaks.org” to the site. When EveryDNS removed service, Internet users who would type in “[www.wikileaks.org](http://www.wikileaks.org)” into their URL bar, or users who clicked on online links to the main wikileaks site would come up with nothing. The site was quickly up and running again, however, using the Swiss domain name wikileaks.ch. The content itself was hosted on servers in Sweden and France.<sup>142</sup> EveryDNS issued a notice claiming that they cut off Wikileaks because the site was subject to massive DDoS attacks that adversely affected its other clients. In an amusing “protest too much” moment, the company's notice ended with “Lastly, regardless of what people say about the actions of EveryDNS.net, we know this much is true - we believe in our New Hampshire state motto, 'Live Free or Die.'”<sup>143</sup> When it became clear that the materials were now hosted by a French firm, the French Industry Minister, Eric Besson, called upon Internet companies to deny service and not to host the cables.<sup>144</sup> Two days later the French company OVH, which was hosting the embassy cables, went offline. The cables were moved to a server hosted by The Pirate Party in Sweden, a political party dedicated to digital copyright reform in Sweden. Beginning on the next day, the party's server, on which the cables were hosted, came under massive DDoS attacks. These were not, however, sufficient to disrupt service significantly. The last major distribution infrastructure company to deny service to Wikileaks content (albeit indirectly) was Apple, which removed an iPhone App, developed and sold by a developer with no connections to Wikileaks, providing access to the information Wikileaks made available free online. Apple's formal reason was the claimed illegality and harm caused by the materials.<sup>145</sup>

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putting innocent people in jeopardy.” ... “when companies or people go about securing and storing large quantities of data that isn't rightfully theirs, and publishing this data without ensuring it won't injure others, it's a violation of our terms of service.”

141 See Michael D. Birnhack and Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6, 48-53 (2003).

142 Guardian Chronology of Attacks, *supra* note 130.

143 *Id.*

144 Josh Halliday & Angelique Chrisafis, *WikiLeaks: France Adds to US Pressure to Ban Website*, THE GUARDIAN (Dec. 3, 2010), <http://www.guardian.co.uk/media/2010/dec/03/wikileaks-france-ban-website>.

<sup>145</sup> Alexis Tsotsis, *Apple Removes Wikileaks App from App Store*, TechCrunch Dec. 20, 2010,

<http://techcrunch.com/2010/12/20/apple-removes-wikileaks-app-from-app-store/>; Andy Greenberg, *Apple Nixes Wikileaks iPhone App., Will Google Follow? Quoting an Apple spokesperson as saying that the App was removed because “Apps must comply with all local laws and may not put an individual or targeted group in harms way.”* Forbes, Dec. 21, 2010, <http://blogs.forbes.com/andygreenberg/2010/12/21/apple-nixes-wikileaks-iphone-app-will-google-follow/>.



## 2. *Payment systems disruption*

Wikileaks is a nonprofit that depends on donations from around the world to fund its operation. A second system that came under attack on a model parallel to the attack on technical infrastructure were payment systems. The first platform to go was PayPal, which suspended service to Wikileaks on Saturday December 4, 2010. That Wednesday, the company's vice-president of platform, mobile and new ventures stated: "What happened is that on November 27th [the day before Wikileaks began releasing cables] the State Department, the US government basically, wrote a letter saying that the Wikileaks activities were deemed illegal in the United States. And so our policy group had to take a decision to suspend the account... It was straightforward from our point of view."<sup>146</sup> The letter was not necessarily evidence of direct pressure from State on PayPal, however, but rather a reference by PayPal to the letter sent by Harold Koh to Wikileaks as evidence that Wikileaks engaged in illegality, and hence violated the company's terms of service.<sup>147</sup> That letter, however, stated that the materials were provided to Wikileaks illegally, not that their publication by Wikileaks was illegal. It was a careful piece of lawyering, insinuating but not asserting illegality on the part of Wikileaks itself.<sup>148</sup> That PayPal would act so swiftly against a client, misstating the illegality, and identifying the State Department as its source all strongly suggest that even if the action was not directly coordinated with the U.S. government, the company certainly thought it was implementing the policy that Joe Lieberman had called for and was the course of action desired by the government.

The other major payment systems followed soon thereafter. On Monday, December 6, MasterCard announced that "MasterCard is taking action to ensure that WikiLeaks can no longer accept MasterCard-branded products."<sup>149</sup> That same day the Swiss postal bank shut down Julian Assange's personal bank account, because, the bank's announcement stated, he "provided false information regarding his place of residence during the account opening process."<sup>150</sup> The irony of a Swiss bank shutting a bank account because its owner provided less-than-transparent information about his residential address is practically more revealing than a straight out admission of a political decision. Visa followed suit the next day. Bank of America, ten days after that.<sup>151</sup>

The pattern of attack through the payment system was similar to the pattern of the attack on the technical system. The initial impetus from the rhetoric equating Wikileaks with global terrorism was followed by Senator Lieberman's express request that U.S. companies cut Wikileaks off. The companies then complied, and the U.S. government did nothing to distance itself from these acts. Indeed, when MasterCard came under attack for its actions, Senator Lieberman publicly came to its

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146 Guardian Chronology of Attacks, *supra* note 130.

147 See *supra* note, \_\_\_\_.

148 See *infra*, Part IV. The demand made in the letter, coupled with the assertion of injury, may itself have been crafted to create a potential violation of the Espionage Act, see *supra*, Note 69 and accompanying text.

149 Guardian Chronology of Attacks, *supra* note 130.

150 *Id.*

<sup>151</sup> Tom Murphy, *Bank of America Stops Handling Wikileaks Payments*, Associated Press, December 18, 2010.

[http://news.yahoo.com/s/ap/20101218/ap\\_on\\_bi\\_ge/us\\_wikileaks\\_bank\\_of\\_america](http://news.yahoo.com/s/ap/20101218/ap_on_bi_ge/us_wikileaks_bank_of_america). Bank spokesperson is quoted there as having said: "This decision is based upon our reasonable belief that WikiLeaks may be engaged in activities that are, among other things, inconsistent with our internal policies for processing payments." In the case of Bank of America, since it was rumored at the time to be the potential target of leaked materials held by Wikileaks, the other financial institutions' decision probably gave cover to the bank's own need to see Wikileaks deterred and shut down, rather than response to pressure.

support.<sup>152</sup> If we were to consider what judicial process would be required for the government to exert this kind of force directly—cutting off technical infrastructures and excluding an organization from the payment systems—because of the content of information that organization disseminated, the barriers in law would have been practically insurmountable. However, the implicit alliance, a public-private partnership between the firms that operate the infrastructure and the government that encourages them to help in its war on terror, embodied by this particularly irritating organization, was able to achieve extra-legally much more than law would have allowed the state to do by itself.

### 3. *Organizational power.*

On December 3, 2010, the Office of Management and Budget issued a memorandum to the various departments, emphasizing that the Wikileaks documents were still classified, and access to them remained subject to all the legal limitations appropriate to their classification.<sup>153</sup> As a result, a wide range of federal agencies prohibited or technically blocked their employees from reading the Wikileaks materials online from their federal computers.

Perhaps the most symbolic of these was that patrons of the Library of Congress could not read materials available everywhere else in the world “because applicable law obligates federal agencies to protect classified information. Unauthorized disclosures of classified documents do not alter the documents' classified status or automatically result in declassification of the documents.”<sup>154</sup> One wonders whether this meant that congressional staff or the Congressional Research Service too were disabled from reaching the cables to make their own independent judgment about the events. At least as ironic was the result that employees in the U.S. Department of Defense were not permitted to read cables available to every terrorist and foreign intelligence analyst with a computer and a terminal.<sup>155</sup> Plainly, these blocks could not possibly do anything to limit further leakage of already-leaked documents. It also seems highly implausible that these blocks represented an effort to prevent federal employees from seeing the paucity of the threat—and the exaggerated nature of the response—for themselves. Much more likely is that these were uncoordinated acts intended as public performances of allegiance in the face of threat to the national pride. More than most other acts we have seen, these public announcements suggest a futile panic response.

The internal moves within the government translated through other organizational systems into constraints on reading and accessing the materials elsewhere. Most clearly, these are represented in a series of memoranda that university offices of career services throughout the country sent to their students, warning them that reading the Wikileaks cables could endanger their future employment prospects in the U.S. government.<sup>156</sup> This becomes a serious exercise of power over speech through

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152 Ryan Singel, *Key Lawmakers Up Pressure on WikiLeaks and Defend Visa and MasterCard*, WIRED (Dec. 9, 2010), <http://www.wired.com/threatlevel/2010/12/wikileaks-congress-pressure/>.

153 David de Sola, *U.S. Agencies Warn Unauthorized Employees Not to Look at WikiLeaks*, CNN.COM (Dec. 4, 2010), <http://edition.cnn.com/2010/US/12/03/wikileaks.access.warning/index.html>.

154 *Id.* (quoting Library of Congress spokesman Matthew Raymond).

155 *Id.* (“We have put out a policy saying Department of Defense military, civilian and contractor personnel should not access the WikiLeaks website to view or download the publicized classified information,” Department of Defense spokesman Maj. Chris Perrine told CNN.”).

156 Emanuella Grinberg, *Will Reading Wikileaks Cost Students Jobs With the Federal Government?*, CNN.COM, Dec. 8,

the power of the government to hire or refuse to hire. As such, it is a direct and effective constraint on reading publicly available truthful information with clear political import. And, as with the case of the companies, here university career services offices provided accreditation and dissemination services to the initial move by the government, so that the chilling effect was amplified through the organizational power of recruitment and hiring in the country's institutes of higher education.

One particularly interesting source of accreditation was the *Washington Post*, which published a career advice column on the threat that reading the cables created to one's eligibility to get a government job.<sup>157</sup> The article, authored by the Post's leading expert on Federal career placement,<sup>158</sup> opens with the following sentences:

You have always had an interest in the U.S. government and the missions of the agencies that deal with national security and international affairs. You even hope to work for the feds or serve in the military one day. Then you find yourself—an avid reader and seeker of knowledge—face-to-face with the WikiLeaks Web site. This rare look inside government operations could also cost you a potential security clearance.<sup>159</sup>

It is hard to imagine a more effective way to prevent young people aspiring to a career in politics or public service from reading the materials that the government would prefer they not read.

#### 4. *Indirect Legal Assault*

The multisystem attack on Wikileaks employs the legal system on two dimensions which are not directly aimed at the actions of Wikileaks in leaking the cables. Each attack is likely to put pressure on the continued ability of the organization to function.

The first of these is the actual legal action against the soldier who is accused of having leaked the materials: a 22 year old army intelligence analyst named Bradley Manning. As of this writing, little is known about Manning or his motivations beyond a series of articles in *Wired Magazine*, based on materials provided by the hacker who turned Manning in, Adrian Lamo.<sup>160</sup> That Manning can be prosecuted under military or civilian criminal law is certainly true. It is clear, however, from what little is available here, that Manning was under stress and self-medicating, but was operating at least in part from motives that we would normally consider the paradigm case of whistleblowing: moral and political disagreement with the course of action of the state.<sup>161</sup> Whether the actions exposed in the documents are indeed illegal or immoral in a manner that would justify blowing the whistle is not obvious. After almost a year of revelations from this set of materials, they seem more a broad affirmation of what is widely believed to be the case than offering any new smoking guns. Their

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2010, [http://articles.cnn.com/2010-12-08/justice/wikileaks.students\\_1\\_wikileaks-security-clearance-students?\\_s=PM:CRIME](http://articles.cnn.com/2010-12-08/justice/wikileaks.students_1_wikileaks-security-clearance-students?_s=PM:CRIME).

157 See Derrick T. Dortch, *Job Hunters Should Steer Clear of WikiLeaks Site*, WASH. POST, Dec. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120806796.html>

158 *Our Leadership: Derrick T Dortch, President*, THE DIVERSA GROUP, <http://www.diversagroup.com/DerrickTDortchBio.html> (last visited Feb. 19, 2011).

159 Dortch, *supra* note 151.

160 Kevin Poulsen & Kim Zetter, *I Can't Believe What I'm Confessing to You*, WIRED.COM, Jun. 10, 2010, <http://www.wired.com/threatlevel/2010/06/wikileaks-chat/>.

161 See *id.*

disclosure largely serves to confirm readers' views—both positive and negative—of U.S. policy. The contours of what protection, if any, is due federal employees generally, and military personnel in particular, who engage in whistle blowing under these circumstances or where unambiguous illegality is exposed is beyond the scope of this article.<sup>162</sup> From the perspective of the assault on Wikileaks, the important aspect of Manning's treatment is the effort to use him to deter future whistleblowers and the question of whether his culpability could serve to anchor conspiracy liability against Assange and Wikileaks. Given the Pentagon memorandum's focus on disrupting the trust of whistleblowers in Wikileaks by exposing them,<sup>163</sup> Manning's long-term solitary confinement seems clearly intended as a warning<sup>164</sup> and possibly as a lever to obtain his cooperation in bringing a conspiracy charge against Assange; however, the long confinement may undermine a court's willingness to credit his testimony in such a case.

The second dimension of indirect legal attack on Wikileaks is the Swedish investigation into accusations of sexual assault by Julian Assange against two women during an August 2010 visit to Sweden. On August 20, 2010, after release of the Collateral Murder video and the Afghanistan documents, the Swedish prosecutor's office issued an arrest warrant against Assange in an investigation of allegations of rape stemming from accusation by two women whom he met at a conference in Sweden, on August 14<sup>th</sup> and 17<sup>th</sup>. The accusations and issuance of the arrest warrant were leaked to the press. The next day, the arrest warrant was withdrawn, and a chief prosecutor in the Swedish prosecutor's office stated “I don't think there is reason to suspect that he has committed rape.”<sup>165</sup> On September 1 the Director of Prosecutions decided to overturn the investigating prosecutor's decision, and reopen the rape investigation.<sup>166</sup> On November 18, three weeks after release of the Iraq documents, the Director of Prosecutions obtained a warrant to detain Assange for questioning. Assange, then in the UK, offered to come in to the Swedish embassy or Scotland Yard for the interview. On November 20 Sweden issued an international arrest warrant. On November 30 Interpol issued a “red notice” against Assange, and on December 7 Assange gave himself up to London police and was denied bail until the extradition hearing.<sup>167</sup> While the UK government did not comment on the arrest, U.S. Secretary of Defense responded that it was “good news,”<sup>168</sup> lending support to concerns raised by observers from

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162 See generally, Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, FIRST AMENDMENT CENTER 1, 1-10 (2006), <http://www.firstamendmentcenter.org/PDF/Govt.Secrecy.Stone.pdf>.

163 See *supra*, note \_\_.

164 Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's detention*, SALON, Dec. 15, 2010,

[http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/14/manning/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/manning/index.html). See also updates from Manning's counsel, *Posts on Manning Case*, Law Offices of David E. Manning Blog, (last updated Feb. 2, 2011, 6:01 PM),

<http://www.armycourt martialdefense.info/search/label/Manning%20Case>. “[S]olitary confinement is recognized as difficult to withstand; indeed, psychological stressors such as isolation can be as clinically distressing as physical torture.” Jeffrey L. Meltzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW 104, (March 1, 2010), available at

[http://www.hrw.org/en/news/2010/03/22/solitary-confinement-and-mental-illness-us-prisons#\\_edn6](http://www.hrw.org/en/news/2010/03/22/solitary-confinement-and-mental-illness-us-prisons#_edn6). On the psychological effects, see P. S. Smith, *The Effects of Solitary Confinement on Prison Inmates: a Brief History and Review of the Literature* 34 CRIME & JUST. 441 (2006).

165 *Timeline: Sexual Allegations Against Assange in Sweden*, BBC NEWS, Dec. 16, 2010, <http://www.bbc.co.uk/news/world-europe-11949341>.

166 *Sweden Reopens Wikileaks Founder Rape Investigation*, BBC NEWS, Sept. 1, 2010, <http://www.bbc.co.uk/news/world-europe-11151277>.

167 *Wikileaks Founder Julian Assange Refused Bail*, BBC NEWS, Dec. 7, 2010, <http://www.bbc.co.uk/news/uk-11937110>.

168 *Id.*

the moment of the initial issuance of the arrest warrant and its retraction that the charges were part of a campaign to undermine Wikileaks.<sup>169</sup> On December 14<sup>th</sup>, the judge awarded bail, but the prosecution appealed the grant of bail so that Assange's release was delayed.<sup>170</sup> The decision to appeal may have been requested by the Swedish prosecutor's office.<sup>171</sup>

The facts underlying the effort to extradite Assange before charging him raise questions about the relationship between the aggressive pursuit of the extradition request and appeals over bail and the general assault on Wikileaks. According to a report in *The Guardian*, based on police reports leaked to the newspaper,<sup>172</sup> the accusers suggested that Assange behaved aggressively with at least one of the two accusers, and inconsiderately with both.<sup>173</sup> It is entirely possible that under Sweden's definition of rape and sexual molestation laws, reflecting significant respect for women's rights to just say no at any point in the interaction,<sup>174</sup> Assange committed an offense.<sup>175</sup> The treatment of the case: issuance of the warrant, its retraction and reissuance; the leaks to the press, and most importantly issuance of an international arrest warrant, requested extradition without consenting to an initial interview at the embassy or Scotland Yard, and repeated efforts to seek denial of bail and appeal of the bail decision, suggest that the manner of pursuit was a political act, rather than purely standard procedure in such a case.<sup>176</sup> Whether the politics were about Wikileaks or simply using the name recognition of the accused to make a point about sexual assault law in Sweden is unclear.<sup>177</sup> Certainly, it created the materials for the media interference pattern described above.

#### *E. Sources of Resilience of the Networked Fourth Estate, and Their Limits*

Despite the multi-system assaults it sustained, Wikileaks continued to operate throughout the period following release of the cables, and its supporters continued to function and indeed respond to the attack along many dimensions. Just as the attacks provide insight into the ways in which human practice involves action in and through multiple intersecting systems, so too do the responses.

*Jurisdictional arbitrage.* The first and most obvious feature of the operation of Wikileaks is its

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169 See e.g., Alan Nothnagle, *Swedes Question Rape Accusations Against Wikileaks Founder*, Lost in Berlin: News and trends from the Heart of Europe Blog (Aug. 21, 2010, 1:13 PM),

[http://open.salon.com/blog/lost\\_in\\_berlin/2010/08/21/swedes\\_question\\_rape\\_accusations\\_against\\_wikileaks\\_founder](http://open.salon.com/blog/lost_in_berlin/2010/08/21/swedes_question_rape_accusations_against_wikileaks_founder).

170 *Wikileaks Founder Assange Bailed, but Release Delayed*, BBC NEWS, Dec. 14, 2010, <http://www.bbc.co.uk/news/uk-11989216>.

171 *Wikileaks Founder Julian Assange Freed on Bail* BBC NEWS, Dec. 16, 2010, <http://www.bbc.co.uk/news/uk-12005930>.

172 Nick Davies, *10 Days in Sweden: the Full Allegations Against Julian Assange*, THE GUARDIAN, Dec. 17, 2010, <http://www.guardian.co.uk/media/2010/dec/17/julian-assange-sweden>.

173 See *id.*

174 *Id.*

175 See *Wikileaks: Julian Assange v Sweden's Broad Sexual Laws*, BBC NEWS, Dec. 8, 2010, <http://www.bbc.co.uk/news/world-europe-11946652>.

176 The only statistics I have been able to obtain state that in 2009-2010, Sweden made a total of 6 extradition requests from the UK under a European Arrest Warrant, which is not the same as an Interpol Red Notice. *Written Response of Nick Herbert on European Arrest Warrants in the House of Commons*, WWW.PARLIAMENT.UK, Nov. 9, 2010, <http://services.parliament.uk/hansard/Commons/ByDate/20101109/writtenanswers/part004.html>.

177 The accusers' lawyer is a Swedish politician whose signature issue is gender equality. It was apparently he who initiated and advised the accusers that they could challenge and reverse the prosecutorial decision not to pursue Assange. See David Leigh and Luke Harding, *WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY* 162-163 (2011).

presence outside the jurisdiction of the affected country—the United States. Even if U.S. law were to permit shutting down the site and/or arresting Julian Assange, that alone would be insufficient. The fact that the actors and servers are in other countries, and in particular, in countries with strong rights protecting whistleblowers—initially Iceland and later Sweden—provided Wikileaks with a degree of robustness against the most predictable legal attacks. The defense is, of course, only as strong as the self-imposed limits of potentially offended countries on applying extra-territorial jurisdiction, and the degree to which the host countries are, or are not, susceptible to legal process or diplomatic pressure.

*Shifting to redundant backup technical systems.* When EveryDNS, a California company, cut off domain name service, Wikileaks used a Swiss domain name service, Switch, and a Swiss domain name—Wikileaks.ch—to remain reachable. Despite U.S. and French pressure to shut down the Swiss domain name, the Swiss DNS registrar refused to do so.<sup>178</sup> Wikileaks then used Twitter to disseminate the new URL. The redundancy of naming platforms, and the availability of uncontrolled pathways to disseminate information necessary to coordinate on the alternative platform meant that Wikileaks was again available within hours. Combining jurisdictional arbitrage with technical system redundancy, Wikileaks quickly set up 14 domain servers, in multiple countries, to respond to searches for its domain.<sup>179</sup> Similarly, when Amazon denied Wikileaks service, the organization was able to quickly shift to copies hosted on servers provided by OVH in France; and when the French government cracked down on that backup system, Wikileaks moved to pointing at copies hosted in Sweden, which has stronger press freedom and whistleblower protection laws.

*Shifting to backup payment systems.* When payment systems were denied Wikileaks by Paypal, Mastercard, and Visa, several pathways remained. These included a German bank, an Icelandic bank, Datacell (a Swiss-Icelandic online payment system processing money transfers from banks in several European countries), as well as simply using PayPal to pay Julian Assange's UK lawyer directly.<sup>180</sup> Unlike the technical backup solutions, these are obviously less efficient avenues, and the need to resort to them inflicted real damage to Wikileaks.<sup>181</sup>

*Socio-political framing as journalism.* Throughout the events, Assange and Wikileaks emphasized their role as journalists. Inverting the practices of those who sought to analogize Wikileaks to terrorists, some commentators and reporters emphasized the basic argument that Wikileaks is a reporting organization, fulfilling a reporting function. In particular, Glenn Greenwald of Salon provided the most detailed and systematic coverage in support of Wikileaks.<sup>182</sup>

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178 Josh Halliday, *Wikileaks Site's Swiss Registry Dismiss Pressure to Take it Offline*, THE GUARDIAN, Dec. 4, 2010, <http://www.guardian.co.uk/media/2010/dec/04/wikileaks-site-swiss-host-switch>.

179 Jane Wakefield, *Wikileaks' Struggle to Stay Online*, BBC NEWS, Dec. 7, 2010, <http://www.bbc.co.uk/news/technology-11928899>.

180 For a time-sensitive snapshot, see Guardian Chronology of Attacks, *supra* note 130. See also <http://wikileaks.ch/support.html> (Last visited Jan. 11, 2011).

<sup>181</sup> Assange notes that it is true that the back up payment systems did function, “but by knocking out the most popular payments systems, some 80 to 90% of revenue stream was lost, at least \$5M dollars. We have since worked around this, and can now take PayPal, Visa and Mastercard through the appropriate proxies, but the Bank of America interdiction remains.” Assange’s Annotations to this paragraph.

182 See, e.g., Glenn Greenwald, *Attempts to Prosecute WikiLeaks Endanger Press Freedoms*, SALON, Dec. 14, 2010, [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/14/wikileaks/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/wikileaks/index.html); Scott Shane, *Keeping Secrets Wikisafe*, N.Y. TIMES, Dec. 11, 2010,

*Backup organizational systems.* Perhaps the most important strategic choice of Wikileaks in this case was to release through several established news sites, in different jurisdictions and markets. This approach achieved several things. First, it provided accreditation for the materials themselves. Second, offering the materials to several organizations meant that no single organization could, acting alone, suppress the cables. Competition for the scoop drove publication. Third, it located Wikileaks squarely within the “journalist,” and even “responsible established media” rubric. This effort failed, at least in the public framing of the release, although it may yet play a role in the decision as to whether to prosecute anyone at Wikileaks. By harnessing the established fourth estate to its materials, Wikileaks received accreditation and attention, and was able to exercise power over the public sphere well beyond what it could have commanded by a single document dump on its own site, or an edited set of its own. By releasing an exclusive to major outlets in different global markets, it was able to create enough exclusivity to make publication commercially valuable to each of the news organizations in their respective markets, and enough competition to prevent any organization from deciding, in the name of responsibility, not to publish at all, or, as the *Times* did in the case of the NSA eavesdropping report, delay publication for a year.<sup>183</sup> Doing so also solved the problem of how to sift through these vast amounts of data without having to harness a large army of volunteers and thereby defeating the purpose of releasing carefully, so as not to harm innocent bystanders.<sup>184</sup>

*DDoS attacks by supporters.* In the days following the denial of service attacks by the payment systems companies, a network of online activists called Anonymous launched a series of DDoS attacks against PayPal.<sup>185</sup> The group knew that its combined power was insufficient to cause substantial damage, and its members responded in an interview that they were mounting the attacks: “to raise awareness”, “to show the prosecutor that we have the ability to act.”<sup>186</sup> The attacks were investigated by the FBI, and lead to a backlash concerned with anarchic protests aimed at major components of the market system.<sup>187</sup> Rather than providing support to Wikileaks, as they clearly were intended to do, these attacks helped to underscore and legitimate the framing of Wikileaks as a dangerous and anarchic actor. Participants rapidly abandoned this strategy.<sup>188</sup>

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[http://www.nytimes.com/2010/12/12/weekinreview/12shane.html?pagewanted=1&\\_r=1&src=twrhp](http://www.nytimes.com/2010/12/12/weekinreview/12shane.html?pagewanted=1&_r=1&src=twrhp); Clint Hendler, *The Wikileaks Equation, Secrets, Free Speech, and the Law*, COLUM. JOURNALISM REV., Dec. 28, 2010, available at [http://www.cjr.org/behind\\_the\\_news/the\\_wikileaks\\_equation.php](http://www.cjr.org/behind_the_news/the_wikileaks_equation.php).

<sup>183</sup> Paul Farhi, *At the Times, a Scoop Deferred*, WASH. POST, Dec. 17, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601716.html>.

<sup>184</sup> Of less importance, but worth noting nonetheless, was the role of the Pirate Party in Sweden, which hosted the data, and the Swiss Pirate Party, which had registered [wikileaks.ch](http://wikileaks.ch) months earlier and made it immediately available as the backup domain name that has provided access since the shutdown by EveryDNS. These parties are registered in their national systems as political parties; the Swedish Pirate Parties actually has two members of parliament in the European Parliament. They reflect the beginnings of the institutionalization of the anti-authoritarian culture of peer-to-peer file sharing, and its conversion into a more established part of the European political system.

<sup>185</sup> B.G. Babbage, *The 24 Hour Athenian Democracy*, ECONOMIST, Dec. 8, 2010, [http://www.economist.com/blogs/babbage/2010/12/more\\_wikileaks](http://www.economist.com/blogs/babbage/2010/12/more_wikileaks).

<sup>186</sup> *Id.*

<sup>187</sup> *FBI in Hunt for pro-WikiLeaks Hackers: Report*, AFP, Dec. 31 2010, <http://www.google.com/hostednews/afp/article/ALeqM5jvBh43hRP1Fc-fmZYMBmWdvDHXBA?docId=CNG.64db65f15c356aba84d7ef1d0c9a0ba9.241>.

<sup>188</sup> Babbage, *supra* note 177. *Assange annotations* suggest that at least Assange disagrees with my assessment of the effect, and holds that “It appears that that the supportive attacks won us more popular support than we lost and possibly

*Threat of major embarrassment: the “insurance” file.* In anticipation of arrest or assassination, Assange posted on Wikileaks as early as July a 1.4 GB file, much larger than all the available materials, which was available for download. It was also made available as a torrent peer-to-peer file sharing file.<sup>189</sup> The file is encrypted, apparently with sufficiently secure encryption to assure that it will not be broken.<sup>190</sup> The threat was clear: if Assange is arrested or harmed, or Wikileaks attacked, the decryption key will be released. Of all the actions by Wikileaks or Assange, this was the one that most conformed to the profile of a dangerous activist. The file remains at large; the decryption code remains secret; it was not released despite Assange's arrest.

*Mutation and replication.* On the larger, longer-term scale, another important response during the first month following the release of the embassy cables was replication and mutation. Some former Wikileaks members announced creation of a parallel organization, OpenLeaks, intended to receive leaks and release them solely to subscribing NGOs and media organizations.<sup>191</sup> A separate organization, Brussels Leaks, was launched to provide leaks specifically regarding the EU Commission.<sup>192</sup> Both organizations plan to institutionalize in their structure the strategy that Wikileaks rapidly evolved over the course of 2010—the dedication to release through the mediation of “legitimate” real world organizations, both media and NGOs. A month later, *Al Jazeera* launched (and the *New York Times* was considering launching) its own copy of Wikileaks: a secure platform for decentralized submission of leaked documents.<sup>193</sup> *Al Jazeera's* Transparency Unit<sup>194</sup> was launched with the leaked “Palestine Papers.”<sup>195</sup> To the extent that the campaign against Wikileaks was intended not to quash the specific documents, but to tame the beast of distributed online systems providing avenues for leaking documents outside of the traditional responsible media system, the emergence of these new sites suggests that the social and cultural phenomenon of distributed leaking is too resilient to be defeated by this type of attack. Just as the closure of Napster was merely the invitation for the development of more litigation-proof systems like Gnutella and KaZaa, so too here it appears that even the destruction of Wikileaks itself is unlikely to lead to the abandonment of this new model of provisioning one important aspect of the fourth estate. Reporting based on documents leaked securely online and using multiple overlapping systems to reach the public and evade efforts at suppressing their publication is here to stay.

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also as a "social discipline" mechanism, these "online protests" may be valuable in policing future extrajudicial censorship attacks.”

189 Kim Zetter, *Wikileaks Posted Mysterious ‘insurance’ file*, WIRED, July 30, 2010, <http://www.wired.com/threatlevel/2010/07/wikileaks-insurance-file/>.

190 Ashley Fantz, *Assange's ‘Poison Pill’ Impossible to Stop*, CNN.COM, Dec. 8, 2010, [http://articles.cnn.com/2010-12-08/us/wikileaks.poison.pill\\_1\\_julian-assange-wikileaks-key-encryption?\\_s=PM:US](http://articles.cnn.com/2010-12-08/us/wikileaks.poison.pill_1_julian-assange-wikileaks-key-encryption?_s=PM:US).

191 “A new WikiLeaks” *Revolts Against Assange*, DN.SE, Dec. 9, 2010, <http://www.dn.se/nyheter/varlden/a-new-wikileaks-revolts-against-assange-1.1224764>.

192 *Id* (*describing OpenLeaks*); *Brussels Leaks About*, <http://brusselsleaks.com/>.

193 Michael Calderone, *NY Times Considers Creating an ‘EZ Pass lane for leakers’*, THE CUT LINE, YAHOO NEWS BLOG, Jan. 25, 2011, [http://news.yahoo.com/s/yblog\\_theoutline/20110125/ts\\_yblog\\_theoutline/ny-times-considers-creating-an-ez-pass-lane-for-leakers](http://news.yahoo.com/s/yblog_theoutline/20110125/ts_yblog_theoutline/ny-times-considers-creating-an-ez-pass-lane-for-leakers).

194 AL JAZEERA TRANSPARENCY UNIT, <http://www.ajtransparency.com/> (last visited Feb. 19, 2011).

195 *The Palestine Papers*, AL JAZEERA, <http://english.aljazeera.net/palestinepapers/> (last visited Feb. 19, 2011).



F. *The Response to Wikileaks: Wrap up.*

The response to Wikileaks was dramatic, extensive, overwrought, and ineffective. If the purpose was to stop access to the cables, it failed. If the effort was to cast a doubt on the credibility of the cables, it failed. If the purpose was to divert attention from the cables, it failed. And if the effort was to prevent the future availability of decentralized dissemination of leaked documents outside of the confines of the responsible press, it failed. Indeed, it is possible that, had Secretary Clinton adopted the same stance as Secretary Gates and shrugged off the events as embarrassing, but not fundamentally destructive, a measured response to Wikileaks could have significantly advanced the State Department's Internet Freedom agenda by allowing the U.S. to exhibit integrity and congruence between its public statements in support of Internet freedom and its actions.<sup>196</sup> The actual response will create a visible incongruity should the State Department continue to assert Internet freedom as a major policy agenda.<sup>197</sup>

Part III will be dedicated to outlining the constitutional limits on the state's ability to prevent such dissemination directly through law, and the legal avenues open to constraining the capacity of the state to use extralegal avenues to achieve what it cannot do directly within those confines. Part IV will use the event to outline the emerging shape of the networked public sphere, the emerging structure of the networked fourth estate, and the new challenges it faces and affordances it has relative to those of the mass mediated fourth estate.

PART III: THE LEGAL FRAMEWORK

A. *Baseline: Freedom of the Press and the National Interest*

To anchor our understanding of the Wikileaks case, it is useful first to provide a baseline of what law is relevant for more traditional media. Consider the release of the embassy cables by the *New York Times* and *The Guardian*. Each of these newspapers received a cache of classified cables it (correctly) believed to be authentic. Each spent time negotiating the details of receipt and publication of these documents with its source (Wikileaks). Each ultimately released over one thousand cables, some in redacted form, others without redaction where it deemed release in full to be safe. What is the legal framework governing the government's response to the actions of these organizations, in this very case?

The basic framework for this question is provided by *New York Times v. United States*,<sup>198</sup> the Pentagon Papers case. The United States was at war. Daniel Ellsberg, a former Defense Department employee, leaked to the *New York Times* a copy of a forty-seven volume internal study commissioned by Robert McNamara in 1967 on the Vietnam War, including details of military operations and secret

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196 Secretary of State Hillary Rodham Clinton, *Remarks on Internet Freedom*, U.S. Department of State (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

197 Indeed, Secretary Clinton's second set of remarks on Internet Freedom did just that, and her weak response to Wikileaks in that talk underscored the extent to which the United States' moral authority to speak of Internet Freedom was undermined by its response. See Secretary of State Hilary Clinton Remarks, *Internet Rights and Wrongs*, <http://www.state.gov/secretary/rm/2011/02/156619.htm>.

198 403 U.S. 713 (1971).

diplomatic negotiations. As soon as the *Times* began publishing the papers, the Attorney General of the United States, John Mitchell, sent a telegram to the *New York Times* worded very much like the letter Harold Koh sent to Wikileaks, claiming that publication would “cause irreparable injury to the defense interests of the United States” and demanding that the *Times* show that it had “made arrangements for the return of these documents to the Department of Defense.”<sup>199</sup> The government sought an injunction against publication. Within 17 days of the original publication the case reached the Supreme Court and was decided in favor of the *Times* and freedom of publication. As Justice Stewart, with whom Justice White joined to provide the fifth and sixth votes for the decision put it, “We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will *surely result in direct, immediate, and irreparable damage to our Nation or its people*. That being so, there can under the First Amendment be but one judicial resolution of the issues before us.”<sup>200</sup> It is particularly pertinent to the question of Wikileaks that Justice Stewart was well aware of the consequences of disclosure. Writing as though for the Wikileaks cable embassies case itself, Justice Stewart writes that: “it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence.”<sup>201</sup> Indeed, Justice Stewart opened his opinion by emphasizing that in areas of national defense and international relations the Executive has relatively unchecked powers, by comparison to other areas of policy where Congress and the Judiciary are more closely engaged, making a robust, critical, free press all the more important as the only foundation for a critical and enlightened public that could act as a check on abuse of Executive power.<sup>202</sup> This very powerful executive had the responsibility of maintaining its own operations with enough security and wisdom to make sure that only what needs classifying is indeed classified, and that which is classified does not get leaked. But it could not, consistent with the First Amendment, call upon the courts to enjoin publication of leaked materials. That messy balance between the administration's need for secrecy and the public's right and need to know, while far from perfect, does mean that the administration continues to function under normal conditions, subject to occasional disclosures to keep it honest.<sup>203</sup> The rare exceptions would require a combination of high likelihood, magnitude, and immediacy of harm to justify suppression. In the area of national defense, this is captured by the phrase “the sailing dates of transports or the number and location of troops.”<sup>204</sup> Or, as Justice Stewart put it, to justify suppression

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199 Stone, *Government Secrecy vs. Freedom of the Press* at 11 (2006); Hedrick Smith, *Mitchell Seeks to Halt Series on Vietnam, but Times Refuses*, N.Y. TIMES, June 15, 1971.

200 403 U.S. at 730 (emphasis added).

201 *Id.* at 728.

202 *Id.* at 727-28 (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”).

203 See Stone, *supra* note 149.

204 *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

the publication must “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>205</sup>

But the Pentagon Papers case concerned prior restraint, which the Court recognized as requiring extraordinary care. What of prosecution *ex post*? In the first instance, imagine what would have happened had the Justice Department turned around and brought criminal charges against the editors and journalists of the *New York Times* and the *Washington Post* after publication of the Pentagon Papers. Do we think that a court that held that the First Amendment requires that the newspapers be permitted to publish it would have simply allowed the government to charge and imprison the journalists after the fact? That would make a mockery of the protection, and impose much greater of a chill on publication than the risk of an injunction. The long history from *The Masses* case<sup>206</sup>, *Schenck v. United States*<sup>207</sup> and the “bad tendency” era to *Brandenburg v. Ohio*<sup>208</sup> overturning of *Whitney v. California*<sup>209</sup> to embrace the “clear and present danger” framework ended up requiring a similar combination of high damage, high probability, and immediacy for prosecutions, as well as for prior restraints. As the Supreme Court put it in the context of considering criminal liability of a broadcaster who had broadcast illegal materials, the First Amendment does not permit prosecution of a journalist transmitting truthful information of public interest “absent a need of the highest order.”<sup>210</sup> The distinction, then, is minimal in practice. The standard for prior restraint and the standard for criminal prosecution over the publication of truthful materials of public concern seems to be largely the same, and exceedingly stringent.<sup>211</sup> On the background of this extremely high barrier to both prior restraint and to criminal prosecution, it is perhaps not surprising that efforts by the Bush Administration to prosecute the *New York Times* for its revelations of the National Security Agency's program of domestic eavesdropping, and the *Washington Post* for its reporting on the existence of CIA-operated black sites in Eastern Europe, were abandoned.<sup>212</sup>

On the background of this legal regime, and what we know of the contents of the embassy cables eight weeks after their initial publication, it is for all practical purposes impossible to imagine that the *New York Times* would be prosecuted, or that if such an ill-advised prosecution were to be brought, that it could survive judicial scrutiny under prevailing first amendment doctrine. Now, what of *The Guardian*? Could it be that U.S. statutory law—say, the Espionage Act or the Computer Fraud and Abuse Act—extends to noncitizens' actions outside of the United States, but the protections afforded by the first amendment do not apply to such defendants? In that case, non-U.S. defendants

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<sup>205</sup> N.Y. Times, 403 U.S. at 729.

<sup>206</sup> *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

<sup>207</sup> 249 U.S. 47 (1919).

<sup>208</sup> 395 U.S. 444 (1969).

<sup>209</sup> 274 U.S. 357 (1927).

<sup>210</sup> *Bartnicki v. Vopper* 532 U.S. 514, 528 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

<sup>211</sup> See *Landmark Commc'ns, Inc. v. Va.*, 435 U.S. 829 (1978); *Worrell Newspapers of Ind. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984), *aff'd* 469 U.S. 1200 (1985); GEOFFREY STONE, *PERILIOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004); Stone, *supra* note 187 at 14 (citing David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 32, 57-59 (Lee C. Bollinger & Geoffrey R. Stone ed., 2002) (“it is difficult to believe that the Court would have allowed newspaper editors to be punished, criminally, after they published the [Pentagon] Papers”).

<sup>212</sup> See Mary-Rose Papandrea, *Lapdogs, Watchdogs and Scapegoats*, 83 IND. L.J. 233, 234-35 (2007); see also Stone, *supra* note 149 at 27 n.2.

who publish materials that harm the interests of the United States in ways that are legal in their own jurisdiction could be prosecuted under U.S. law without either legal system's protections. That non-citizens are “persons” covered by the substantive guarantees of the Bill of Rights is long-settled law.<sup>213</sup> That a range of provisions of United States criminal law can apply extra-territorially is similarly settled,<sup>214</sup> and that the extension of constitutional protections and limitations does not necessarily travel with the extra-territorial reach of the criminal law is also quite clear. The intuition, and the area of primary application, is criminal procedure: questions such as how to deal with the criminal procedure owed foreign nationals in trials carried out abroad.<sup>215</sup> In the past decade, post-9/11 detention of enemy combatants has placed significant pressure by the executive, on courts, to limit extra-territorial application of constitutional guarantees. The Supreme Court, however, has not taken the formalist path argued to it (that the Constitution stops at the border), holding instead that even non-citizens designated as enemy combatants and held in Guantanamo can assert *habeas corpus*.<sup>216</sup> The Court reemphasized that “Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.’”<sup>217</sup> A hypothetical suit against the *Guardian*, or, for that matter, Assange, for publishing the embassy cables would be vastly simpler than the post-9/11 cases. First, it would proceed within in the United States, not abroad. Even the absolutist version would not deny protection in trials conducted here. Second, the rights to be asserted are those involving the first amendment's freedoms of expression and of the press. Over one hundred years ago the Supreme Court, in one of the most important precedents limiting the extension of constitutional protections beyond the borders of the United States, nonetheless specifically stated that “freedom of speech and of the press” were among those rights so “indispensable to a free government” that they would apply abroad.<sup>218</sup> Do we imagine, for example, that if *the Guardian* were to publish a report making revelations about a U.S. political figure, that person could sue the *Guardian* for libel in the United States without having to comport with the constraints of *New York Times v. Sullivan*?<sup>219</sup> Indeed Congress is pushing to have our own constitutional constraints protect our citizens from libel suits in perfectly democratic countries that give less deference to press freedom in the area of libel.<sup>220</sup> It seems highly unlikely, then, that the mere fact of a publisher being a company or person who is not a U.S. citizen or resident, or of the publication being disseminated outside the United States, as would be the case were the government to prosecute the *Guardian*, would entail a lower level of first amendment protection than the *New York Times* itself would receive. This conclusion is made even clearer when we remember that the core purpose driving freedom of the press is the democratic necessity of an informed citizenry, to avoid the “farce, or tragedy, or both” that James Madison warned of.<sup>221</sup>

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213 *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886); *see also* *Boumediene v. Bush*, 553 U.S. 723 (2008).

214 *See* Gerald L. Neuman, *Whose Constitution?* 100 *YALE L.J.* 909 (1991); *see also* Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 *YALE L.J.* 1660 (2009).

215 *Id.*

216 *Boumediene v. Bush*, 553 U.S. 723.

217 *Id.* at 765 (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

218 *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

219 376 U.S. 254 (1964).

220 *See* Securing The Protection Of Our Enduring And Established Constitutional Heritage (“SPEECH”) Act of 2010 28 U.S.C. § 4101 et seq. (2006).

221 Letter from James Madison to W. T. Barry (Aug. 4, 1822), in 9 *WRITINGS*, at 103-9 (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power

Functionally, whether the American public learns of official misconduct from a U.S.-based publication or a foreign publication is immaterial to the real beneficiaries of robust first amendment freedom of the press—these are always and foremost the American public and American democracy.

Looking at both the *Guardian* and the *New York Times*, then, any effort on the part of the United States government to prosecute either of these two publications for their publication of the embassy cables would founder on the bulwarks of the first amendment. What, if anything, would make Wikileaks sufficiently different from *the Guardian* or the *Times* to justify treating its publications under a different standard?

B. *Does the First Amendment treat Wikileaks and Julian Assange as less protected than the New York Times and its editors and reporters?*

The most obvious difference between Wikileaks and the more traditional media outlets is the organizational identity. The latter are culturally familiar as major media outlets; they have established editors and boards, and we have a general cultural assumption about their organizational culture: they care about getting the facts right, and being “responsible” in presenting the news. Perhaps, then, the important dividing line is between established media and journalists, on the one hand, and the decentralized, informal and quasi-formal culture of speech on the Internet?

What might account for such a difference? The intuition would likely take a form along the lines expressed by Jonathan Klein, who, just before taking over as president of CNN/U.S. said that “you couldn't have a starker contrast between the multiple layers of checks and balances, and a guy sitting in his living room in his pajamas writing what he thinks.”<sup>222</sup> He was speaking of the bloggers who had exposed the fact that a *60 Minutes* report by Dan Rather on President George Bush's military record was based on inauthentic documents. While Klein no longer leads CNN U.S.,<sup>223</sup> the disdainful treatment of the blogosphere by traditional media has not disappeared. The *New York Times*'s own coverage of Wikileaks paired coverage of the substance of the materials that Wikileaks made public with unflattering portraits of Julian Assange, describing him variously as a “hunted man” who “checks into hotels under false names, dyes his hair, sleeps on sofas and floors, and uses cash instead of credit cards, often borrowed from friends,”<sup>224</sup> or “like a bag lady walking in off the street, wearing a dingy, light-colored sport coat and cargo pants, dirty white shirt, beat-up sneakers and filthy white socks that collapsed around his ankles. He smelled as if he hadn't bathed in days.”<sup>225</sup> These descriptions seem to represent a deep anxiety and identity crisis of the traditional media; perhaps they exhibit existential fear

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which knowledge gives.”).

222 *Special Report with Brit Hume: How the Blogosphere took on CBS' Docs* (Fox News television broadcast, Sept. 14, 2004), transcript available at <http://www.foxnews.com/story/0,2933,132494,00.html>).

223 Brian Stetler, *Jonathan Klein to Leave CNN*, MEDIA DECODER (Sept. 24, 2010, 10:12 AM), <http://mediadecoder.blogs.nytimes.com/>; Catherine Taylor, *With Jonathan Klein Dismissal, CNN Finally Pushes the Panic Button*, CBS BUSINESS INTERACTIVE NETWORK (Sept. 27, 2010), <http://www.bnet.com/blog/new-media/with-jonathan-klein-dismissal-cnn-finally-pushes-the-panic-button/6204>.

224 John F. Burns & Ravi Somaiya, *Wikileaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES, Oct. 24, 2010, at A1, available at <http://www.nytimes.com/2010/10/24/world/24assange.html>.

225 Bill Keller, *Dealing with Assange and the Wikileaks Secrets*, N.Y. TIMES, Jan. 30, 2011, at MM32, available at [http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?\\_r=2&adxnml=1&ref=global-home&pagewanted=all&adxnml=1296126172-2rQw0P2MEyzJ5ewVG0VG4g](http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?_r=2&adxnml=1&ref=global-home&pagewanted=all&adxnml=1296126172-2rQw0P2MEyzJ5ewVG0VG4g).

that the glory days of their profession are past; perhaps simple envy over the fact that the biggest scoop of 2010, a scoop that dominated the front pages of all the major outlets for weeks, was generated by someone who was not a member of the club. Whatever the reason for this unflattering portrait, it cannot form the basis of a constitutional principal.

If Manning had walked off a military base in Oklahoma and handed the disc with the files to the editor of a tiny local newspaper of a small town 100 miles away, and that newspaper had published the materials, we would not conceivably have treated that local newspaper, even if it were a two person operation, as categorically different from the *New York Times*. Indeed, we lionize the local newspaperman as a bulwark against local corruption.<sup>226</sup> *The Progressive* does not have the organizational heft of the *New York Times*, but this lack does not affect its constitutional protections. As the Supreme Court put it, “Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”<sup>227</sup> Organizationally, the tiny local newspaper cannot possibly institute the kinds of institutional-procedural “checks and balances” that Klein spoke of. Their presence or absence cannot sustain a distinction that makes a constitutional difference if we are not willing to leave the small local newspaper out of the protective umbrella of freedom of the press.

The difference between the constituents of the networked fourth estate and the mass media cannot, then, be organizational size or complexity. Functionally, it is more important to provide robust constitutional protection to the weaker members of the fourth estate, who have less public visibility and wherewithal to withstand pressure from government officials, than it is to emphasize the rights of the organizationally and economically stronger members of the press. When Senator Bunning and Representative Kyl called the *New York Times*' disclosure of the NSA domestic eavesdropping agenda “treason,”<sup>228</sup> there was little risk that the *Times* could successfully be prosecuted criminally, or that its editor would find himself under house arrest wearing an ankle bracelet. The sheer economic, social, and cultural power of the *Times* meant that the constitutional limitations will not have to kick in to prevent such an eventuality. The same is not necessarily true of a man whom the Vice President of the United States describes as a “high-tech terrorist,”<sup>229</sup> and whom the *New York Times* publicly describes as “a hunted man”<sup>230</sup> while its executive editor emphasizes that he sees him as “a source,” emphatically not a partner, and not really a journalist.<sup>231</sup> Recall that in this case, the source, Manning, is in solitary confinement precisely because he is a source.<sup>232</sup> It is possible that the *Times*' efforts to distance itself from Assange were driven by a concern to insulate itself from prosecution, should the Department of Justice decide to proceed on a conspiracy theory. But the emphatic rejection of the idea of a partnership with Wikileaks is equally likely to be an assertion of identity by the flagship of an industry and profession that feels itself to be under threat. Whatever the reason, it increases the threat level to

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226 Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, THE NEW REPUBLIC, March 4, 2009, available at <http://www.tnr.com/article/goodbye-the-age-newspapers-hello-new-era-corruption?page=1>.

227 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

228 Stone, *supra* note 149 at 1.

229 *Meet the Press* (NBC television broadcast, Dec., 19, 2010), transcript available at <http://www.msnbc.msn.com/id/40720643/>.

230 Burns & Somaiva, *supra* note 208, at A1.

231 Keller, *supra* note 209, at MM32.

232 Greenwald, *supra* note 39.

members of the networked fourth estate. The emphatic denial of membership in the club does not make a formal constitutional difference; but as a matter of constitutional culture, it puts the practitioners of the networked fourth estate at greater risks than fringe journalists have been in the United States for almost a century.

The difference is not organizational complexity or formal membership in the Press Club, but the difference also certainly cannot be technology. The portions of the *New York Times* that are published only in the Web are no less protected from those published in print; nor would anyone argue that the online-only publication launched by legendary magazine editor Tina Brown, *The Daily Beast*, or that Glenn Greenwald's coverage of Wikileaks over the course of 2010 in the online-only publication *Salon* count for less, constitutionally, than does the *New York Times*. Repeatedly over the course of this past decade we have seen Internet-only publications, primarily in what we currently see as the blogosphere, take on investigative reporting and critical opinion-writing and evaluation that are at the very heart of the function of the fourth estate.<sup>233</sup> Whether it is the role that bloggers played in exposing Dan Rather's error, the central role that Josh Marshall's *TalkingPointsMemo* played in exposing the U.S. Attorney scandal,<sup>234</sup> or Sheri Fink's Pulitzer Prize winning work for ProPublica,<sup>235</sup> it is by 2011 beyond cavil that these outlets deserve as much first amendment protection as did traditional media.

In law, the area where the efforts to define the line between “journalist” and “just a guy in his pajamas” have come to a head has been in the definition of eligibility for the journalist's privilege under state laws. Here, the need for a definition is obvious, because law offers much more than the first amendment's core protection from criminal prosecution for what one has published. In *Von Bulow v. Von Bulow*, the Court of Appeal for the Second Circuit held that “the individual claiming the privilege must demonstrate... the intent to use material--sought, gathered or received--to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”<sup>236</sup> “The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for '[t]he press in its historic connotation comprehends *every sort of publication which affords a vehicle of information and opinion.*”<sup>237</sup> The court concluded by emphasizing that membership in the club of established journalists is not required for protection: “Although prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination, it is not the *sine qua non*. The burden indeed may be sustained by one who is a novice in the field. Further, the protection from disclosure may be sought by one not traditionally associated with the institutionalized press because '[t]he informative function asserted by representatives of the organized press ... is also performed by lecturers, political pollsters, novelists,

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233 See Yochai Benkler, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* ch. 7 (2006); Clay Shirky, *COGNITIVE SURPLUS* (2010); Dan Gilmore, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2006).

234 Paul McLeary, *How TalkingPointsMemo Beat the Big Boys on the U.S. Attorney Story*, COLUM. JOURNALISM REV. (Mar. 15, 2007, 1:53 PM), [http://www.cjr.org/behind\\_the\\_news/how\\_talkingpointsmemo\\_beat\\_the.php?page=1](http://www.cjr.org/behind_the_news/how_talkingpointsmemo_beat_the.php?page=1).

235 *Pulitzer Prize in Investigative Reporting: Deadly Choices at Memorial*, PROPUBLICA, <http://www.propublica.org/awards/item/pulitzer-prize-in-investigative-reporting-deadly-choices-at-memorial/>. (last visited Feb. 19, 2011).

236 811 F.2d 136, 144 (2d Cir. 1987).

237 *Id.* (emphasis added, internal citation to *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) omitted). The Third Circuit, in *In re Madden*, interpreted this as “the Supreme Court's recognition that the ‘press’ includes all publications that contribute to the free flow of information.” 151 F.3d 125, at 129 (3d Cir. 1998).

academic researchers, and dramatists.<sup>238</sup> In following the Second Circuit, and integrating it with the Ninth Circuit,<sup>239</sup> the Third Circuit in *In re Madden* summarized: “We hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public.”<sup>240</sup> The critical definitional element here is intent at the time of gathering and function, not mode of dissemination: intent to gather for public dissemination. There simply cannot be the remotest doubt that the entire purpose of Wikileaks is the gathering of information for public dissemination; and the use of traditional media outlets as the primary pathway emphasizes this fact, although it is not constitutive or a necessary element of the defense. The professionalism, niceness, or personal hygiene of the reporter are not germane to the inquiry. The interest concerned is not individual, but systemic: it is “society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public.”<sup>241</sup>

Perhaps, though, there is nonetheless something about the “intent” test required by the courts of appeal in the journalists’ privilege cases that allows us to separate Assange and Wikileaks from *Talkingpointsmemo*’s role in exposing the U.S. Attorney’s scandal, or from *Free Republic* and *Powerline*, the main movers of the Dan Rather scandal. Most relevant here is a memorandum apparently authored by Julian Assange in 2006, which was posted by Cryptome.org, a much older website that was already publishing material uncomfortable to someone in power a decade before Wikileaks was founded. Assange opens the 2006 paper *State and Terrorist Conspiracies*, with a quote from Theodore Roosevelt: “Behind the ostensible government sits enthroned an invisible government owing no allegiance and acknowledging no responsibility to the people. To destroy this invisible government, to befoul this unholy alliance between corrupt business and corrupt politics is the first task of statesmanship.”<sup>242</sup> The core of the paper’s claim includes three elements: (1) Authoritarian regimes depend on secret internal communications to organize their functioning suppression of opposition; (2) secrecy is necessary for these regimes to function, because if these internal communications were publicly known, they would induce more resistance than the regime can effectively deal with; (3) exposing the internal communications of authoritarian regimes will drive these regimes to clamp down on their internal communications, and by slowing internal communications, will lead these regimes to function less effectively and weaken them. The purpose of transparency, in this ideological framework, is to decrease the effective functioning of its targets, not through the criticism that sunlight will induce, but through the decline in internal information flows caused by the effort to evade that sunlight. Now, nowhere in the essays does Assange say that the “conspiratorial regime” he is talking about is the U.S. government.<sup>243</sup> At the time of this memorandum, recall from the Pentagon Memo,<sup>244</sup> Wikileaks was focused on providing a platform for exposing communications of regimes whose designation as

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238 *Id.* (citing Branzburg, *supra* note 209, and quoting language on the lonely pamphleteer).

239 See Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993).

240 151 F.3d at 130.

241 *Id.* at 128.

242 me @ iq.org, 1, (Nov. 10, 2006) in Cryptome (Jul. 31, 2010), <http://cryptome.org/0002/ja-conspiracies.pdf>. (Cryptome states that the pseudonym “me @ iq.org” is, in fact, Julian Assange.)

243 The closest he comes to it is the implication, in the second version of the essay, that the Republican and Democratic parties would fit his definition of “conspiracy”. See me @ iq.org, *Conspiracy as Governance*, 5 (December 3, 2006) in Cryptome (Jul. 31, 2010), <http://cryptome.org/0002/ja-conspiracies.pdf>.

244 See *supra* notes \_\_\_ and accompanying text.



authoritarian or at least non-democratic and oppressive would be mainstream. Yet the quote from Roosevelt, and the current context of disclosure of U.S. documents certainly lends itself to a reasonable interpretation that the secret functioning of the U.S. government, and the powerful role that corporate interests are seen to play in defining U.S. policy, all out of the public eye, falls under the umbrella of targets of this strategy.

So, imagine that we were satisfied by these essays from 2006, in the context of these revelations, that Assange's primary purpose for exposing the embassy cables was to force the administration to limit the sharing of information across agencies and increasing the difficulty of information spreading into and across the government, and that the ultimate motivation is specifically to make the government's functioning less effective, so that it can oppress its own people less.<sup>245</sup> Would that motivation change the constitutional analysis—particularly given the role of “intent” in defining “who is a journalist”? The answer seems to be quite clearly not. The “intent” entailed by the constitutional analysis is intent to a certain action: dissemination to the public, as distinguished from research for private use. The purpose of protecting the press is systemic and functional—to serve a more enlightened public, which is a precondition to a well functioning democracy. The motivation driving any given individual to advance that goal is entirely irrelevant to the core question. A journalist is not measured by whether she investigates and publishes in order to serve democracy, aggrandize her name, or make money; *Fox News* would be no less deserving of freedom of the press if we were to find a set of internal memos revealing that its prime motive were to undermine the capacity of President Obama to govern, rather than to inform the public. Inquiring into the political or personal motivations of speakers opens the door to the most pernicious form of censorship—the definition of some political motivations as legitimate bases for speech, and others as illegitimate and not eligible for protection. The intent has to focus on the intended action—public dissemination. By this measure, irrespective the political theory underlying the investigation and publication, Horace Greeley is no more and no less protected than William Randolph Hearst or Upton Sinclair. A reporter operating out of political conviction is every bit as protected as a reporter out to make a buck, become a celebrity, or humbly serve the public interest.

We come, then, to the conclusion that as a matter of First Amendment doctrine, *Wikileaks* is entitled to the protection available to a wide range of members of the fourth estate, from fringe pamphleteers to the major press organizations of the industrial information economy. As a matter of First Amendment values, what is being protected by this refusal to privilege the *New York Times* over *Wikileaks* is the continued access of the public to a steady flow of truthful publicly relevant information about its government's inner workings. As the networked public sphere develops, as a more diverse set

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245If that was the purpose, it is hard to tell whether it was successful in the long term. Initial public statements suggest that the response is less oriented toward limiting information sharing, and more toward tighter controls on how easy it is to copy information, on identifying patterns of leakage, and on identifying individuals at risk for disaffection. See, e.g., Secretary Robert Gates, News Briefing, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728>. The primary available formal action known publicly is a memorandum from the Office of Management and Budget detailing appropriate agency efforts that seem to be focused on preventing leakage, both technical and human, rather than efforts to limit information sharing. How these will be implemented remains, of course, to be seen. See Jacob J. Lew, Director, Office of Management and Budget, *Initial Assessments of Safeguarding and Counterintelligence Postures for Classified National Security Information in Automated Systems* (Jan. 3, 2011), [http://msnbcmedia.msn.com/i/msnbc/sections/news/OMB\\_Wiki\\_memo.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/OMB_Wiki_memo.pdf).

of actors, from individual bloggers like *Instapundit*,<sup>246</sup> through non-profits like the *Sunlight Foundation*,<sup>247</sup> small commercial online publications like *Talkingpointsmemo*,<sup>248</sup> and large decentralized groups of political activists like *DailyKos* or *Townhall*,<sup>249</sup> come to play an ever larger role in the construction of the public sphere,<sup>250</sup> the functional importance of divorcing the constitutional protection from the degree to which the actor is a familiar part of the twentieth century model of mass media increases.

We cannot afford as a polity to create classes of privileged speakers and press agencies, and underclasses of networked information producers whose products we take into the public sphere when convenient, but whom we treat as susceptible to suppression when their publications become less palatable. Doing so would severely undermine the quality of our public discourse and the production of the fourth estate in the networked information society. Fortunately, clarifying that this freedom extends to “every sort of publication which affords a vehicle of information and opinion” and that “Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher” is not a matter of policy discretion or moral belief. Our constitution requires it, and the Supreme Court's jurisprudence has made this clear.

C. *The prospects of prosecution: The Espionage Act, the Computer Fraud and Abuse Act, and Conspiracy.*

Senator Diane Feinstein, Chairman of the Senate Intelligence Committee, called for Assange's prosecution under the Espionage Act of 1917.<sup>251</sup> News reports suggest more specifically that the Justice Department considered, and perhaps continues to consider as of this writing, conspiracy charges associated either with the Espionage Act, the Computer Fraud and Abuse Act, or a different provision pertaining to publication of classified materials as inchoate liability predicated on the primary liability of Bradley Manning.<sup>252</sup> The intuition behind such an approach is fairly obvious. Imagine that a reporter suspects that the Governor of the State of Ruritania is corrupt, and is selling mining rights in the state for large personal payments. The reporter could not break into the house of one of the contractors, looking for documentation of the payments, and hope to defend against a burglary charge by claiming a journalist's privilege. The same would be true of vicarious liability if the journalist were

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246 *Instapundit.com*, <http://pajamasmedia.com/instapundit/> (last visited Feb. 23, 2011).

247 SUNLIGHT FOUNDATION, <http://sunlightfoundation.com/> (last visited Feb. 23, 2011).

248 TALKINGPOINTSMEMO, <http://www.talkingpointsmemo.com/> (last visited Feb. 23, 2011).

249 DAILY KOS, <http://www.dailykos.com/>; TOWNHALL.COM, <http://townhall.com/>. Note, however, that it appears that the these kinds of engaged, larger scale participatory platforms are more typical of the left wing of the blogosphere than the right wing. See Yochai Benkler & Aaron Shaw, *A Tale of Two Blogospheres: Discursive Practices on the Left and the Right* 23 (Berkman Center for Internet and Society at Harvard Univ. Working paper, April 27, 2010), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Benkler\\_Shaw\\_Tale\\_of\\_Two\\_Blogospheres\\_Mar2010.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Benkler_Shaw_Tale_of_Two_Blogospheres_Mar2010.pdf).

250 Yochai Benkler, *Giving the networked public sphere time to develop*, in Robert McChesney and Victor Packard, eds., *The Future of Journalism*, forthcoming March 2011; Benkler *Wealth of Networks* *supra* note 213.

251 Diane Feinstein, *Prosecute Assange under the Espionage Act: Just as the First Amendment is not a license to yell 'Fire!' in a crowded theater, it is also not a license to jeopardize national security*, WALL ST. J., Dec. 7, 2010, <http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html>.

252 Charlie Savage, *Building A Case for Conspiracy by Wikileaks*, N.Y. TIMES, Dec. 16, 2010; available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DE2DF123CF935A25751C1A9669D8B63&ref=charliesavage>.

to hire a professional burglar to do the job. These laws of general applicability apply to journalists as to others, and the incidental effect on freedom of speech puts them in the more relaxed framework of *O'Brien* review.<sup>253</sup>

There is little doubt that the government has the power to prosecute its own employees, particularly those whose employment relates to national security and who have access to classified information by dint of their public employment, for revealing classified materials.<sup>254</sup> Specifically, one could imagine Pfc Manning being charged under a variety of provisions,<sup>255</sup> ranging from Section 793(e) of the Espionage Act, which prohibits any person from willfully communicating “any document... relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation;”<sup>256</sup> through 18 U.S.C. § 952, which specifically prohibits disclosure of diplomatic cables,<sup>257</sup> to the provisions of the Computer Fraud and Abuse Act (CFAA), which would appear to cover Manning's exceeding his authorized access to government computers willfully intending to transmit classified information that “could be used to the injury of the United States, or to the advantage of any foreign nation” to a person not authorized to receive it.<sup>258</sup> That Manning can be prosecuted; or that anyone who had hacked in to government computers from the outside could be,<sup>259</sup> even if the intent is to publish and deliver to the press,<sup>260</sup> is not legally controversial. What is controversial is the idea that this initial liability can form the basis of liability for the journalist or publisher who publishes the information.

It is well settled that a journalist who passively receives illegally obtained information is privileged to publish it. Both Neil Sheehan, the New York Times reporter who received the Pentagon Papers from Daniel Ellsberg,<sup>261</sup> and Fred Vopper, the radio commentator whose broadcast of illegal telephone intercepts pertaining to local school and union negotiations was the basis for the Supreme Court's holding in *Bartnicki v. Vopper*,<sup>262</sup> clearly received materials from someone who violated criminal law in the acquisition and transfer of the materials. If the “receipt of stolen goods” rationale were applicable; or if inchoate liability, such as aiding and abetting or conspiracy were triggered by such passive receipt, the journalists in these cases would have been liable.

Passive receipt of illegally obtained materials is, then, not subject to prosecution.<sup>263</sup> What, then, are we to make of the space between hiring a burglar, or bribing a public employee to breach her obligations of secrecy, on the one hand, and passive receipt of a brown paper envelop in the mail, on the other hand? What are we to make of a journalist who is contacted by a potential source, meets

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253 *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning case).

254 See *Snepp v. United States*, 444 U.S. 507 (1980); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); Stone, *supra* note 149, at 14-18.

255 For an overview of sources of liability, see Stephen I. Vladek, *The Statutory Framework*, (2006).

256 18 U.S.C. § 793(e).

257 18 U.S.C. § 952.

258 18 U.S.C. §1030 (a)(1)..

259 18 U.S.C § 1030(a)(5).

260 See *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

261 Neil Sheehan, Hedrick Smith, E. W. Kenworthy, Fox Butterfield, *THE PENTAGON PAPERS* (1971); see also Stone, *Perilous Times*, *supra* note 113, at 500-516.

262 532 U.S. 514 (2001).

263 Stone, *supra* note 149, at 21-23.

them in a cafe once or twice; hears them out; listens to their complaints, fears, anxieties; promises them anonymity; arranges for another meeting when the materials can be delivered? What of the journalists who receives one set of documents in the mail, and then is required by the source to meet that source again to receive further caches of documents? What if the journalist sees the source wavering, believes that publication itself would be legal and politically significant, and encourages the source: “I know this is hard to do, but you're doing the right thing; what you've uncovered is really important and the public has a right to know....” Casting the shadow of potential criminal liability on these kinds of conversations would create a significant chilling effect on journalists and journalism, and, as Professor Stone has argued on the background of the *New York Times* case concerning NSA eavesdropping, likely causes too great a loss of press freedom to justify except under extremely limited conditions that include the journalist knowing both that the information would cause imminent harm and that it did not have high public value.<sup>264</sup>

To build a prosecution of Assange on the foundation of this gray area would present grave risk to press freedom. As we have seen, distinguishing between Assange and other journalists is not feasible without effectively excluding core pillars of the emerging networked public sphere and the networked fourth estate. The kind of gray area that would have to be probed to expand liability through a conspiracy theory would cover behaviors that are a daily part of journalists' lives as they contact and cultivate sources. As Glenn Greenwald explains, it would cover contacts that *New York Times* reporters reporting on the NSA eavesdropping program, during which they promised a dozen officials anonymity, as well as the *Washington Post's* communications with sources about the CIA black sites.<sup>265</sup> Moreover, building a conspiracy claim on the testimony of Manning, who would be considered a co-conspirator, after the latter had spent over eight months in solitary confinement should give pause to any court adjudicating such a case. If journalists who cultivate sources and promise anonymity, or who appeal to their sources that transmitting the information they are transmitting is a public service can be prosecuted criminally under a conspiracy theory, on the testimony of sources held under conditions of extreme duress, then the only real protection journalists have is the political clout of their employers. That is insufficient to secure the press freedom necessary for an informed and engaged public that is at the very foundation of the First Amendment's distinct protection of the institution of the press.

#### *D. Legal Responses to Extralegal Public-Private Actions to Restrain Wikileaks*

What the government could not achieve through law within the boundaries of the constitution, it partly achieved through extralegal avenues,<sup>266</sup> in particular, through pressure on skittish private companies more concerned with preserving their public image with consumers than preserving their customers' continued access to their facilities. A system that depends on privately-owned critical communications systems and privately-run payment systems is clearly susceptible to an indirect violation of civil rights.<sup>267</sup> This is not, fundamentally, a new threat. Blacklisting during McCarthyism was a particularly extreme form of economic persecution of political undesirables, achieved not

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<sup>264</sup> *Id* at 23.

<sup>265</sup> *Getting to Assange Through Manning*, SALON.COM (Dec. 16, 2010),

<http://www.salon.com/news/wikileaks/index.html?story=/opinion/greenwald/2010/12/16/wikileaks>.

<sup>266</sup> See *supra*, Section II.D.1-II.D.3, TAN \_\_ - \_\_ (describing the multi-system attack on Wikileaks).

<sup>267</sup> See Birnhack and Elkin Koren, *supra* note 130, at 25.

directly by government but through a public-private partnership between Senator MacCarthy's hearings, the House UnAmerican Activities Committee, private list compilers and the private employers who adhered to them. The rest is an all too familiar story of repression and persecution over a decade that was not one of the finest hours in the annals of American political freedom. Most recently, the resort to an extralegal public-private partnership was used as a means to circumvent constitutional privacy protections and became the subject of litigation in *Heptig v. AT&T*,<sup>268</sup> where customers sued AT&T over its collaboration with the federal government in implementing illegal wiretaps. The company was given retroactive immunity by Congress in the FISA Amendments Act of 2008,<sup>269</sup> and the case against it was subsequently dismissed.<sup>270</sup>

The basic framework is clear. What makes the networked public sphere generally, and the networked fourth estate in particular, especially democratic, open, and diverse, is the relatively large role that decentralized, non-traditional speakers and journalists can play.<sup>271</sup> These online media and citizen speakers are newly enabled by the widespread availability of low-cost machines and platforms for speech. The susceptibility of the basic infrastructure, or platform providers, to public pressure of the kind we saw developing around the Wikileaks embassy cables release therefore represents a threat not to the fourth estate in general, but specifically to the politically weak, technically-dependent on widespread information, communications, and payment utilities elements of the networked economy. In the print environment, accessibility to the mails as a common carrier was central; in the physical, soap-box world, access to streets and parks indispensable. What the Wikileaks cables case emphasizes is the extent to which the networked environment is made up of private speech spaces, and in particular the susceptibility of these kinds of spaces to a demonization attack pattern by the opponents of the speaker—both within the government and outside it.

### *1. Suits against officials*

Because the pressures involved in this kind of public-private partnership need not be forceful or explicit, but rather can act by indirection and subtly, it would be extremely difficult to bring action against the government or its officials. A *Bivens* action against this kind of subtle request to a third party provider would be all but impossible,<sup>272</sup> particularly given the attitude that the right wing of the court exhibits toward the continued existence of a private right of action against federal officials for civil rights' violations.<sup>273</sup> Moreover, the few cases that have looked at “regulation by raised eyebrow” or “jawboning” suggest that the barrier for courts treating informal government pressure on private actors as state action sufficient to trigger first amendment review, even where it is intended to achieve results that could not be achieved directly by the regulator, is far from trivial.<sup>274</sup> A more likely, but still

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268 For a collection of documents, see *Heptig v. AT&T*, THE ELECTRONIC FRONTIER FOUNDATION: <http://www.eff.org/cases/hepting#242>.

269 FISA Amendments Act of 2008, Pub L. No 110-261, 122 Stat. 2436 (codified as amended at 50 USC § 1885a).

270 *In re Nat'l Security Agency Telecomm. Records Litig.*, No. 06-1791 (N.D. Ca. June 3, 2009), available at [http://www.eff.org/files/filenode/att/orderhepting6309\\_0.pdf](http://www.eff.org/files/filenode/att/orderhepting6309_0.pdf).

<sup>271</sup> Benkler, WEALTH OF NETWORKS, *supra*, notes \_\_, at Chapter 7.

272 See *Wilkie v. Robbins*, 551 U.S. 537 (2007).

273 See *id.* at 568 (Thomas J. concurring in part).

<sup>274</sup> See, e.g. *Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355, 365 (1979) (describing and citing a wide range of cases on regulation by raised eyebrow, or jawboning).

difficult avenue might be suit for tortious interference with contractual relations against the participating government officials themselves, in this case, perhaps against Senator Lieberman.<sup>275</sup> Here, a plaintiff must show that the defendant (1) knew of the contractual relationship, (2) intentionally and (3) improperly interfered with the relationship, (4) that intervention caused the party contracting with the plaintiff to terminate or impair the contractual relations, and (5) the plaintiff suffered damage.<sup>276</sup> It would be trivial to establish elements 1, 2, and 5. Determining whether scolding companies about their patriotic duty would be “improper,” and whether indeed it was the intervention that “caused” EveryDNS, Amazon, Mastercard / Visa or Paypal to terminate their contracts with Wikileaks or Assange would be the difficult part. However, action along these lines, however tentative, appears to be the primary legal avenue available to disrupt the extralegal avenues of enforcement that we observe in the Wikileaks event and others like it. Moreover, as long as the action can survive a motion to dismiss, so that the parties can reach discovery, the threat of public disclosure of public pressure on companies to deny service to members of the networked fourth estate could provide a measure of deterrence against improper extralegal efforts to circumvent the First Amendment requirements for obtaining and injunction by harnessing private companies to shut down the undesirable speakers. Nonetheless, it seems that legal avenues against the government itself, barring a direct “smoking gun” type communication from the Executive to the private actors, would be difficult to sustain.

## *2. Suits against the private partners*

One potential path to temper the threat of extralegal action from service providers of critical platform services—like DNS service, data hosting, or payment systems—is to bring suit against the commercial firms for wrongful denial of service. Clarifying the existence of a legal duty to customers to continue service absent a clear contractual violation on the part of the customer or a significant necessity on the part of the provider would give service providers the cover they need to resist government requests for aid in extralegal suppression of inconvenient publications, and provide an adequate public explanation for continued service to an unpopular customer that would avert the market pressure to comply. A firm asked to stop pointing its DNS server to the offending material or to remove it from its cloud hosting service can answer both the government official and the complaining public: “I’m sorry; I have a legal obligation to continue to provide this service unless I get a court order telling me to stop providing the service.” That is an answer that is complete and adequate legally, politically, and culturally. Recognizing a legal duty would not mean that suits would be forthcoming left and right; recognizing the right would by itself, in large measure, prevent the harm to begin with.

The most direct path to such a cause of action would be to argue an implied contractual obligation not to unreasonably, or without good faith, withhold service. The services we are speaking of are all in consumer markets, subject to standard contracts. Amazon’s hosting service contract, for example, includes termination provisions, both for cause and at will. Most pertinent here would be provisions for termination for cause, that give the company the right to terminate service effective immediately, if “(vii) we receive notice or we otherwise determine, in our sole discretion, that you may be using AWS Services for any illegal purpose or in a way that violates the law or violates, infringes, or

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<sup>275</sup> RESTATEMENT (SECOND) OF TORTS § 766 (1979).

<sup>276</sup> PROSSER AND KEETON ON TORTS § 129 (W. Page Keeton et. al., eds., 5th ed. 1984) (citing extensive case law).

misappropriates the rights of any third party; (viii) we determine, in our sole discretion, that our provision of any of the Services to you is prohibited by applicable law, or has become impractical or unfeasible for any legal or regulatory reason.”<sup>277</sup> The terms were changed on December 6, 2010, the week following termination of Wikileaks's services; copies of earlier versions in the Internet Archive are unreachable.<sup>278</sup> The vagueness of the combination of “in our sole discretion:” and “impracticable or unfeasible for any legal or regulatory reason” essentially invite the kind of government pressure that Senator Lieberman apparently applied to Amazon. This is precisely the kind of contract of adhesion that provides room for a court to exercise its judgment as to whether the term should be applied. At least where the *Restatement* is concerned, these terms should be construed against the drafting party<sup>279</sup> and are subject to an obligation of good faith.<sup>280</sup> It is hard to imagine a court striking this kind of provision down as in general unconscionable,<sup>281</sup> but the obligation of good faith may provide sufficient basis for a court to review and constrain a service provider from cutting off critical services to a client where that is done in order to suppress their speech, rather than because there is genuine illegal behavior. As a matter of public policy, it is conceivable that such a right would be tailored to denial of service that undermines the facilities of the press, although one suspects that such special treatment of the press under generally applicable law, like contract law, would not be a particularly attractive path.<sup>282</sup>

An alternative approach may be to develop a tort claim, modeled on tortious interference with prospective economic advantage.<sup>283</sup> In the case of volunteer organizations like Wikileaks, the economic advantage or contractual relation aspect may be something of a stretch in a suit against the network provider, as opposed to a suit against the government official.<sup>284</sup> The other elements of the tort can, under the right facts, be present: intent to bring about an interference, a relationship (between the networked journalists and their readers) that the provider seeks to interfere with—indeed sever—which is advantageous to the journalist. For members of the networked press who are of the small commercial type, there is no difficulty in establishing this. It might be a mild stretch to argue that a donation-dependent organization like Wikileaks depends on reaching its audience has a pecuniary interest in continued access to its materials and website. Intentional efforts to prevent that communication, and thus to harm the network journalists' pecuniary advantage, are sufficient. No actual malice, in the sense of ill will toward the party interfered with, is required.<sup>285</sup> Certainly such an effect would be trivial to establish in the case of Mastercard, Visa, and PayPal, whose denial of service was clearly intended to prevent Wikileaks from using their payment services to receive donations that sustain the organization. The hard part here would be to establish the intent requirement and that the claims of violation of terms of service were pretextual. Despite the difficulty, this kind of factual dispute would make discovery necessary; and with it the salutary effects of shining a light on back

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277 *Amazon Web Services Customer Agreement*, Last updated December 6, 2010, AMAZON.COM (include date accessed here), <http://aws.amazon.com/agreement/#3>.

278 Attempts on dates \_\_, \_\_.

279 RESTATEMENT (SECOND) OF TORTS § 206 (1965).

280 *Id.* § 205.

281 *Id.* § 208.

282 *United States vs. Associated Press*, 326 U.S. 1 (1945) (refusing to create a special antitrust law for the press).

283 RESTATEMENT (SECOND) OF TORTS § 766B (1979).

284 See *surpa* notes \_\_.

285 RESTATEMENT (SECOND) OF TORTS § 766, cmts. a-1 (1979).

channel communications between government and private actors aimed to “disrupt and degrade” the operations of members of the networked fourth estate.<sup>286</sup>

The private law solutions I offer here are small steps in the direction of solving a basic problem: core facilities and infrastructure necessary to communicate effectively in the networked environment can be arbitrarily denied by their private owners. By looking at currently available means in tort and contract law I aim to underscore the necessity of achieving a basic outcome—the introduction of a right to communicate and not to be unreasonably excluded from services critical to achieving that end. In the early republic and since, basic mailing privileges over a common carrier mail system played a foundational role in the development of the fourth estate in the United States.<sup>287</sup> As capital costs of production rose, carriage was transposed into public interest obligations for radio and television. But when privately-deployed cable and satellite met the neoliberal revival of the Reagan era, the concept of common carriage began to fall out of favor, and “the public interest” found itself on the defensive. Most recently, even where the case for common carriage of Internet service was most clearly indicated legally and economically, in the last mile to the home, the FCC shied away from treating broadband carriage to the home as common carrier service.<sup>288</sup> The basic problem presented by the denial of service attacks on Wikileaks is that some of the core facilities necessary to enable precisely those actors who make the networked environment open, participatory, and available for critical insight are susceptible to arbitrary denial of service by private providers. This power that private actors have, given these actors’ incentives to avoid offending the public at large, creates a new version of the much older vulnerability of speech to ostracism and boycott, one that is particularly effective against the new players that depend on these critical infrastructures. To counter this vulnerability, we need a menu of legal constraints that will preserve the ability to communicate against unreasonable denials of service. In an environment where light weight, low-cost low-return models, both commercial and nonprofit, play an important role, we learn from this case that private payment systems are also a core component of the new infrastructure, alongside hosting services, logical addressing, and carriage. Given the range and diversity of essential facilities, it is possible that these very humble foundations in contracts and tort law will offer a more general basis for developing a system of legal constraints that will be robust to manipulation and control by government actors in particular, and less susceptible to shut down by skittish private actors more generally.

#### PART IV. FROM MASS-MEDIATED TO NETWORKED FOURTH ESTATE

The constitutional analysis of the Wikileaks case must be informed by an understanding of the emerging shape of the networked fourth estate. The attack on Wikileaks, in particular the apparent fear of decentralization that it represents, requires us to understand the current decline of the traditional model of the press and the emergence of its new, networked form. At core, the multi-system attack on Wikileaks, including mass media coverage and framing, is an expression of anxiety about the changes

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<sup>286</sup> It is worth noting that organizations, like Wikileaks, that depend on bobbing and weaving between jurisdictions may not choose to employ this technique, so as not to risk jurisdictional exposure. On the other hand, core facilities the organization needs—like DNS service and hosting—are subject to the jurisdiction, and so bringing action may not be seen as fundamentally increasing the organization's exposure.

<sup>287</sup> STARR, *CREATION OF THE MEDIA*, *supra* note \_\_, at 88-90; Ithiel de Sola Pool, *TECHNOLOGIES OF FREEDOM* 75-80 (1984).

<sup>288</sup> Federal Communications Commission, *In re: Preserving the Open Internet*, FCC 10-201, Report and Order, December 23, 2010, Section IV.



that the fourth estate is undergoing. This anxiety needs to be resisted, rather than acted upon, if we are to preserve the robust, open model of news production critical to democracy in the face of economic and technological change.

A. *The Crisis of the Mass Mediated Fourth Estate*

The American fourth estate is in the midst of a profound transformation, whose roots are in the mid-1980s, but whose rate, intensity, and direction have changed in the past decade.<sup>289</sup> The first element of this transformation includes changes internal to the mass media—increasing competition for both newspapers and television channels, and the resulting lower rents to spend on news rooms and fragmented markets that drove new strategies for differentiation. Many of the problems laid at the feet of the Internet—fragmentation of the audience and polarization of viewpoints in particular—have their roots in this element of the change. The second element was the adoption of the Internet since the mid-1990s. The critical change introduced by the network was decentralized information production, including news and opinion, and the new opportunities for models based on neither markets nor the state for financing to play a new and significant role in the production of the public sphere.<sup>290</sup>

As Paul Starr showed in *The Creation of the Media*,<sup>291</sup> the middle of the 19<sup>th</sup> century saw a fundamental shift in the cost structure of journalism. Starr had emphasized the rise of the large, professionalized newsroom. James Beniger, identifying the same trend, emphasized the high capital cost of the electric press, automated setting, and paper folding machines.<sup>292</sup> Regardless the relative importance and causal relations between organizational and technical innovations, it is quite clear that a combination of technological and organizational changes began a dynamic that, within a few decades, came to replace the party press and postal service patronage system that preceded it. The model of high physical capital, high fixed-cost labor investments created the basis for the rise of major advertising supported dailies that typified the first half of the twentieth century. These high costs, coupled with the relatively high proportion of the cost related to physical distribution, created significant barriers to entry in local news markets. Over the course of the twentieth century, local newspapers had become local monopoly businesses. By 1984 the average market share of the top newspaper in small towns was close to 95%, and in medium-sized cities just over 93%. By 2006, the market share of the largest newspapers in such towns was over 97%. In large cities that share was around 60% throughout this period.<sup>293</sup> The absence of competition, in turn, sustained unusually high rents.<sup>294</sup>

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289 YOCHAI BENKLER, WEALTH OF NETWORKS, chs. 6-7 (2006).

290 *Id.* at chs. 2-4 and 7.

291 PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION (2004).

292 JAMES BENIGER, THE CONTROL REVOLUTION (1986).

293 ELI M. NOAM, MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA 377, Table 15.4 (2009).

294 Warren Buffet explained this most clearly in a letter to shareholders of Berkshire Hathaway in 1984:

The economics of a dominant newspaper are excellent, among the very best in the business world. Owners, naturally, would like to believe that their wonderful profitability is achieved only because they unfailingly turn out a wonderful product. That comfortable theory wilts before an uncomfortable fact. While first-class newspapers make excellent profits, the profits of third-rate papers are as good or better - as long as either class of paper is dominant within its community. Of course, product quality may have been crucial to the paper in achieving dominance. We believe this was the case at the News, in very large part because of people such as Alfred Kirchofer who preceded us.

Once dominant, the newspaper itself, not the marketplace, determines just how good or how bad the paper will be. Good or bad, it will prosper. That is not true of most businesses: inferior quality generally produces inferior economics.

This ability to extract rents and use them to subsidize newsrooms had begun to change just before the emergence of the Internet into widespread use. As early as 1990, Warren Buffet's annual letter to Berkshire Hathaway shareholders stated with regard to his media holdings: "While many media businesses will remain economic marvels in comparison with American industry generally, they will prove considerably less marvelous than I, the industry, or lenders thought would be the case only a few years ago."<sup>295</sup> The main cause of this change, which he saw as part of a long-term secular trend rather than a cyclical downturn, was "the number of both print and electronic advertising channels has substantially increased. As a consequence, advertising dollars are more widely dispersed and the pricing power of ad vendors has diminished. These circumstances materially reduce the intrinsic value of our major media investments . . . ."<sup>296</sup> A year later he explained further: "The fact is that newspaper, television, and magazine properties have begun to resemble *businesses* more than *franchises* in their economic behavior."<sup>297</sup> What he called an "economic franchise" is what we would sometimes call possessing market power: being able to demand and obtain high prices for its product, getting high rents, and being relatively free of competitive pressures on the quality of the product or the management.<sup>298</sup> He concluded, "Until recently, media properties possessed the three characteristics of a franchise and consequently could both price aggressively and be managed loosely. Now, however, consumers looking for information and entertainment (their primary interest being the latter) enjoy greatly broadened choices as to where to find them. . . . The result is that competition has intensified, markets have fragmented, and the media industry has lost some - though far from all - of its franchise strength."<sup>299</sup> His conclusion foreshadows the media industry woes in the years that followed them: cost cutting, often at the expense of news rooms, and failures of management and financing deals, like those of the *Tribune* company. "In contrast," continues Buffet, "a business' earns exceptional profits only if it is the low-cost operator or if supply of its product or service is tight. Tightness in supply usually does not last long. With superior management, a company may maintain its status as a low-cost operator for a much longer time, but even then unceasingly faces the possibility of competitive attack. And a business, unlike a franchise, can be killed by poor management."<sup>300</sup>

The dispersion of attention and increasing competition that Buffet observed before the Internet

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But even a poor newspaper is a bargain to most citizens simply because of its 'bulletin board' value. Other things being equal, a poor product will not achieve quite the level of readership achieved by a first-class product. A poor product, however, will still remain essential to most citizens, and what commands their attention will command the attention of advertisers. Since high standards are not imposed by the marketplace, management must impose its own. *See* Letter from Warren Buffett, Chairman, Berkshire Hathaway, Inc., to Shareholders of Berkshire Hathaway, Inc. (1984), *available at* <http://www.berkshirehathaway.com/letters/1984.html>.

<sup>295</sup> *See* Letter from Warren Buffett, Chairman, Berkshire Hathaway, Inc., to Shareholders of Berkshire Hathaway, Inc. (1990), *available at* <http://www.berkshirehathaway.com/letters/1990.html>.

<sup>296</sup> *Id.*

<sup>297</sup> *See* Letter from Warren Buffett, Chairman, Berkshire Hathaway, Inc., to Shareholders of Berkshire Hathaway, Inc. (1991), *available at* <http://www.berkshirehathaway.com/letters/1991.html>

<sup>298</sup> Buffet put it: "An economic franchise arises from a product or service that: (1) is needed or desired; (2) is thought by its customers to have no close substitute and; (3) is not subject to price regulation. The existence of all three conditions will be demonstrated by a company's ability to regularly price its product or service aggressively and thereby to earn high rates of return on capital. Moreover, franchises can tolerate mis-management. Inept managers may diminish a franchise's profitability, but they cannot inflict mortal damage." *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

age meant that there were more outlets that consumers could go to that simply did not provide news. The television Six O'Clock News was no longer a fixture; nor was the front page of the local paper. The ease with which Americans need not confront news at all, together with the incentives to provide news that would attract a less informed and politically engaged audience likely contributed to the observed decline in the level of knowledge of Americans exposed primarily to, say, morning broadcast news shows or local television news about public affairs.<sup>301</sup> Audience dispersion also meant that there was an opportunity to capture narrower market segments than were most profitable during the more concentrated period. Where there is only one outlet, providing content that is highly mobilizing to 30% of the audience but alienates 70% is a bad strategy. You gain strong commitment to 30%, but if you are a local monopoly, those 30% have no real options and would have bought your product anyway, while the 70% who might have bought a bland informative media product will be turned off by, say, a highly partisan screed.<sup>302</sup> The same is not true when one is faced with a field of, for example, seven media outlets of roughly similar coverage. Now, if one outlet is able to mark itself as uniquely representative of a significant minority of the population, it can generate for itself an audience segment within which it can enjoy the kinds of franchise economics Buffet had described the media industry as losing. This (together with the contemporaneous elimination of the fairness doctrine)<sup>303</sup> is why Rush Limbaugh's show, launched in 1988, became not only economically viable, but economically advantageous, a strategy followed with enormous success by Fox News eight years later.

In combination, these changes within the industrial organization of American mass media were leading to disinvestment in newsrooms, audience fragmentation, and the emergence of right wing media that used polarization as a differentiation strategy. The two major criticisms of the networked public sphere—fragmentation and polarization—are at least as much the product of industrial structure changes internal to the commercial mass media as they are the product of an asserted “Daily Me” Internet culture,<sup>304</sup> the extent of whose actual empirical existence continues to be a matter for investigation, not assertion. Both the disinvestment and the niche targeting placed significant pressure on the will and ability of many outlets to commit to and pursue serious journalism consistent with professional norms.

At the same time the Internet rapidly shifted from being primarily a research and education platform to a core element of our communications and information environment. The defining characteristic of the Net was the decentralization of physical and human capital that it enabled.<sup>305</sup> In 1999, acute observers of the digital economy saw *Encarta* as the primary threat to *Britannica* in the encyclopedia market, and the epitome of what the new rules for the digital economy required.<sup>306</sup> That a radically decentralized, non-proprietary project in which no one was paid to write or edit, and that in

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301 The Pew Research Center for People and the Press, *Public Knowledge of Current Affairs Little Changed by News and Information Revolutions: What Americans Know: 1989-2007*, Apr. 15, 2007, available at <http://people-press.org/report/319/public-knowledge-of-current-affairs-little-changed-by-news-and-information-revolutions>.

302 For a more detailed analysis of this phenomenon and a review of the literature, See BENKLER, *supra* note \_\_, chs. 5-6 (2006).

303 FEDERAL COMMUNICATIONS COMMISSION, FAIRNESS REPORT, 102 F.C.C.2d 142, at 246 (1985) (declaring that the Fairness Doctrine was no longer in the public interest).

304 Cass Sunstein, *REPUBLIC.COM* (2001, 2008).

305 BENKLER, *supra* note \_\_, chs. 2-4.

306 CARL SHAPIRO AND HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 19-27 (1999).

principle anyone could edit, would compete with the major encyclopedias was simply an impossibility. And yet, 10 years later *Wikipedia* was one of the top six or seven sites on the net, while *Encarta* had closed its doors. Peer production and other forms of commons-based, non-market production became a stable and important component of the information production system,<sup>307</sup> an observation not lost on business writers,<sup>308</sup> and, increasingly, governments.<sup>309</sup> Just as free and open source software became an important complement to and substitute for some proprietary software models; just as photography,<sup>310</sup> cookbooks,<sup>311</sup> travel guides,<sup>312</sup> restaurant and consumer reviews,<sup>313</sup> and video<sup>314</sup> came to develop important components of their industrial organization that were based on peer production and social production more generally, so too has been the case with news reporting and opinion. If the first Gulf War was the moment of the 24 hour news channel and CNN, the Iranian Reform movement of 2009 was the moment of the amateur video reportage, as videos taken by amateurs were uploaded to YouTube, and from there became the only significant source of video footage of the demonstrations available to the major international news outlets. Most recently, the Tunisian revolt was in part aided by amateur videos of demonstrations, uploaded to a Facebook page of an activist, Lotfi Hajji, and then retransmitted around the Arab world by Al Jazeera,<sup>315</sup> and video taken by protesters was mixed with that taken by professional journalists to depict the revolt in Egypt. But the networked public sphere is constructed of much more, and more diverse, organizational forms than ad hoc bursts of fully decentralized activity.

#### B. *The emerging networked fourth estate*

As of the end of the first decade of the twenty-first century, it seems that the networked public sphere is constructed of several intersecting models of production whose operation to some extent complements, to some extent competes with, each other. One central component of the new environment is comprised of core players in the mass media environment. These however now have a global reach, and have begun to incorporate decentralized elements within their own model. It is perhaps not surprising that *CNN*, the *New York Times*, *NBC News* and *MSNBC News*, the *Wall Street*

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307 See, e.g., BENKLER, *supra* note \_\_; CLAY SHIRKY, *HERE COMES EVERYBODY* (2008); SIVA VAIDHYANATHAN, *ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* (2005).

308 See, e.g., DON TAPSCOTT, ANTHONY WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* (2006); *The Power of Us: Mass collaboration on the Internet is shaking up business*, BUSINESS WEEK, June 20, 2005, available at [http://www.businessweek.com/magazine/content/05\\_25/b3938601.htm](http://www.businessweek.com/magazine/content/05_25/b3938601.htm).

309 For example, the peer-to-patent initiative, developed by Beth Noveck as an academic, seeks to harness distributed knowledge to improve the quality of patents granted, see PEER-TO-PATENT: BETTER INFORMATION FOR BETTER PATENTS, THE WHITE HOUSE, <http://www.whitehouse.gov/open/innovations/Peer-to-Patent>; on the local level, efforts ranging from very practical efforts to improve services through harnessing distributed citizen reporting systems, like Boston's New Urban Mechanics initiative, THE MAYOR'S OFFICE OF NEW URBAN MECHANICS, <http://www.newurbanmechanics.org/>, to a wide range of efforts to engage citizens in participation in participatory budgeting or planning, see Jennifer Shkabatur, *Cities @ Crossroads: Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. (forthcoming 2011).

310 Flickr.com, <http://flickr.com/> (last visited Feb. 22, 2011).

311 Allrecipes.com, <http://allrecipes.com/> (last visited Feb. 22, 2011).

312 Tripadvisor.com, <http://tripadvisor.com/> (last visited Feb. 22, 2011).

313 YELP, <http://yelp.com>

314 YOUTUBE, <http://www.youtube.com>; REVVER, <http://www.revver.com>; METACAFE, <http://www.metacafe.com>.

315 Robert F. Worth and David D. Kirkpatrick, *Seizing a Moment, Al Jazeera Galvanizes Arab Frustration*, N.Y. TIMES, January 27, 2011, at A1. Available at [http://www.nytimes.com/2011/01/28/world/middleeast/28jazeera.html?\\_r=1&hp](http://www.nytimes.com/2011/01/28/world/middleeast/28jazeera.html?_r=1&hp)

*Journal*, *FoxNews.com*, the *Washington Post* and the *Los Angeles Times* are among the top-ranked news sites on the Internet.<sup>316</sup> But alongside these are major international sites. The publicly-funded BBC and the UK nonprofit the *Guardian* play a large role alongside U.S. commercial media. The *Guardian's* editor-in-chief claimed to have 36 or 37 million readers a month, by comparison to the paper's daily circulation of about 283,000.<sup>317</sup> These major players are, in turn, complemented by the online presence of smaller traditional media platforms and sources from other countries, accessed by U.S. readers through Yahoo and Google News, both among the top news sites in the world. The Wikileaks case presents quite well how central these large, global online news organizational players are; but it also shows how, because they are all in the same attention market, it is harder for any one of them to control access to the news. One of the strategically significant moves that Assange made was precisely to harness these global mass media to his cause by providing them with enough exclusivity in their respective national markets to provide them with economic benefits from publishing the materials, and enough competition in the global network to make sure that none of them could, if they so chose, bury the story. The global nature of the platform and the market made this strategy by a small player with a significant scoop both powerful and hard to suppress.

Alongside the broader reach of these traditional outlets in a new medium, we are seeing the emergence of other models of organization, which were either absent or weaker in the mass media environment. Remaining for a moment within the sites visible enough to make major Internet rankings lists, the *Huffington Post*, a commercial online collaborative blog, is more visible in the United States than any other news outlet except for the *BBC*, *CNN*, and the *New York Times*.<sup>318</sup> There are, of course, other smaller scale commercial sites that operate on advertising, like the *Drudge Report*, *Pajamas Media*, or *Talkingpointsmemo*. These form a second element in the networked public sphere. *Talkingpointsmemo*, for example, has an Alexa reach and rank roughly in the neighborhood of the *St. Louis Post-Dispatch* or the *Pittsburgh Post-Gazette*<sup>319</sup>, with a staff that in mid-2009 was 11.<sup>320</sup>

A third model that is emerging to take advantage of the relatively low cost of distribution, and the relatively low capital cost of production, of news, is the nonprofit sector. Here, I do not mean the volunteer, radically decentralized peer production model, but rather the ability of more traditionally organized nonprofits to leverage their capabilities in an environment where the costs of doing business are sufficiently lower than they were in the print and television era that they can sustain effective newsrooms staffed with people who, like academic faculties, are willing to sacrifice some of the bottom line in exchange for the freedom to pursue their professional values. One example is *Pro*

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316 ALEXA Ranking, for U.S., for News Sites (as of January 28), <http://www.alexa.com/topsites/category/Top/News>

317 David Reid and Tania Teixeira, Are people ready to pay for online news? BBC NEWS (26 February 2010), [http://news.bbc.co.uk/2/hi/programmes/click\\_online/8537519.stm](http://news.bbc.co.uk/2/hi/programmes/click_online/8537519.stm). It is difficult to translate exactly from daily subscription numbers, which may include multiple readers per household and need to be multiplied to reach a monthly figure, and what 36 million readers online means. The numbers should therefore be read for illustration purposes only.

318 ALEXA Ranking, for U.S., for News Sites (as of January 28), <http://www.alexa.com/topsites/category/Top/News>. I exclude here The Weather Channel and Yahoo News from what I consider to be “news outlets.” Both are ahead of the *Huffington Post*.

319 See <http://www.alexa.com/siteinfo/talkingpointsmemo.com#>, include <http://www.post-gazette.com/>, and <http://www.stltoday.com/> in “compare” boxes, and run. Rank tab describes Alexa traffic rank; “reach” tab describes percent of global Internet users who visit the site.

320 Noam Cohen, *Now Hiring at Talking Points Memo*, N.Y. TIMES July 12, 2009, at B5, available at <http://www.nytimes.com/2009/07/13/business/media/13marshall.html>.

*Publica*, a foundation supported model for an otherwise classic-style professional newsroom. A similar approach underlies journalistic award-winning local reporting work of the Center for Independent Media, founded in 2006 and renamed in 2010 the American Independent News Network. This organization funds a network of local independent non-profit media, as of this writing in Colorado, Iowa, Michigan, Minnesota, New Mexico. A related model is the construction of university-based centers that can specialize in traditional media roles. A perfect example of this is *Factcheck.org*, based in the Annenberg Public Policy Center at the University of Pennsylvania, which plays a crucial watchdog role in checking the veracity of claims made by political figures and organizations.

Alongside these professional-journalism-focused nonprofits we are seeing other organizations using a combination of standard nonprofit organization with peer production to achieve significant results in the public sphere. An excellent example of this model is offered by the *Sunlight Foundation*, which supports both new laws that require government data to be put online, and the development of web-based platforms that allow people to look at these data and explore government actions that are relevant to them. Like Wikileaks did before the most recent events, Sunlight Foundation focuses on making the raw data available for the many networked eyes to read. Unlike Wikileaks, its emphasis is on legal and formal release of government data and the construction of technical platforms to lower the cost of analysis and construct collaborative practices so as to make it feasible for distributed social practices and people with diverse motivational profiles, embedded in diverse organizational models, to analyze the data.

Alongside the professionals based in large-scale global media, small-scale commercial media, high-end national and local non-profit media outlets, and other non-media nonprofits, we also see emerging a new party press culture. Over 10,000 *Daily Kos* contributors have strong political beliefs, and they are looking to express them and to search for information that will help their cause. So do the contributors to *Town Hall* on the right, although the left-wing of the blogosphere uses large collaborative sites at this point in history more than the right.<sup>321</sup> For digging up the dirt on your opponent's corruption, political ambition and contestation is a powerful motivator, and the platforms are available to allow thousands of volunteers to work together, with the leadership and support of a tiny paid staff (paid, again, through advertising to this engaged community, or through mobilized donations, or both).

Finally, although less discretely prominent than the large collaboration platforms like *Daily Kos* or *Newsvine*, and much more decentralized than any of the other models, individuals play an absolutely critical role in this new information ecosystem. First, there is the sheer presence of millions of individuals with the ability to witness and communicate what they witnessed over systems that are woven into the normal fabric of networked life. This is the story of the Iranian reform videos; and it is of course the story of much more mundane political reporting: from John McCain singing “Bomb Iran” to the tune of a Beach Boys song to George Allen's Macaca. Second, there is the distributed force of observation and critical commentary, as we saw in the exposure of the error in the CBS/Dan Rather expose. Third, there are the experts. For instance, academic economists like Brad DeLong, on the left,

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321 Yochai Benkler & Aaron Shaw, *A Tale of Two Blogospheres: Discursive Practices on the Left and the Right*, at 23 (Berkman Center for Internet and Society at Harvard Univ. Working paper, April 27, 2010), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Benkler\\_Shaw\\_Tale\\_of\\_Two\\_Blogospheres\\_Mar2010.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Benkler_Shaw_Tale_of_Two_Blogospheres_Mar2010.pdf).

and Tyler Cowen, on the right, played a much greater role in debates over the stimulus and bailout (which can be observed by looking at traffic patterns to their individual blogs during the debates over the bailout) than they could have a mere decade ago. Collaborative websites by academics, like Balkinization or Crooked Timber, provide academics with much larger distribution platforms to communicate, expanding the scope and depth of analysis available to policy and opinion makers.

The Wikileaks events need to be understood in the context of these broad trends in the construction of the networked fourth estate. Like the Sunlight Foundation and similar transparency-focused organizations, Wikileaks is a nonprofit focused on bringing to light direct, documentary evidence about government behavior so that many others, professional and otherwise, can analyze the evidence and search for instances that justify public criticism. Like the emerging party presses, it acts out of political conviction. And like so many other projects on the Net, it uses a combination of volunteerism, global presence, and decentralized action to achieve its results. As such, Wikileaks presents an integral part of the networked fourth estate—no less than the protesters who shoot videos on the streets of Teheran, Tunis, or Cairo and upload them to the Web, or the bloggers who exposed the Rather/CBS story. Whatever one thinks about the particular actions of Wikileaks in the particular instance of the release of the embassy cables, the kind of organization and the kind of effort to bring to light actual internal government documents bearing on questions of great public import is the networked version of the Pentagon Papers and of Roosevelt's Man with the Muck Rake. An attack on Wikileaks—legal or extralegal, technical or commercial—needs to be assessed from that perspective, and allows us to explore the limitations and strengths of the emerging networked fourth estate.

### C. *Mass media anxiety over the new neighbors in the networked environment*

In 2009-2010 the state of mass media news reporting, in particular newspapers, and the financial future of these organizations became a matter of substantial public debate. The Senate held hearings on the future of journalism,<sup>322</sup> and the Federal Trade Commission launched a series of public workshops under the title *How will Journalism Survive the Internet?*<sup>323</sup> A range of publications tried to understand what was happening to journalism, and what its future would look like. The *New Republic*, for example, ran a thoughtful cover on the end of the age of newspapers;<sup>324</sup> NPR's *On the Media* carefully explored the sense of crisis,<sup>325</sup> and academics weighed in as well.<sup>326</sup>

Many treatments, like those cited, were careful and thoughtful. Much of the debate, however, involved name-calling of the “guy in his pajamas,” “echo-chamber of the blogosphere” variety. The

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322 *Future of Journalism debated in US Senate*, AFP (May 6, 2009),

<http://www.google.com/hostednews/afp/article/ALeqM5gWvGizqEZzkGqCUEJZjb6ldVjcBw>

323 See 2009 FTC Workshop, <http://www.ftc.gov/opp/workshops/news/index.shtml>; *Potential policy recommendations to support the reinvention of journalism*, Federal Trade Commission Staff, [www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf](http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf).

324 Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, THE NEW REPUBLIC (March 4, 2009), available at <http://www.tnr.com/article/goodbye-the-age-newspapers-hello-new-era-corruption?page=1>.

325 *On the Media: Government Intervention to Save Journalism*, WNYC (July 16, 2010), available at <http://www.onthedia.org/transcripts/2010/07/16/02>;

326 See, e.g., ROBERT MCCHESENEY AND JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM (Nation Books, 1st ed. 2010); Leonard Downie, Jr. and Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REVIEW, October 19, 2009.

core of the critique of the networked forms of the press has been the same since Klein's memorable quote: the concern that the Internet and the blogosphere provide misinformation, while the traditional media are necessary to provide reliable investigative reporting. An event study that does not involve Wikileaks offers a baseline portrayal of what is in fact the much more complex interaction between the traditional and networked components of the fourth estate, and the distribution of responsible and irresponsible journalism on both sides of that divide. It turns out that being part of the mass media is no guarantee of high-quality and effective journalism; nor is being an online outlet a guarantee of falsehood and echo-chamber effects. The new system will have high quality, effective participants of each type, and low quality rumormongers on either side of the traditional/networked media divide. Understanding this fact, as well as the dynamic that seems to lead serious writers on the traditional side to discount it, provides important insight into the ways in which the Wikileaks case, in turn, has been perceived.

On November 17, 2010 the New York Times published an op-ed by Thomas Friedman, *Too Good to Check*, whose opening beautifully explains the whole:

“On Nov. 4, Anderson Cooper did the country a favor. He expertly deconstructed on his CNN show the bogus rumor that President Obama’s trip to Asia would cost \$200 million a day. This was an important ‘story.’ It underscored just how far ahead of his time Mark Twain was when he said a century before the Internet, ‘A lie can travel halfway around the world while the truth is putting on its shoes.’ But it also showed that there is an antidote to malicious journalism — and that’s good journalism. In case you missed it, a story circulated around the Web on the eve of President Obama’s trip that it would cost U.S. taxpayers \$200 million a day ...”<sup>327</sup>

The quote tells the whole of the story. The villain is “the Internet” which enables the lie traveling half way around the world—in this case, from India to the U.S. public sphere—where it circulates around “the Web.” The hero is the expert journalist in an established news outlet, who exposes the lie, airs his exposé on a mass media outlet, and thereby administers the antidote.

There is only one problem with this story: it wasn't quite so. The initial source of the 200 million dollar a day story was an established media outlet: the Press Trust of India; it was primarily followed by the right wing mass media in the United States, with one blogger playing an important importation role. “The Internet,” on the other hand, was actually the first place where investigative journalism occurred to debunk the falsehood.

At 11:25am EST on November 2, 2010, New Delhi Television<sup>328</sup> posted a story with the byline of the Press Trust of India, India's equivalent of the AP and Reuters, entitled “US to spend \$200 mn a day on Obama's Mumbai visit.” This story was linked to within the next two hours by the Drudge Report,<sup>329</sup> Michelle Malkin's site at 1:53pm,<sup>330</sup> as well as three other lower-visibility right wing

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327 Thomas Friedman, *Too Good to Check*, N.Y. TIMES, Nov. 17, 2010, at A33. Available at <http://www.nytimes.com/2010/11/17/opinion/17friedman.html?partner=rssnyt&emc=rss>.

328 A major Indian news outlet that Forbes Magazine described in a 2006 article as “India's top-rated English-language news channel.” Naazneen Karmali, *News Delhi TV*, FORBES.COM (Sept. 18, 2006), <http://members.forbes.com/global/2006/0918/034.html>.

329 THE DRUDGE REPORT (Nov. 2, 2010) [http://www.drudgereportarchives.com/data/2010/11/02/20101102\\_155942.htm](http://www.drudgereportarchives.com/data/2010/11/02/20101102_155942.htm)



blogs.<sup>331</sup> The afternoon and evening belonged to the mass media. That afternoon, Rush Limbaugh repeated it on his radio show.<sup>332</sup> The story was repeated in the British *Daily Mail*<sup>333</sup> at about 5:00pm EST, and that evening, Mike Huckabee repeated the story on *Fox News* election coverage.<sup>334</sup>

By the end of November 2, a story had been created by some of India's most respected news outlets, imported to the United States by two highly visible right wing blogs, and then repeated and amplified by two major right wing mass media outlets—Fox News and Rush Limbaugh. Limbaugh's story actually revived and combines the new 200 million dollar meme with an earlier one: claiming that the president was taking 40 airplanes. The “40 aircraft” meme comes from a story originally reported in *India Today*,<sup>335</sup> an established Indian weekly magazine on October 27. This story was picked up two days later by the same Doug Powers who later reported the 200 million dollar a day story on Michelle Malkin, on his own blog.<sup>336</sup> His post was picked up in an opinion column for by the *Washington Times* on October 29,<sup>337</sup> but this part of the story did not take off until combined with the 200 million dollar claim by Limbaugh.

On November 3, the right wing mass media propagation continued. Fox News' program “Follow the Money” created a whole segment, by Eric Bolling, repeating the claim with vivid images and the tag “*The Obamas: The New American Royalty?*”.<sup>338</sup> That same evening, Sean Hannity's program repeated the claim and conducted a panel discussion around its inappropriateness given the election results and the financial condition of the country. A few hours later Representative Michelle Bachman repeated the accusation in an interview on *Anderson Cooper 360*; the interview that

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(precise timestamp unavailable).

330 Doug Powers, *Obama to See India on \$200 Million a Day*, MICHELLE MALKIN (Nov. 2, 2010, 1:53 PM) <http://michellemalkin.com/2010/11/02/india/>.

331 *2nd Update – Obama India Trip: 34 Warships and 1km-long AC Bomb-proof Tunnel!*, DAILYPAUL.COM (Nov. 2, 2010), <http://www.dailypaul.com/node/148219>; *Joe Biden making his move on Obama*, LAMECHERRY.COM (Nov. 2, 2010), <http://lamecherry.blogspot.com/2010/11/joe-biden-making-his-move-on-obama.html>; *Obamas' India Trip Costing USA \$200 Million PER DAY*, KATABLOG.COM (Nov. 2, 2010), [http://www.katablog.com/display\\_blog.cfm?bid=0E0FDD3C-B83E-F4FC-82E1FA3F39F534A8](http://www.katablog.com/display_blog.cfm?bid=0E0FDD3C-B83E-F4FC-82E1FA3F39F534A8).

332 *Stack of Stuff Quick Hits Page*, THE RUSH LIMBAUGH SHOW (Nov. 2, 2010), [http://www.rushlimbaugh.com/home/daily/site\\_110210/content/01125104.guest.html](http://www.rushlimbaugh.com/home/daily/site_110210/content/01125104.guest.html).

333 James White, ‘\$200m-a-day’ cost of Barack Obama’s trip to India will be picked up by U.S. taxpayers, MAIL ONLINE (Nov. 2, 2010), <http://www.dailymail.co.uk/news/article-1325990/Obamas-200m-day-India-visit-picked-US-taxpayers.html>.

334 The Media Desk, *Election Night: Live Blogging the Media Coverage, 11:26 P.M. Carter: On Fox, Huckabee Puts a Price Tag on a State Visit*, N.Y. TIMES (Nov. 2, 2010), <http://mediadecoder.blogs.nytimes.com/2010/11/02/election-night-watching-the-media-coverage/#carter-on-fox-huckabee-puts-a-price-tag-on-a-state-visit>. “On Fox News, one of the potential future Republican presidential candidates on the network’s payroll, Mike Huckabee, said that the president was about to take a huge entourage to India this week that would cost the American people \$200 million a day — but that was less than the government spent each day in the United States, so the people were probably getting a break.”

335 Saurabh Shukla, *Obama’s trip to be biggest ever*, INDIATODAY.IN (Oct. 27, 2010), <http://indiatoday.intoday.in/site/Story/117956/India/obamas-trip-to-be-biggest-ever.html>.

336 Doug Powers, *Details of Obama’s Big ‘Carbon Footprint felt ‘Round the World’ Tour*, THE POWERS THAT BE (Oct. 29, 2010), <http://dougpowers.com/2010/10/29/details-of-obamas-big-carbon-footprint-felt-round-the-world-tour/>.

337 Robert Knight, *Pulling back the curtain on Obama’s audacity*, WASHINGTON TIMES (Nov. 1, 2010) at B1. Available at <http://www.washingtontimes.com/news/2010/oct/29/pulling-back-the-curtain-on-obamas-audacity/?page=2>.

338 Eric Bolling, *Follow the Money* (FOX Business television broadcast Nov. 3, 2010). Available at: <http://mediamatters.org/mmtv/201011030048>.

ultimately led Cooper to investigate and refute the claim, on CNN, 24 hours later on his November 4 show. But that refutation, the one to which Friedman paid such high respects, was by no means the first. The initial refutation, on November 3 was not in mainstream media but on the Net. *Factcheck.org* provided a clear breakdown of the source and flow of the story.<sup>339</sup> *Mediamatters.org* posted a long story in the afternoon of November 3, providing a similar flow and debunking of the story.<sup>340</sup> *Snopes.com* also provided enough debunking either on November 3 or early November 4<sup>341</sup> to be linked to by a November 4, 3:16pm *Wall Street Journal* blogpost.<sup>342</sup> By the end of November 3, only Internet-based reporting was doing the “good journalism” work; the only established media working the story were either purposefully repeating the misstatement—in the case of *Fox News*—or being used by right wing politicians to propagate the slander, as in Bachman's interview on Cooper's show.

By November 4, the tide of the story was turning. Glenn Beck started the day by repeating the slander.<sup>343</sup> But an increasing number of blogs and mainstream outlets were picking up the White House and Pentagon denials. Over the course of that day, the MediaCloud database identified 13 blogposts within the political blogosphere that continued to support and propagate the story, and 14 blogposts that pointed to the critique and refutations of the story.<sup>344</sup> Interestingly, several of the blogposts underscoring and disseminating the debunking reports were right wing blogs: HotAir,<sup>345</sup> Instapundit<sup>346</sup> (although these sites framed the debunking with: it's not our fault we believed this bunk given Obama's reputation for extravagance), and Outside the Beltway.<sup>347</sup>

In the mainstream, *USA Today*, the *Washington Post*, the *Wall Street Journal*, and the *Kansas City Star* all had various versions of the refutation in their web-based versions. At 10pm that night, Anderson Cooper aired a long segment that specifically emphasized the vacuity of the sources, and the

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339 *Trip to Mumbai*, FACTCHECK.ORG (Nov. 3, 2010), <http://factcheck.org/2010/11/ask-factcheck-trip-to-mumbai/>.

340 Sarah Pavlus, *White House debunks “wildly inflated” \$200M-per-day price tag for Obama’s India trip*, Media Matters for America (Nov. 3, 2010, 4:31 PM), [http://mediamatters.org/blog/201011030032?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+MediaMattersForAmerica-CountyFair+%28Media+Matters+for+America+-+County+Fair%29](http://mediamatters.org/blog/201011030032?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+MediaMattersForAmerica-CountyFair+%28Media+Matters+for+America+-+County+Fair%29).

341 *Foreign Currency*, SNOPE.COM, <http://www.snopes.com/politics/obama/india.asp>. Precise time obscured by a November 5 update of that site's analysis.

342 Jonathan Weisman, *Fuzzy Math Dogs Obama’s Asia Trip*, THE WALL STREET JOURNAL (Nov. 4, 2010, 3:16 PM), [http://blogs.wsj.com/washwire/2010/11/04/fuzzy-math-dogs-obamas-asia-trip/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+wsj/washwire/feed+%28WSJ.com:+Washing+ton+Wire%29](http://blogs.wsj.com/washwire/2010/11/04/fuzzy-math-dogs-obamas-asia-trip/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+wsj/washwire/feed+%28WSJ.com:+Washing+ton+Wire%29).

343 *Details on Obama trip remain unclear*, GLENN BECK, (Nov. 5, 2010, 12:53 PM), <http://www.glennbeck.com/content/articles/article/198/47729/>.

344 Media Cloud is a research platform developed at the Berkman Center for Internet and Society at Harvard. <http://www.mediacloud.org/>. Lead developer, Hal Roberts; the team includes David Larouchelle, Catherine Bracy, and associated researchers include Ethan Zuckerman, Bruce Etling, John Plafrey, Urs Gasser, Rob Faris, and Yochai Benkler. Results of the particular analysis on file with author.

345 *No, Obama’s not taking 34 Navy ships to India with him*, HOT AIR (Nov. 4, 2010), <http://hotair.com/archives/2010/11/04/no-obamas-not-taking-34-navy-ships-to-india-with-him/>.

346 Glenn Reynolds, *Debunking: No, Obama’s not taking 34 Navy ships to India with him*, INSTAPUNDIT.COM (Nov. 4, 2010), <http://pajamasmedia.com/instapundit/109224/>.

347 Doug Mataconis, *Obama’s India Trip Costing \$ 200 Million A Day? Don’t Believe It*, OUTSIDE THE BELTWAY (Nov. 4, 2010), [http://www.outsidethebeltway.com/obamas-india-trip-costing-200-million-a-day-dont-believe-it/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+OTB+%28Outside+The+Beltway+|+OTB%29](http://www.outsidethebeltway.com/obamas-india-trip-costing-200-million-a-day-dont-believe-it/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+OTB+%28Outside+The+Beltway+|+OTB%29).

central role that the right wing conservatives—Limbaugh, Beck, Don Imus, and Michael Savage—played in repeating and amplifying the lie.<sup>348</sup> It was indeed a good piece of journalism. Its story captured the right tone of how the story emerged, why it was unreliable, and who repeated the lie. Cooper then went to his “data board” and explained how the 200 million dollar claim could not possibly be true, given what we know from public sources about the daily cost of the war in Afghanistan and what we know based on an old GAO report about the costs of Bill Clinton's Africa trip in 1999. All these were indeed excellent pieces of journalism. All of them, down to the comparison to the 190 million dollar a day cost of the Afghan war and the GAO report on Clinton's trip, had already been reported over 24 hours earlier by Factcheck.org. Cooper played an enormously important role in giving voice and amplifying the excellent research that was done by Factcheck. Given the continued importance of mass media outlets in reaching very large audiences, that is indeed an important role for someone with a mass media voice to play. It is certainly a necessary counterweight to the kind of propagandist reportage that *Fox News* and talk radio employ to solidify their brand and retain their franchise, as well as perhaps to support the owner's politics. But the story is emphatically not one where “the Internet” spread lies and professional journalism combats them.

The story of these three days in November 2010 offers some insight into the emerging structure of the global, networked fourth estate. It identifies a more complex relationship than simply either “good professionals vs. bad amateurs” or “pure-hearted net-based journalists vs. a corrupt mainstream media.” It reveals a networked alternative to the more traditional models of media checks and balances. Here, publication by an Indian outlet was globally visible; “the Internet,” or rather one entrepreneurial right wing blogger, moved that information quickly, and the network and its relationship to mass media created and elevated the memes. But the networked environment also included nonprofit academic and professional groups (Factcheck.org; Mediamatters), as well as a small commercial professional publisher (Snopes), all of whom were able to check the reporting and criticize it. And the Net included over two dozen sites that sifted through the original and the refutation. The mass media, in turn, took both the false and the correct story lines, and in each case amplified them to their respective audiences.

*D. Mass media anxiety played out in the Wikileaks case endangers the Networked Fourth Estate vis-a-vis the state, and makes cooperative ventures across the divide challenging*

The concern that the incumbent news industry has exhibited in the past two years over the emerging competitors in the networked information environment, played out in the way Friedman ascribed the blame for the 200 million dollar a day story, was also on display in the way that American newspapers dealt with Wikileaks after the release of the embassy cables. This anxiety has two practical consequences. The first is that the kind of cooperative venture that Wikileaks entered with the major newspapers was clearly difficult to manage. The cultural divide between established media players and the scrappy networked organizations that make up important parts of the networked fourth estate makes working together difficult, as the published reports from the media partners in this enterprise clearly reveal.

The second practical consequence is that, in seeking to preserve their uniqueness and identity, the traditional media are painting their networked counterparts into a corner that exposes them to

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348 Anderson Cooper 360 November 4, 2010.

greater risk of legal and extralegal attack. As we saw in the analysis of the legal framework, from a constitutional *law* perspective, the way in which the traditional media respond to, and frame, Wikileaks or other actors in the networked fourth estate does not matter a great deal. But from the practical perspective of what is politically and socially feasible for a government to do, given the constraints of public opinion and the internalized norms of well-socialized elites in democratic countries, the more that newspapermen, in their effort to preserve their own identity, vilify and segregate the individuals and nontraditional components of the networked fourth estate, the more they put those elements at risk of suppression and attack through both legal and extralegal systems.

### 1. A Difficult Relationship

Two major pieces in the *New York Times* exemplify the effort to assert the identity of the traditional media as highly professional, well-organized, and responsible by denigrating the networked alternative. The first was a Tom Friedman op-ed piece published on December 14, 2010. In it Friedman wrote: “The world system is currently being challenged by two new forces: a rising superpower, called China, and a rising collection of superempowered individuals, as represented by the WikiLeaks, among others. What globalization, technological integration and the general flattening of the world have done is to superempower individuals to such a degree that they can actually challenge any hierarchy — from a global bank to a nation state — as *individuals*.”<sup>349</sup> He explains: “As for the superempowered individuals — some are constructive, some are destructive. I read many WikiLeaks and learned some useful things. But their release also raises some troubling questions. I don’t want to live in a country where they throw whistle-blowers in jail. That’s China. But I also don’t want to live in a country where any individual feels entitled to just dump out all the internal communications of a government or a bank in a way that undermines the ability to have private, confidential communications that are vital to the functioning of any society. That’s anarchy.”<sup>350</sup> As a factual matter, “a country where they throw whistleblowers in jail” is, in fact, the United States.<sup>351</sup> “They,” read “we Americans,” have been keeping Bradley Manning, the only whistleblower involved in this case, in solitary confinement for months.<sup>352</sup> But the important insight from this op-ed is the expressed fear of anarchy and the fear that the decentralized network, with its capacity to empower *individuals* to challenge their governments or global banks, is not democracy, but anarchy. The fact that the individual in question did not in fact “dump out all the internal communications of a government,” but rather partnered with major traditional news outlets, including the *Times*, to do so, is eliminated from the op-ed. By mischaracterizing what Wikileaks in fact did and labeling those imagined actions “anarchy,” Friedman is able to paint it as the dangerous “other;” just like China, a decentralized, open network is a dangerous threat to what he concludes is the only thing standing between us and either anarchy or authoritarianism: “a strong America.”<sup>353</sup>

More revealing yet is an 8,000 word essay by *New York Times*’s executive editor Bill Keller in a

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349 Thomas Friedman, Op-Ed, *We’ve Only Got America A*, N.Y. TIMES, Dec. 14, 2010, 350 *Id.*

351 See, e.g., Glenn Greenwald, *Attempts to prosecute Wikileaks endanger press freedoms*, SALON (Dec. 14, 2010), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/14/wikileaks/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/wikileaks/index.html).

352 See Greenwald, *supra* note 39; see also Greenwald, *supra* note 151; Greenwald, *supra* note 212.

353 Friedman, *supra* note 325.

*New York Times Magazine* cover story on January 26, 2011.<sup>354</sup> Parts of the essay, particularly around its middle, seem intended to emphasize and legitimate the fourth estate function of the *Times* itself against critics who argue that the *Times* should not have published the materials. Keller writes, for example, “A free press in a democracy can be messy. But the alternative is to give the government a veto over what its citizens are allowed to know. Anyone who has worked in countries where the news diet is controlled by the government can sympathize with Thomas Jefferson’s oft-quoted remark that he would rather have newspapers without government than government without newspapers.”<sup>355</sup>

But any close reading of the essay makes crystal clear that a central purpose it serves is to separate Wikileaks from the *Times*, and to emphasize the *Times*’s professionalism, care, and organizational rationality while denigrating the contribution and reliability of Wikileaks. Immediately in the first paragraph Keller refers to “an organization called WikiLeaks, a secretive cadre of antisecrecy vigilantes.”<sup>356</sup> Compare this to the *Times*’s own characterization of Wikileaks a mere 10 months earlier as “a tiny online source of information and documents that governments and corporations around the world would prefer to keep secret,”<sup>357</sup> or to the 2008 Pentagon Report’s detailed analysis as a website dedicated to “expose unethical practices, illegal behavior, and wrongdoing within corrupt corporations and oppressive regimes,” or that Pentagon Report’s claim that “Wikileaks.org supports the US Supreme Court ruling regarding the unauthorized release of the Pentagon Papers by Daniel Ellsberg, which stated that—‘only a free and unrestrained press can effectively expose deception in government.’”<sup>358</sup> A few paragraphs later Keller then emphasizes Wikileaks’s mistake in releasing the edited version of the *Collateral Murder* video, writing: “in its zeal to make the video a work of antiwar propaganda, WikiLeaks also released a version that didn’t call attention to an Iraqi who was toting a rocket-propelled grenade and packaged the manipulated version under the tendentious rubric ‘Collateral Murder.’”<sup>359</sup> This sentence repeats the *Fox News* accusation against the edited version, ignoring the fact that the opening slide of the edited footage explicitly stated that “Although some of the men appear to have been armed, the behavior of nearly everyone was relaxed[,]”<sup>360</sup> the interpretive disagreement at the time about whether what the pilots thought was an RPG was in fact so,<sup>361</sup> and the fact that a side-by-side comparison of the two versions suggests that none of the critical elements of the event, for either side’s position, was edited out.<sup>362</sup> Later, Keller writes: “The *Times* was never asked to sign anything or to pay anything. For WikiLeaks, at least in this first big venture, exposure was its own reward[,]” implying that perhaps in the long term Wikileaks’ intentions were to profit from its relationships with the press. At a different point Keller implies, without pointing to any evidence, that Wikileaks volunteers hacked into *Times*’ computers during a

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354 Bill Keller, *Dealing With Assange and the WikiLeaks Secrets*, N.Y. TIMES MAG., January 30, 2011..

355 *Id.* at 10.

356 *Id.* at 1.

357 Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES (March 18, 2010).

358 See Pentagon Report *supra* notes 21-22.

359 *Supra* note 330 at 2.

360 Wikileaks, *Open Secrets: WikiLeaks, War and American Diplomacy*, N.Y. TIMES,

<http://www.nytimes.com/projects/2011/video/opensecrets/edited.html> (quoting opening screen of edited version). .

361 Ironically, given the general concern about distributed editorial platform, among the better sources collecting and providing an objective overview of the competing interpretations of the edited volume is the Wikipedia article on the subject. See [http://en.wikipedia.org/wiki/July\\_12,\\_2007\\_Baghdad\\_airstrike](http://en.wikipedia.org/wiki/July_12,_2007_Baghdad_airstrike).

362 See analysis *supra*, text accompanying notes \_\_\_ - \_\_\_ (detailing the differences between the edited and unedited versions).

rocky period of the relationship.<sup>363</sup>

Beyond Wikileaks as an organization, it is clear that Assange and the *Times* had a very bad relationship, and Keller peppers the essay with a range of what reads more like gratuitous name-calling than substantive criticism. In the first paragraph, Keller introduces Assange as “an eccentric former computer hacker of Australian birth and no fixed residence.”<sup>364</sup> Keller then introduces and frames Assange by describing the impressions of the first *Times* reporter who met him: “Assange slouched into The Guardian office, a day late. . . . He was alert but disheveled, like a bag lady walking in off the street, wearing a dingy, light-colored sport coat and cargo pants, dirty white shirt, beat-up sneakers and filthy white socks that collapsed around his ankles. He smelled as if he hadn’t bathed in days.”<sup>365</sup> A few paragraphs later, Keller recounts “Schmitt told me that for all Assange’s bombast and dark conspiracy theories, he had a bit of Peter Pan in him. One night, when they were all walking down the street after dinner, Assange suddenly started skipping ahead of the group. Schmitt and Goetz stared, speechless. Then, just as suddenly, Assange stopped, got back in step with them and returned to the conversation he had interrupted.”<sup>366</sup> By comparison, *The Guardian*, which had as difficult and stormy relationship with Assange as did the *Times*, introduced Assange in its editor’s equivalent of Keller’s overview essay very differently: “Unnoticed by most of the world, Julian Assange was developing into a most interesting and unusual pioneer in using digital technologies to challenge corrupt and authoritarian states.”<sup>367</sup> As *Der Spiegel* put it in reporting on Keller’s essay, “For some time now, Julian Assange has been sparring with *New York Times* Executive Editor Bill Keller. Assange claims the paper didn’t publish the material in its entirety and made too many concessions to the White House before going to print. Now, Keller is fighting back.”<sup>368</sup>

These kinds of jabs make separating out the personal animosity from aspects of the essay that reflect structural, systemic concerns difficult. Nonetheless, it is possible to observe in the piece a clear core theme: asserting a categorical distinction between the *New York Times* as an institution and organizational form and the decentralized, networked form represented by Wikileaks. Keller says “We

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363 Keller, *supra* note 333 at 4 (“At a point when relations between the news organizations and WikiLeaks were rocky, at least three people associated with this project had inexplicable activity in their e-mail that suggested someone was hacking into their accounts.”). *Assange annotations* on this: “This allegation is simply grotesque.”

<sup>364</sup> *Id.* at 1

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 3.

<sup>367</sup> Alan Rusbridger, *WikiLeaks: The Guardian's role in the biggest leak in the history of the world*, THE GUARDIAN, Jan. 28, 2011, <http://www.guardian.co.uk/media/2011/jan/28/wikileaks-julian-assange-alan-rusbridger>.

<sup>368</sup> Marcel Rosenbach & Holger Stark, *An Inside Look at Difficult Negotiations with Julian Assange*, DER SPIEGEL, Jan. 28, 2010, <http://www.spiegel.de/international/world/0,1518,742163,00.html>. Assange, in his annotations to the February 8 version of this paper, explains that the disagreement with Keller was over Keller’s decision to kill a piece on Task Force 373, the targeted assassination squad, by Eric Schmitt, a subject widely considered by other papers to be one of the most important revelations in the Afghan War logs. A Nexis search of the *New York Times* suggests that, indeed, TF 373 is mentioned only once, in a brief, highly sanitized version: “Secret commando units like Task Force 373 -- a classified group of Army and Navy special operatives -- work from a “capture/kill list” of about 70 top insurgent commanders. These missions, which have been stepped up under the Obama administration, claim notable successes, but have sometimes gone wrong, killing civilians and stoking Afghan resentment.” C. J. Chivers, Carlotta Gall, Andrew W. Lehren, Mark Mazzetti, Jane Perlez, and Eric Schmitt, *The War Logs, The Afghan Struggle: A Secret Archive*, NYT Jul. 26, 2010.

regarded Assange throughout as a source, not as a partner or collaborator.”<sup>369</sup> He later concludes by repeating what appears to be a central argument of the essay: “Throughout this experience we have treated Assange as a source. I will not say “a source, pure and simple,” because as any reporter or editor can attest, sources are rarely pure or simple, and Assange was no exception.”<sup>370</sup> Further, even when asserting that First Amendment values require that Wikileaks not be suppressed, Keller prefaces by restating: “I do not regard Assange as a partner, and I would hesitate to describe what WikiLeaks does as journalism.”<sup>371</sup> By contrast, the *Guardian* frames its own account of its relationship quite differently: “the fruit of Davies' eager pursuit of Assange would result in an extraordinary, if sometimes strained, partnership between a mainstream newspaper and WikiLeaks: a new model of co-operation aimed at publishing the world's biggest leak.”<sup>372</sup> It is certainly possible that the difference in framing reflects jurisdictional susceptibility and the advice of counsel: the *Times* may be trying to preempt possible co-conspirator charges against it should the Department of Justice decide to proceed against Assange and Wikileaks on such a theory. It seems more likely, however, that the difference reflects the *Guardian's* strategic embrace of the networked models of journalism, on the one hand, and the *Times'* continued rejection of the model.

The professional/reliable vs. unprofessional/unreliable dichotomy is repeated throughout Keller's essay in more context-specific instances. At one point he describes a certain problem the *Times* reporters had with displaying the data. “Assange, slipping naturally into the role of office geek, explained that they had hit the limits of Excel.”<sup>373</sup> By contrast to Assange, who was merely like “the office geek,” Keller later describes the challenge of organizing the data and explains how “With help from two of The Times's best computer minds [the lead reporters] figured out how to assemble the material into a conveniently searchable and secure database.”<sup>374</sup> When discussing the redaction efforts, Keller writes of the *Times's* efforts: “Guided by reporters with extensive experience in the field, we redacted the names of ordinary citizens, local officials, activists, academics and others who had spoken to American soldiers or diplomats. We edited out any details that might reveal ongoing intelligence-gathering operations, military tactics or locations of material that could be used to fashion terrorist weapons.”<sup>375</sup> Keller does recognize Wikileaks' efforts to avoid harming innocents, but the tone is quite different. He writes “In the case of the Iraq war documents, WikiLeaks applied a kind of robo-redaction software that stripped away names (and rendered the documents almost illegible)” and “there were instances in which WikiLeaks volunteers suggested measures to enhance the protection of innocents. . . . WikiLeaks advised everyone to substitute a dozen uppercase X's for each redacted passage, no matter how long or short. . . . Whether WikiLeaks's 'harm minimization' is adequate, and whether it will continue, is beyond my power to predict or influence. WikiLeaks does not take guidance from The New York Times.”<sup>376</sup>

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369 *Supra* note 330 at 2.

370 *Id.* at 12.

371 *Id.* at 13.

372 David Leigh & Luke Harding, *WikiLeaks: Strained relations, accusations – and crucial revelations*, THE GUARDIAN, Jan. 31, 2011, <http://www.guardian.co.uk/world/2011/jan/31/wikileaks-embassy-cables-publication>.

<sup>373</sup> Keller, *supra* note 333 at 3.

374 *Id.*

<sup>375</sup> *Id.* at 4.

376 *Id.* at 12.

When writing about responsible journalism, Keller again focuses on differentiating between the traditional media participants in the disclosure, and the networked elements, this time explicitly using WikiLeaks as an anchor for denigrating the networked fourth estate more generally. “[W]e felt an enormous moral and ethical obligation to use the material responsibly. *While we assumed we had little or no ability to influence what WikiLeaks did, let alone what would happen once this material was loosed in the echo chamber of the blogosphere*, that did not free us from the need to exercise care in our own journalism.”<sup>377</sup> The essay was written two months after the initial release. Keller by this point knew full well that Wikileaks in fact did not release materials irresponsibly. Nor did anyone else in what he calls “the echo chamber of the blogosphere.” The assertion of difference does not reflect an actual difference in kind relative to what was disclosed by one or another of the traditional media players. Instead, the aside largely seems to express the *Times's* own anxieties about Wikileaks and the more general genre that it represents for Keller.

This sense of self appears to have been complemented and reinforced by the Obama Administration. Comparing the Obama Administration's response to that of the Bush Administration's response to the NSA eavesdropping story, Keller recounts “[T]he Obama administration’s reaction was different. It was, for the most part, sober and professional. The Obama White House, while strongly condemning WikiLeaks for making the documents public, did not seek an injunction to halt publication. There was no Oval Office lecture. On the contrary, in our discussions before publication of our articles, White House officials, while challenging some of the conclusions we drew from the material, thanked us for handling the documents with care.”<sup>378</sup> This basic story line repeats itself in the *Der Spiegel* recounting. In describing their meetings with the Administration, Rosenbach and Stark state quite clearly that “The official fury of the US government was directed at the presumed source, Bradley Manning, and, most of all, WikiLeaks. The government was not interested in quarreling with the media organizations involved.”<sup>379</sup> It appears as though the administration either really did not fear disclosure, as long as it was by organizations it felt were within its comfort zone, or was using the distinction and relative social-cultural weakness of Wikileaks to keep the established media players at the table and, perhaps, more cooperative with the administration's needs.

It is precisely in these descriptions of the relationship with the administration, from both the *Times* and *Der Spiegel*, that we see the danger of mixing the press's own identity anxiety with reporting on the press presents for the networked fourth estate. As one observes the multi-system nature of the attacks on Wikileaks, as well as its defenses, it becomes obvious that law is but one dimension in this multidimensional system of freedom and constraint. Law, as we saw in Part III, at least First Amendment law, is largely on the side of Wikileaks; no less so than it is on the side of the *New York Times* or *Der Spiegel*. Law, however, is not the only operative dimension. The social-political framing of the situation, alongside the potential constraints the government feels on its legal chances and political implications of attempting to prosecute, as well as the possibility of using the various extralegal avenues we saw used in this case, have a real effect on how vulnerable an entity is to all these various forms of attack. As Keller writes: “As one of my colleagues asks: If Assange were an

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<sup>377</sup>*Id.* at 4.

<sup>378</sup>*Id.* at 9.

<sup>379</sup> Marcel Rosenbach & Holger Stark, *Lifting the Lid on WikiLeaks, An Inside Look at Difficult Negotiations with Julian Assange*, DER SPIEGEL, Jan. 28, 2011.



understated professorial type rather than a character from a missing Stieg Larsson novel, and if WikiLeaks were not suffused with such glib antipathy toward the United States, would the reaction to the leaks be quite so ferocious? And would more Americans be speaking up against the threat of reprisals?”<sup>380</sup> The question, of course, is what role traditional media players in the United States played in creating that perception of Assange, and with it the license for what Keller described as the “ferocious” responses. Compare Keller’s “dirty white shirt” or “filthy white socks” description to *Der Spiegel*’s description of Assange as “wearing a white shirt and jacket and sporting a three-day beard, was even paler than usual and had a hacking cough. ‘Stress,’ he said, by way of apology.”<sup>381</sup> Similarly, Rosenbach and Stark describe Assange as a man who is very difficult to work with but one with whom, after extensive negotiations involving lawyers, dinner, and long negotiations over wine, a deal could be, and was, reached. Keller’s vignettes describe someone who was only marginally sane and certainly malevolent. *El Pais* editor, Javier Moreno, claimed that the many hours of a meeting with Assange was insufficient to form a rigorously-researched profile, but he could attest that the discussion was purely focused on a common publication calendar and on how critical it was to protect names, sources and dates that could put people at risk.<sup>382</sup> Keller and the *Times*, then, are not innocent bystanders in the perceptions of Assange that made the response to him so ferocious, but primary movers. It was the *Times*, after all, that chose to run a front page profile of Assange a day after it began publishing the Iraq war logs in which it described him as “a hunted man” who “demands that his dwindling number of loyalists use expensive encrypted cellphones and swaps his own the way other men change shirts” and “checks into hotels under false names, dyes his hair, sleeps on sofas and floors, and uses cash instead of credit cards, often borrowed from friends.”<sup>383</sup>

What responsibility does the established press have toward the newcomers in the networked fourth estate not to paint them in such terms that they become fair game for aggressive, possibly life-threatening, and certainly deeply troubling pressures and threats of prosecution? There is a direct intellectual line connecting Klein’s “you couldn’t have a starker contrast between the multiple layers of checks and balances, and a guy sitting in his living room in his pajamas writing what he thinks”<sup>384</sup> to Keller’s “bag lady walking in off the street”<sup>385</sup> twice denied as a source, not a partner.<sup>386</sup> In combination with the Administration’s clear deference to the traditional media, on the one hand, and its repeated denunciations of, threats to, and multi-systems attacks on Wikileaks and Assange, the need of the incumbent media organizations to assert their identity and shore up their own continued vitality threatens emerging elements of the networked fourth estate. “Multiple layers of checks and balances”

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<sup>380</sup> Keller, *supra* note 333 at 13.

<sup>381</sup> *Id.*

<sup>382</sup> Javier Moreno, Lo que de verdad ocultan los Gobiernos, *El Pais*, December 19, 2010

[http://www.elpais.com/articulo/internacional/verdad/ocultan/Gobiernos/elpepuint/20101218elpepuint\\_23/Tes](http://www.elpais.com/articulo/internacional/verdad/ocultan/Gobiernos/elpepuint/20101218elpepuint_23/Tes) (“Pero sí bastante para dar testimonio de que lo único que se discutió en todos los encuentros fue la conveniencia de acordar un calendario común de publicación y la exigencia de proteger nombres, fuentes o datos que pudiesen poner en riesgo la vida de personas en países en los que la pena de muerte sigue vigente, o en los que no rige el Estado de derecho como se disfruta en Occidente.”) (my thanks to Fernando Bermejo for the pointer and translation).

<sup>383</sup> John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES, Oct. 23, 2010, <http://www.nytimes.com/2010/10/24/world/24assange.html>.

<sup>384</sup> *Special Report with Brit Hume: How the Blogosphere took on CBS’ Docs*, *supra* note 206.

<sup>385</sup> Keller, *supra* note 333 at 2.

<sup>386</sup> *Supra* notes 333 at 2, 12.

are merely one way of creating accountability: the social relations among elite players that make these meetings feasible and that allow Keller to present cables to the administration are central aspects of what both the government and the incumbents of the fourth estate value; and it is the absence of such relations in the new organizational forms run by social outsiders that is so threatening. The risk is that the government will support its preferred media models, and that the incumbent mass media players will, in turn, vilify and denigrate the newer models in ways that make them more vulnerable to attack and shore up the privileged position of those incumbents in their role as a more reliable ally-watchdog. This threat is particularly worrisome because it comes as the economics of incumbent media force us to look for new and creative networked structures to fill the vacuum left by the industrial decline of mid-twentieth century media models.

## 2. *Collaboration between networked and incumbent models of journalism*

The events surrounding Wikileaks mark the difficulties with what will inevitably become a more broadly applicable organizational model for the fourth estate. This new model will require increased integration between decentralized networked and traditional professional models of information production and concentration of attention.

On the production side, even looking narrowly at the question of leaks, whatever else happens, spinoffs from Wikileaks—OpenLeaks or BrusselsLeaks, efforts by established news organizations like *Al-Jazeera* and the *New York Times* to create their own versions of secure online leaked document repositories—mark a transition away from the model of the leak to one trusted journalist employed by a well-established news organization. The advantages of this model to the person leaking the documents are obvious. A leak to one responsible organization may lead to non-publication and suppression of the story. The *New York Times* famously delayed publication of its story on the NSA domestic eavesdropping program for a year.<sup>387</sup> Wikileaks has shown that by leaking to an international networked organization able to deliver the documents to several outlets in parallel, whistleblowers can reduce the concern that the personal risk they take in leaking the document will be in vain. Major news organizations that will want to receive these leaks will have to learn to partner with organizations that, like Wikileaks, can perform that function.

Leaking is of course but one of many ways in which news reporting can benefit from the same distributed economics that drive open source development or Wikipedia. The user-created images from the London underground bombing in 2005 broke ground for this model. They were the only source of images. During the Iranian reform movement protests in 2009, videos and images created by users on the ground became the sole video feed for international news outlets, and by the time of the Tunisian and Egyptian uprisings in early 2011, the integration of these feeds into mainline reporting had become all but standard. Just as in open source software “given enough eyeballs, all bugs are shallow,”<sup>388</sup> a distributed population armed with cameras and video recorders and a distributed population of experts and insiders who can bring more expertise and direct experience to bear on the substance of any given

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387 Paul Farhi, *At the Times, a Scoop Deferred*, WASH POST, Dec. 17, 2005.

388 ERIC RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (Tim O’Reilly ed., 2001), <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/ar01s04.html>.

story will provide tremendous benefits of quality, depth, and context to any story.

But the benefits are very clearly not only on the side of traditional media integrating distributed inputs into their own model. Looking specifically at Wikileaks and the embassy cables shows that responsible disclosure was the problem created by these documents that was uniquely difficult to solve in an open networked model. That problem was not how to release them indiscriminately. That is trivial to do in the network. The problem was not how to construct a system for sifting through these documents and identifying useful insights. Protestations of the professional press that simply sifting through thousands of documents and identifying interesting stories cannot be done by amateurs sound largely like protestations from *Britannica* editors that *Wikipedia* will never be an acceptable substitute for *Britannica*. At this stage of our understanding of the networked information economy, we know full well that distributed solutions can solve complex information production problems. It was the decision to preserve confidentiality that made the usual approach to achieving large-scale tasks in the networked environment—peer production, large-scale distributed collaboration—unavailable. One cannot harness thousands of volunteers on an open networked platform to identify what information needs to be kept secret. To get around that problem Wikileaks needed the partnership with major players in the incumbent media system, however rocky and difficult to sustain it turned out to be.

Another central aspect of the partnership between Wikileaks and its media partners was achieving salience and attention. There is little doubt that mass media continues to be the major pathway to public attention in the United States, even as the role of Internet news consumption rises.<sup>389</sup> Debates continue as to the extent to which the agenda set through those organizations can, or cannot, be more broadly influenced today through non-mainstream media action.<sup>390</sup> Both the Wikileaks case and the brief event study of the 200 million dollar a day story suggest that, at a minimum, ultimate transmission to the main agenda of the population requires transmission through mass media. However important a subject, if it cannot, ultimately, make its way to mainstream media, it will remain peripheral to the mainstream of public discourse, at least for the intermediate future.<sup>391</sup> Networked organizations need a partnership model with traditional organizations in large part to achieve salience.

As more mature sectors in which collaboration across the boundary between traditional

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389 See *Internet Gains on Television as Public's Main News Source*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (Jan. 4, 2011), <http://people-press.org/report/689/>. Although the Internet is gaining as a delivery vehicle, much of what is used on the Net is the online version of major traditional media outlets. See Matthew Hindman, *THE MYTH OF DIGITAL DEMOCRACY* 58-67 (2009).

390 See generally Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs*, 134 PUB. CHOICE 15 (2007); Yochai Benkler, WEALTH OF NATIONS, 212-273; Kevin Wallsten, *Agenda Setting and the Blogosphere: An Analysis of the Relationship between Mainstream Media and Political Blogs*, 24 REV. OF POL'Y RES. 567 (2007); Kevin Wallsten, *Political Blogs: Transmission Belts, Soapboxes, Mobilizers, or Conversation Starters?*, 4 J. OF INFO. TECHNOLOGY AND POL. 19 (2008).

391 See, e.g., Ethan Zuckerman, *Tunisia, Egypt, Gabon? Our responsibility to witness*, MY HEART'S IN ACCRA (Feb. 09, 2011, 1:40 PM), <http://www.ethanzuckerman.com/blog/2011/02/09/tunisia-egypt-gabon-our-responsibility-to-witness/> (discussing difficulty of getting Gabon's revolution covered by Global Voices, through the media focus on Egypt and Tunisia); Ethan Zuckerman, *The Attention Deficit: Plenty of Content, Yet an Absence of Interest*, NIEMAN REP., Fall 2010, <http://www.nieman.harvard.edu/reports/article/102448/The-Attention-Deficit-Plenty-of-Content-Yet-an-Absence-of-Interest.aspx> (describing more generally the difficulties faced by Global Voices in translating the excellent on-the-ground reporting its journalists were performing throughout Africa into attention in U.S. media outlets).

organizational models and new networked models show, creating these collaborations is feasible but not trivial. Open source software is the most mature of these, and shows both the feasibility and complexity of the interface between more hierarchical and tightly structured models and flat, networked, informal structures.<sup>392</sup> The informality of loose networks and the safety of incumbent organizations draw different people, with different personalities and values; working across these differences is not always easy. In looking at the Wikileaks case, it is difficult to separate out how much of the difficulties in the interface were systemic and how much a function of interpersonal antipathy, Assange's personality, and the *Times's* ambivalence about working with Wikileaks.<sup>393</sup> In thinking of the events as a case study, it is important not to allow these factors to obscure the basic insight: that collaboration is necessary, that it is mutually beneficial, and that it is hard.

The networked fourth estate will be made up of such interaction and collaboration, however difficult it may be initially. The major incumbents will continue to play an important role as highly visible, relatively closed organizations capable of delivering much wider attention to any given revelation, and to carry on their operations under relatively controlled conditions. The networked entrants, not individually, but as a network of diverse individuals and organizations, will have an agility, scope, and diversity of sources and pathways such that they will, collectively, be able to collect and capture information on a global scale that would be impossible for any single traditional organization to replicate by itself. Established news outlets find this partnership difficult to adjust to. Bloggers have been complaining for years that journalists pick up their stories or ideas without giving the kind of attribution they would normally give to journalists in other established organizations. But just as software companies had to learn to collaborate with open source software developers, so too will this industry have to develop its interactions. We already see outlets like *the Guardian* well ahead of the curve, integrating what are effective expert blogs into their online platform as part of their menu of offerings. We see the BBC successfully integrating requests for photographs and stories from people on the ground in fast-moving news situations—although not quite yet solving the problem of giving the sources a personality and voice of a collaborative contributor. One would assume that the networked components of the fourth estate will follow the same arc that Wikipedia has followed: from something that simply isn't acknowledged, to a joke, to a threat, to an indispensable part of life.

## CONCLUSION

A study of the events surrounding the Wikileaks document releases in 2010 provides a rich set of insights about the weaknesses and sources of resilience of the emerging networked fourth estate. It marks the emergence of a new model of watchdog function, one that is neither purely networked nor purely traditional, but is rather a mutualistic interaction between the two. It identifies the peculiar risks to, and sources of resilience of, the networked fourth estate in a multidimensional system of expression and restraint, and suggests the need to resolve a major potential vulnerability—the ability of private infrastructure companies to restrict speech without being bound by the constraints of legality, and the

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<sup>392</sup> See generally Siobahn O'Mahony & Beth A. Bechky, *Boundary Organizations: Enabling Collaboration among Unexpected Allies*, 53 ADMIN. SCI. Q. 422 (2008).

<sup>393</sup> Assange notes that Wikileaks had been working with individual *Times* reporters since 2007. Assange Annotations, *supra*. This is, perhaps, not surprising, at a time when Wikileaks was less well known, and played a role that fit much more closely the traditional perception of “source.” By the time of the embassy cables, Wikileaks was no longer playing that role, and the relationship was no longer up to the individual reporter writing the story.

possibility that government actors will take advantage of this affordance in an extralegal public-private partnership for censorship. Finally, it offers a richly detailed event study of the complexity of the emerging networked fourth estate, and the interaction, both constructive and destructive, between the surviving elements of the traditional model and the emerging elements of the new. It teaches us that the traditional, managerial-professional sources of responsibility in a free press function imperfectly under present market conditions, while the distributed models of mutual criticism and universal skeptical reading, so typical of the Net, are far from powerless to deliver effective criticism and self-correction where necessary. The future likely is, as *the Guardian* put it, “a new model of co-operation” between surviving elements of the traditional, mass-mediated fourth estate, and its emerging networked models. The transition to this new model will likely be anything but smooth.