

Article

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TRANSPARENCY, CORRUPTION, AND DEMOCRATIC INSTITUTIONS¹

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ABSTRACT:

This essay examines some of the institutional arrangements that underlie corruption in democracy. It begins with a discussion of institutions as such, elaborating and extending some of John Searle's remarks on the topic. It then turns to an examination of specifically democratic institutions; it draws here on Joshua Cohen's recent *Rousseau: A Free Community of Equals*. One of the central concerns of Cohen's Rousseau is how to arrange civic institutions so that they are able to perform their public functions without being easily abused by their members for individual gain. The view that Cohen sketches on behalf of Rousseau offers a clear framework for articulating institutional corruption in democracy. With this account of democratic institutions in place, the essay turns the discussion to the role of transparency in deterring institutional corruption. The basic thought here is perhaps unsurprising: to ensure that a democratic institution is serving its public function and not being manipulated for self-interested gain, its activities must be subject to public scrutiny, and so these activities must be transparent to the public. Saying this makes the role of transparency in a well-functioning democracy clear, but it does not settle how transparency is to be realized. The essay argues that transparency can be realized in a democracy only by an extra-governmental institution that has several of the familiar features of the press. If this is correct, it follows that in its design and in many, though not all, of its activities, WikiLeaks provides a contemporary example of such an institution.

RÉSUMÉ :

Cet article examine certains des arrangements institutionnels qui sont à la base du problème de la corruption en démocratie. Il débute par une analyse des institutions en tant que telles, en développant et élargissant certaines des remarques de John Searle sur le sujet. Cet article se consacre ensuite à l'étude des institutions spécifiquement démocratiques; il s'inspire ici du récent ouvrage de Joshua Cohen intitulé *Rousseau: A Free Community of Equals*. L'une des préoccupations centrales du Rousseau de Cohen concerne la manière d'organiser les institutions civiques pour qu'elles soient en mesure de remplir leurs fonctions publiques sans être facilement abusées par leurs membres en vue de gains individuels. Le point de vue esquissé par Cohen au nom de Rousseau offre un cadre clair permettant d'articuler la corruption institutionnelle dans une démocratie. Une fois établi ce compte rendu des institutions démocratiques, l'article se penche sur le rôle pouvant être joué par la transparence pour décourager la corruption institutionnelle. L'idée de fond que l'on retrouve ici ne nous surprend pas vraiment: pour s'assurer qu'une institution démocratique s'acquitte bien de sa fonction publique et n'est pas manipulée à des fins d'intérêts personnels, il est nécessaire que ses activités soient soumises à l'examen du public; ces activités doivent donc être transparentes pour celui-ci. Cette affirmation clarifie le rôle de la transparence dans une démocratie qui fonctionne bien, mais ne définit pas la manière de réaliser cette transparence. L'article soutient que la transparence ne peut être réalisée, dans une démocratie, que par une institution extragouvernementale qui possède plusieurs des caractéristiques de la presse qui nous sont familières. Si cela est vrai, il s'en suit que WikiLeaks, dans sa conception et dans beaucoup de ses activités, mais pas toutes, fournit un exemple contemporain d'une telle institution.

INTRODUCTION

WikiLeaks, an organization that collects and disseminates individual, corporate, and governmental secrets, conceives of itself as part of the journalistic media. On the importance of the media and its own place in it, WikiLeaks says the following:

Publishing improves transparency, and this transparency creates a better society for all people. Better scrutiny leads to reduced corruption and stronger democracies in all society's institutions, including government, corporations and other organisations. A healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals. We are part of that media².

This self-ascription is contentious; U.S. Congressperson Peter King has sought, for example, to have WikiLeaks declared a foreign terrorist organization³. If we are to say whether WikiLeaks is part of the journalistic media, or a terrorist organization, or something else, we will need to know the details of WikiLeaks's activities. These are many and varied, and it is beyond the scope of this essay to treat them in much depth, although I shall make some remarks on them as the essay proceeds⁴. However, we will need to know more than just these details; to know whether to agree with WikiLeaks or King, we will need to know what it is to be part of the journalistic media in a democracy. My discussion here will be organized around this question.

If we understand the phrase 'journalistic media' liberally, then any individual or group that channels the day's events to an audience is part of the journalistic media. In this sense, when your child comes home and reports what has happened on the playground that day, she is part of the journalistic media. In this sense, even if WikiLeaks is properly understood as a terrorist organization, it is also part of the journalistic media, for its activities channel information about governments and corporations to anyone with an uncensored Internet connection. King does not appear to have this sense of 'journalistic media' in mind when he suggests that WikiLeaks is a terrorist organization; he seems to think that because it is a terrorist organization, it is not part of the journalistic media. The latter, but not the former, has a legitimate role to play in a democracy. WikiLeaks seems to have this narrower understanding in mind as well when it claims that the journalistic media reduces corruption and strengthens democracies.

In this essay I will defend a version of this last claim. I will argue that in a democracy one of the institutional roles of the journalistic media—or, as I shall speak of it, the press—is to reduce corruption. Once we understand this role and its place in a well-organized democracy, we have no choice, I will conclude, but to see WikiLeaks's more notorious activities as those of a well-functioning democratic press. My argument will proceed as follows. Because I will be focusing on the press as an institution, I will open with a discussion of what, in general, an institution is. My remarks here will be structured around John Searle's

account of institutions. I will then proceed to an examination of specifically democratic institutions. My point of departure will be a discussion of Joshua Cohen's *Rousseau: A Free Community of Equals*⁵. Few historical figures have provoked more interpretive disagreement than Rousseau, so one might think that I am generating unnecessary confusion by discussing Rousseau here at all⁶. Let me defend this choice at the outset. My argument requires an account of democratic institutions that demonstrates both how they can be corrupted and how such corruption can be deterred. The fifth chapter of Cohen's book, titled "Democracy," offers just such an account. The key claims I will take from this chapter are, I think, true on any viable conception of democracy, so I suspect that the argument I will offer can be advanced without adopting Cohen's Rousseauian vocabulary. I nevertheless shall use that vocabulary, for I find the central thought it expresses—viz., that we can understand institutions as unified and guided by *wills*—to be of great use in examining institutional corruption.

With this account of democratic institutions in place, I turn the discussion to the role of transparency in deterring institutional corruption. The basic thought here is perhaps unsurprising: to ensure that a democratic institution is serving its public function and not being manipulated for self-interested gain, its activities must be subject to public scrutiny, and so these activities must be transparent to the public. Saying this makes the role of transparency in a well-functioning democracy clear, but it does not settle how transparency is to be realized. I argue that transparency can be realized in a democracy only by an extra-governmental institution that has several of the familiar features of the press. If I am correct on this point, it follows that in its design and in many, though not all, of its activities, WikiLeaks provides a contemporary example of such an institution⁷.

INSTITUTIONS

Let us open with a general discussion of institutions. The majority of contemporary academic work on institutions has been conducted by economists, and they tend to characterize institutions as "the rules of the game"⁸. Searle's view of institutions fits with this conception, for Searle defines institutions as bound by *constitutive rules*. The rules of chess provide a paradigm case of these sorts of rules. If one takes a chess set and moves the pieces around however one likes, one is not playing chess; one must move the pieces according to the rules of chess to count as playing chess. According to Searle, it is this count-as relation that is key to understanding institutions. The institution of marriage exists only because we count certain people as being married to one another; the institution of government exists only because we count what certain people say as the law; the institution of property exists only because we count certain physical boundaries as marking property rights. In each of these cases, Searle thinks, the institution exists because we collectively follow and enforce its defining rules; if not for these rules, the institution would not exist⁹.

By creating institutions, we not only structure our actions, but we also, Searle thinks, create *deontic powers*. Consider the institution of government, specifically in its legislative capacity. Governments have the power to make and to

enforce laws. This power is not a brute physical power, such as gravity; rather, it is a power that arises from a society counting certain of its members as legislators. If we want to indicate that a given individual has or is constrained by a deontic power, we speak of that individual's rights, or duties, or obligations, etc. To speak of the deontic power of a citizenry to elect its own leaders, for example, we speak of the right to vote; to speak of the constraints instituted by property laws, we speak of the obligation not to trespass. The thought that institutions give rise to deontic powers can be, I think, quite helpful; I shall appeal to it on several occasions over the course of this essay¹⁰.

As for Searle's claim that all institutions are bound by constitutive norms: this may be correct, but there are some institutions that cannot be fully understood without an explication of their functional roles¹¹. A national postal service, for example, might be bound by constitutive norms, but one will not understand this institution if one does not understand the function performed by a postal service. The function of many institutions is social maintenance, i.e., to help maintain the society to which it belongs. This is the broader function of a postal service. Its narrow function, of course, is to deliver mail and packages. Such things need to be delivered, however, to foster communication and commerce, which—in a commercial society, at least—are integral to the maintenance of that society.

This brief discussion of institutions gives us a framework within which to analyze both democracy as such and the organizations that may exist within a democracy. To be a democracy is to count as a democracy, so we can ask what is necessary for a multitude to count as a democratic organization. We can also ask if democracy has a function, and if so, what it is; if it has a function, we can ask what deontic powers must exist for it to execute its function. If some of these deontic powers belong only to some of the members of a democracy, then those powers will define democratic institutions. The function of these institutions will be to maintain the broader institution of democracy to which they belong. This way of thinking about democracy and democratic institutions lines up neatly with Cohen's interpretation of Rousseau, with one crucial omission: the framework just presented makes no use of Rousseau's central concept of the General Will. Adding this concept to the framework will enrich its explanatory power; let us turn, then, to a discussion of the General Will¹².

DEMOCRATIC INSTITUTIONS

According to Cohen, the concept of the General Will is Rousseau's answer to the fundamental problem of collective self-rule¹³. The problem: “[t]o find a form of association that will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obey only himself and remain as free as before¹⁴.” The function of the General Will, then, is to provide a solution to this problem. If the General Will is the solution to this problem, then either it just is the form of association described above or it produces that form of association. I will assume the latter and treat the General Will as a special kind of cause, one that can guide the action

of individuals who belong to the association united by that Will. When the General Will causes a person to act, one of the act's effects is the partial production of the form of association described in the problem. The General Will cannot be an alien force determining action; rather, it must be a force produced and maintained by the individuals whose action it is to guide. An association that makes its own laws thus gives itself a General Will, and its activities follow this will to the extent that the members of the association abide by their own laws. When these members follow their own laws, their actions aim, in part, at the maintenance of a well-functioning social unity¹⁵.

Although the formation of a General Will makes it possible for the individuals bound by it to act because of it, its existence does not guarantee its causal efficacy. This point can be usefully put, I think, by noting two different ways that an action can be in one's self-interest. In an association that has a General Will, acting according to the law is in one's self-interest, with 'self' properly explicated by the first-person plural ("what is good for *us*"). Sometimes, however, acting against the law and so against the General Will is in one's self-interest, conceived of by the first-person singular ("what is good for *me*"). Establishing a General Will does not remove the capacity of an individual to self-conceive by the first-person singular, nor does it eliminate individual interests that are properly articulated by the first-person singular. Dropping the grammatical language, we can bluntly say that even in an association guided by the General Will, individual members will maintain their individual wills, which aim at satisfying individual desires. This fact of human psychology need not threaten the integrity of an association that has given itself a General Will: so long as every individual follows the General Will when it conflicts with her individual will, the association remains intact. Unfortunately, as Rousseau himself reminds us, "[m]en are wicked; a sad and constant experience makes proof unnecessary¹⁶." Experience teaches us to expect, then, that an association guided by a General Will will contain individuals who, on occasion, knowingly act in accordance with their individual wills against the General Will.

This basic fact of human psychology has consequences for the way that deontic powers are to be divvied up in any association that can count as a democracy. The constitutive aim of any governmental agency in a democracy is to help maintain democratic unity, and it can only do this if its members act in accordance with the General Will. In order to pursue its specific aim, a governmental agency will be given a specific deontic power; for example, a regulatory agency, in order to perform its specific regulatory function, may be specially authorized to set and to collect fines for regulatory non-compliance. Now an institution acts only when the individuals who belong to that institution act in their capacity as members of that institution. In the case of governmental institutions, an institution itself can be understood as acting in accordance with the General Will if all of its members' governmental actions accord with the General Will. Should an individual, in his capacity as a member of a governmental institution, act on his individual will against the General Will, his action will thereby diminish the extent to which that institution acts in accordance with the

General Will. This is what corruption amounts to on the Rousseauian model: exploiting institutional power to pursue one's individual will instead of the General Will.

The corruption here is the rupture of the unity produced by the General Will. One way to avoid this corruption, obviously, is to populate governmental institutions only with political saints, whose tendency to follow the General Will always wins out in the face of competing individual desires. If we cannot hope to populate our institutions exclusively with such individuals—and here, experience recommends against such hope—then we can alternatively deter corruption by structuring governmental institutions in a way that minimizes the temptation to exploit their deontic powers to satisfy competing individual desires. The less an institution tempts one to exploit its power for individually self-serving use, the more likely that institution's activities will accord with the General Will¹⁷.

Cohen discusses these institutional issues at length in his concluding chapter on democracy. A primary aim of this discussion is to describe how “[...] to structure institutions so that individuals and groups are not typically in a position to design and implement policies which can reasonably be expected to yield benefits for themselves alone and to impose the bulk of them on others¹⁸.” Cohen's Rousseau makes a number of recommendations for achieving this structural goal. In any association where laws are made by representatives and not directly by all members, the temptation to exploit legislative office for individual gain will be diminished if representatives are elected, subject to frequent review, given specific and binding directions, and required to report all of their activities to their constituents. The thinking here is straightforward: to deter a representative from using her governmental powers to serve her individual interest, it must be possible to vote her out of office, and her actions as a representative should be reviewable by the public, lest she secretly exploit her office to pursue her individual self-interest. Similar restrictions must be placed on the executive in order to diminish the temptation to exploit its office for individual gain. It too is subject to public review, and its members may also be removed if they fail, in their capacity as executives, to abide by the General Will.

In a democratic organization, then, it must normally be possible for the people to know what its governmental officials do when they are acting in their capacity as these officials. Rousseau himself is explicitly clear about this: discussing the people as the supreme legislator of an association bound by a General Will, he remarks that “the Legislator, existing always, sees the effect of the abuse of its laws: it sees whether they are followed or transgressed, interpreted in good or bad faith; it watches over it; it ought to watch over it; that is its right, its duty, even its sworn oath¹⁹.” To call this a duty, even a “sworn oath,” is to claim that this oversight is a deontic power that must be exercised for the association to count as a democracy. In order for the people to be capable of exercising this deontic power, members of state institutions must normally not be allowed to hide activities that involve the use of institutional power²⁰.

This last point can be reformulated as a claim about transparency. As I shall be using the term, ‘transparency’ picks out an epistemic relation between a potential knower of some agential activity and the agent or agents who perform said activity. In the present context, the potential knowers are the members of the public, and the activity to be known is governmental activity²¹. A governmental activity is transparent to the extent that it is easy for a member of the public to gain knowledge about it. Transparency thus admits of degrees: the easier it is to know about a governmental activity, the more transparent it is. An activity is also more or less transparent as a function of the amount of information that is readily knowable about it. An activity can become more transparent as more information about it is made readily available. For example, reading *The Guardian* on 29 April 2009, one could have easily learned that the Obama administration was “urging” nations in Europe to accept released detainees from the U.S.’s prison at Guantánamo Bay²². At the time, this activity of urging was thus somewhat transparent. It was made more transparent, however, by a WikiLeaks cable release seven months later, which showed a willingness of the U.S. to pander to “small, meek Belgium” by promising them “prominence in Europe” for taking released detainees²³. An activity can also go from being completely non-transparent to being transparent. Continuing to read the *Guardian* article just mentioned, one would have found then-U.S. Attorney General Eric Holder open to the possibility of former Bush officials being tried in Spain for acts of torture in Guantánamo. With the WikiLeaks cable release seven months later, one could later learn that U.S. officials were in fact working to deter this possibility by secretly pushing members of the Spanish government to drop the case²⁴.

AN EQUILIBRIUM MODEL OF THE FREEDOM OF THE PRESS

If it is the “sworn oath” of democratic citizens to watch over their government, then democratic institutions must be arranged so that governmental activity is transparent. This gives rise to a pair of questions: how are the relevant institutions to be arranged? and what limits, if any, should there be on government transparency? Geoffrey Stone’s work on the rights of the democratic press can be understood as addressing these questions. Stone argues that a democratic press has the right to publish classified material, although this right is not total. For example, he denies that the press has the right to publish state secrets that it obtains through bribery. Any information given to a media outlet without solicitation, however, ought in Stone’s view to be publishable. Stone claims that this is a necessary counterbalance to a government’s prerogative to keep its secrets, which it can best fulfill by imposing stringent regulations on what governmental employees can disclose to the public. Here is his argument for this position:

If we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; if we give the government too little power to control confidentiality “at the source,” we risk too great a sacrifice of secrecy. The solution, which has stood us in good stead for more than two centuries, is to reconcile the irreconcilable values of secrecy and accountability by guaranteeing both a strong

authority of the government to prohibit leaks and an expansive right of the press to publish them. This solution may seem awkward in theory and unruly in practice, but it makes perfect sense and has stood the test of time²⁵.

Stone quotes Alexander Bickel, an early advocate of this equilibrium model of the freedom of the press, as describing this arrangement as a “disorderly situation²⁶.” Stone thinks that in spite of, or perhaps because of, this disorder, the arrangement succeeds in balancing a government’s need for secrecy against a public’s right to know its activities.

Let us explicate this brief argument in terms of the Rousseauian framework developed above. Begin with Rousseau’s claim that the people have not only a right but a duty, a “sworn oath,” to watch over their government’s activities. This duty follows from the duty of every individual to act in accordance with the General Will. A failure to monitor the government creates a context in which state institutions can tempt their members to exploit their institutional power to satisfy their individual wills, which corrupts the General Will. Now if we admit that at least some of what a government does—e.g., the plans it makes to capture a dangerous enemy in hiding—must be kept secret in order to preserve the democratic association, then the institutions that perform these specific activities must be granted the deontic power to keep the relevant information secret. This power, however, must not be so great that it is easy for the members of these institutions to exploit it to satisfy their individual wills. If the power of any such institution is easily exploitable, we can expect it to tempt individuals to use their official capacity in the institution to satisfy their individual wills, not the General Will.

Stone’s solution to this problem is to create a pair of institutions that have apparently conflicting rights with respect to state secrets. One of these is a governmental institution, and its task is to keep secret all information whose secrecy is necessary for the maintenance of the social unity generated by the General Will. The institution may be populated by either some or all of the government’s members; for lack of a better term, call this institution “the classifier.” In a democracy, the classifier cannot take the form of a state censor whose unrestricted judgment determines what information should be classified. Any individual or board empowered to classify material in this manner would be too powerful, for the power of such an institution would be too tempting to the individual wills of its members; a society that included this sort of censor would not count as a democracy. In a democracy, then, the classifier must be governed by general laws. Given its task, this institution must be internal to the government: its function is to keep certain information within the government, and it cannot perform this function if it itself is outside of the government. This function also cannot be performed unless the laws that specify what information is to be classified are sufficiently general to keep all needed information secret. On Stone’s view, in order to make sure that all needed information is in fact kept secret, these laws will need to be overly general, and in being so, they will end up legitimating the

classification of information whose secrecy is not necessary for maintaining the democracy to which the classifier belongs. Without instituting a corrective, governmental activity will not be sufficiently transparent.

To correct for this over-classification of information, a second institution—call it “the press”—is established with the right to publish any secrets it obtains by legitimate means. To bring the relevant sense of ‘legitimate’ into view, at present we need only to contrast what Stone takes to be the limiting cases. At one end there is bribery, which is illegitimate; at the other end is any case in which the press is the passive recipient of unsolicited information, which Stone claims is legitimate. Whenever the press comes to have information in the latter manner, it has the right to publish that information. Its rights appear to conflict with those of the classifier: whereas the classifier has the right to keep secrets, the press has the right to disclose them. On Stone’s view, the conflict here is merely apparent, however; if information is conveyed legitimately, the classifier has thereby lost its right to keep it secret. It may retain the right to punish any of its members who convey information to the press, but it cannot legitimately demand that the press not publish the information in its possession. If the information is conveyed by proper means from the classifier to the press, then so too is the right to publish that information conveyed; if the information is not conveyed properly, then neither is the right.

In order for the press to function in the way Stone describes, it, in contrast with the classifier, must be external to the government. To be clear, this is not to say that the press is external to the laws of the state: it is bound, as all institutions in the state are, to the laws that define the General Will. It is external to the government in that it is not bound by the rules that regulate and guide the government itself. There are at least two reasons that the press must be so external. First, if it were not, then its information would be subject to classification, and it thus could not play its de-classifying role. Second, and related, its function is to inform the sovereign, i.e., the people—by rendering governmental activity transparent, it allows them to fulfill their duty of watching over the making and implementing of laws. It is, in a sense, the eyes of democracy. Because its service to the people is watching over the making and implementing of laws, its deontic power must not be limited by the powers that constitute the government²⁷.

A case can be made that, according to the equilibrium model, many of WikiLeaks’s activities count as legitimate press activities. WikiLeaks is designed to accept unsolicited materials²⁸. If a document is submitted according to this design, it will count as having been legitimately transferred. The organization is clearly external to any government. Indeed, it is arguable that it is external to any state; I will return to this point in the essay’s conclusion. If we accept the equilibrium model, then it seems we should accept that WikiLeaks is protected by the expansive right that the model assigns to the press to publish the unsolicited secrets it receives²⁹.

INSTITUTIONAL IRRATIONALITY

The equilibrium model's characterization of the press as necessarily external to the government is, I think, correct. The model goes wrong, however, in portraying the antagonism between the government and the press as making "perfect sense." This conflict institutionalizes a sort of practical irrationality, so the model itself may be considered as a sort of institutionalized irrationality. We can make the irrationality in question clear if we continue explicating the equilibrium model within our Rousseauian framework. For this, we will need to expand the framework by introducing the Rousseauian notion of a *corporate will*³⁰. This will specifies the collective goal of an institution that is a part of the broader institution of a state; when it causes individuals within the unit to act towards its end, it unifies the activity of the unit into that of a single body. In a well-functioning democracy, the corporate wills of all of its institutions are instruments of the General Will. The goals of these corporate wills are instrumental goals that have as their final end the well-functioning of the social association to which they belong. Just as individual wills can run counter to the General Will, however, so too can corporate wills. When this happens, the activity of the body united by a corporate will pursues its own narrow collective goal or goals over and against the broader collective interest of the democracy to which it belongs.

The classifier and the press can be distinguished from one another as having different corporate wills. The corporate will of the classifier directs its members to maintain the secrecy of information that it has classified; the corporate will of the press directs its members to reveal information that helps the public govern itself. As already noted, in a well-functioning democracy each of these wills must be an instrumental will of the General Will, so these corporate wills function well only if a person who acts in accordance with one of them thereby acts in accordance with the General Will. On the equilibrium model, this is sometimes impossible, for sometimes acting on the corporate will of the classifier runs counter to the General Will. According to the model, some of the information that is classified by the classifier does not need to be classified and can be of benefit to the public for self-governance. When a member of the classifier classifies this information, she acts in accordance with the classifier's corporate will but against the General Will. This is a sort of practical irrationality, akin to setting an end for oneself and then adopting a means that runs counter to that end. On the equilibrium model, this sort of irrationality will sometimes occur, not due to an accident or incompetence, but due to institutional design.

For evidence that this design does not, as Stone asserts, make "perfect sense," consider the various reactions to Edward Snowden's revelations to *The Guardian* of some of the United States' National Security Administration's (NSA's) spying programs. Some believe that these programs infringe on the civil liberties of citizens of the United States; to them, it does not make "perfect sense" that the U.S. government has conducted these programs in secret. Others believe that the revelation of these secrets threatens the security of the United States; to them,

it does not make “perfect sense” that these secrets can be published. Neither of these two camps sees the process of the programs’ first being secret and then being revealed as a well-functioning democratic process; one camp thinks there never should have been such secret programs in the first place, while the other thinks that they never should have been revealed. According to the equilibrium model, however, this process just is democracy in action. Neither the pro-transparency nor the pro-secrecy camps, it seems, would agree.

If we apply the Rousseauian framework to Snowden’s case, we can begin to see what is needed for this “disorderly situation” to make a little more sense. Prior to deciding to reveal the NSA’s programs to *The Guardian*, Snowden was bound by a pair of conflicting wills. As a citizen of the United States, he was bound by its General Will; as a contractor for the NSA, he was bound by its corporate will. These wills pulled him in opposite directions. This fact alone is evidence that something had gone wrong. It is possible, of course, that what went wrong was Snowden’s perception of what each will demanded; were this the case, it would be analogous correctly judging that a given action is incompatible with a given goal but then incorrectly judging that one was bound anyway to perform that action. If Snowden made no comparable failure of judgment, then the problem is that serving the General Will of the United States required violating the corporate will of the NSA, and vice versa. If a person finds herself in such a situation as a result of institutional design, it constitutes an institutional defect³¹.

Now it may be that this sort of defect is an inevitable feature of a democracy. If we accept the basic elements of the Rousseauian framework, it is not clear how the possibility of this defect can be avoided. The people have a sworn duty to watch over their government, but on occasion the government will have to prevent some of its activities from becoming public knowledge. The problem lies in specifying the deontic powers of the institution that will serve as the classifier. As we have already noted, the classifier cannot be a state censor; the power of such an institution would be too tempting and thus would risk corruption. The remedy for this, it seems, must be the one Stone recommends, viz., a general set of rules that the classifier will follow. If the rules are to be sufficiently general, following them will inevitably result in the classification of information that the public would benefit from knowing; so, inevitably, there will be instances where abiding by the corporate will of the classifier will require one to act counter to the General Will. There may be no way to organize the relevant institutions within the Rousseauian framework that is immune to this possibility³².

Even if this is so, the framework does recommend structuring these institutions so as to minimize this possibility. It agrees with U. S. Supreme Court Justice Potter Stewart that the duty of maintaining state secrets requires “[...] judgment and wisdom of the highest order [...] [and] that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake³³.” The equilibrium model is blind to this wisdom, for it places no internal restrictions on the extent to which the government can classify information. It is legitimate, according to

the model, for the government to classify information aggressively, as long as there also exists a press that is sufficiently empowered to balance this aggressive classification. But as Cass Sunstein notes, “the notion that the government may control information at its source is at odds with the idea that the purpose of a system of free expression is to control the conduct of representatives³⁴.” The Rousseauian framework agrees. In response to cases such as Snowden’s, it recommends rectifying the disorder by focusing squarely on the lack of governmental transparency in an effort to bring the corporate will of the classifier in line with the General Will. It may not on its own make specific recommendations on how to align these wills, but that is no shortcoming of the framework; its role as a framework is to set standards and terms for democratic deliberation, not to resolve every deliberative matter. In cases such as Snowden’s, this is not trivial, for it means that the democratic course of action—the course of action that accords with the General Will—is first to decide how to reorganize the relevant institutions to promote greater transparency and only later to worry about what punishment, if any, Snowden himself deserves.

THE PRESS

We have just used the Rousseauian framework to criticize the equilibrium model’s conception of the classifier. When we apply the framework to the model’s conception of the press, the result is not a critique, but rather an elaboration. As ever, we are only concerned here with the role the press may play in combating democratic corruption, which we have defined as the use of institutional power to serve a will other than the General Will. The institutionalization of a press that has the deontic power to disclose any governmental information it passively receives, even if that information is secret, aims at just this end. A press that is free to publish any governmental secret it passively receives institutionalizes a corrective to the temptation of individually self-serving secrecy.

Several notes are in order here on this freedom of the democratic press. First, as I intend the notion, it is a deontic power that constitutes a specific sort of activity, which in turn defines the institution of the press. The power is the power to serve as the eyes of democracy, that sworn oath, according to Rousseau, of every citizen. Anyone who publishes anything that is of use to the public in governing itself thereby exercises this power and engages in press activity. ‘Publish’ here has its etymological meaning, “to make public.” On this definition, press activity does not require constructing a narrative based on primary sources, as journalistic writing does. The presentation of those materials itself counts as press activity, for such a presentation serves to render governmental activity transparent. To exercise this power and thereby perform a press activity, then, a person need not be employed by a traditional media outlet, such as a newspaper organization or a television network³⁵. Should a group—e.g., WikiLeaks—be a non-traditional, online group that publishes primary sources, it is not thereby precluded from counting as a press organization³⁶.

This freedom is instrumental to, not partially constitutive of, self-rule. A democracy governed by political saints would not require an institution with this free-

dom. Given human nature, however—specifically, given the temptation to exploit the power of public office to satisfy one’s individual will—the freedom is necessary. In order for humans to govern themselves, they must structure their governmental institutions to minimize this temptation, which threatens to corrupt their self-governance. The freedom of the press to publish state secrets is a necessary means to this end.

Next, the arguments here only concern the freedom to publish state secrets. These arguments do not immediately apply to private secrets. They will apply to private secrets that hide information of relevance to members of a democracy; the secret composition of toxic fluids injected into the ground during hydraulic fracturing might be such a case. They will not apply, however, to private secrets that are irrelevant for self-governance, e.g., my secret plan to utter ‘Rosebud’ on my 78th birthday. I take no stand here on the press’s right to publish such private secrets, should it come by them legitimately. If it has such a right, though, it is not one that is necessary for performing the function that is presently under discussion.

In speaking here of legitimate means of obtaining state secrets, I follow Stone, who follows the standard established in the U.S. Supreme Court case *Bartnicki v. Vopper*³⁷. A secret is legitimately received if it is received passively, which in this context means without coercion, including bribery. At issue here is the quality of the received information. If someone is willing to pay someone else for a bit of information, the latter has an incentive to say what he thinks the former wants to hear, whether or not what is said is true. The press is of little use if it spreads misinformation, so it must be structured so that it can trust that the putative information it receives is accurate. Where passivity tapers off into coercion may not be clear-cut, but sorting out these details is beyond the present discussion.

The arguments here are compatible with the possibility of the press being liable for individual harm. Consider the following view, put forth as outlining sufficient conditions for such liability: if the press publishes information that leads to an individual’s harm, and if the information does not concern any wrongdoing (imagine, e.g., it concerns a person’s sexual orientation), and if the press had strong evidence that publishing the information would lead to the harm, it is liable, at least in part, for the harm. The arguments here are compatible with this view. To see this, imagine a bit of information that the government has made secret, that the press has discovered, that concerns a person engaged in permissible activity, and whose publication can be expected to lead to that person’s harm. If the press releases the information in such a way that the expected harm results, it may be held liable for doing so. This liability poses no restriction on the press’s freedom to reveal the secret, however, for it can publish the secret while concealing the identity of the relevant person, e.g., by redacting her name. If the press does this, it can perform the function described above without harming the individual mentioned in the information.

The key to the last point is a firm separation between the press's responsibility to individuals qua individuals and its right to publish governmental secrets. This leads me to my next point regarding the freedom of press articulated by these arguments, which concerns the absolute nature of this deontic power. If the role of the press is to prevent the government from consolidating power in such a way that risks corrupting self-rule, then the government cannot mark off a class of information as so secret that it is illegal, under any circumstances, for the press to publish it. The line of reasoning that leads to this conclusion parallels that of traditional liberal arguments against the criminalization of seditious libel³⁸. The power to classify some information as absolutely unpublishable parallels the power to classify some political views as absolutely inarticulable: once the power exists, it institutionalizes the temptation to control the flow of information and ideas to satisfy the individual wills of the government's officers. If the role of the press is to check this power, then its capacity to publish secrets it legitimately receives must be absolute.

To some, surely, this will seem too strong. The test case here is whether during a time of war the press has the right to publish "the sailing dates of transports or the number and location of troops," which the U.S. Supreme Court has said is not a press activity worthy of legal protection in a democracy³⁹. Set aside the harms that might come to the individual troops from publishing the dates; again, I do not deny that the press might be liable for such harms. The issue here, as it has been throughout this essay, concerns institutional design. What I have called the classifier has the power to make governmental activities and their results, such as a battle plan, secret. This power, if left unchecked, can be abused. In a state full of political saints, this power will not be abused, but most humans are not saints. It is the role of the press to make governmental officers act as if they were political saints. If the government has the power to designate information as beyond the right of the press to publish, then that power cannot be checked, and so it can be abused for individual gain. In a democracy, then, the government cannot have this power. To say this is not to deny that some information, such as the sailing dates of ships, ought to be kept from the public eye. Rather, as was suggested at the end of the previous section, it is to place the full responsibility of keeping this information secret on the government itself.

CONCLUSION: WIKILEAKS

I have sought here to explain one role of the press in a democracy; as it has seemed fitting to do so, I have tried to illuminate the explanation by discussing contemporary examples. Let me close by returning to the essay's central contemporary case and consider in a bit more detail whether WikiLeaks should count as a press institution, specifically in relation to the United States. Begin by focusing on the releases that made WikiLeaks notorious by the end of 2010, "The Afghan War Diary," "The Iraq War Logs," and "The Secret US Embassy Cables (Cablegate)." As noted in the introduction, Congressperson King believes that the release of these materials constitutes a sort of terrorism, presumably perpetrated against the United States and its citizens. If the arguments above are correct, then to the contrary, these releases accord with the General Will of the

United States. It does not matter that WikiLeaks is an international organization, which itself is not a part of the United States. As noted above, the role of the press in democracy is instrumental, so an organization can perform this role in a state to which it does not belong. It performs this role just in case its activities function as the work of the press for that state. I have described this work as serving as the eyes of democracy: it keeps the sovereign, the people, informed of its government's activities, including secret activities. I have not argued here that a democratic people has a right to this information, though that may be true; rather, I have argued that publishing this information reveals a failure of the government to serve its people. Either the information does not need to be kept secret, in which case the government has misused its power to classify, or it should be kept secret, in which case the government has failed its responsibility to keep it so. Either way, a body that releases information that notifies a people of this governmental failure does the proper work of a democratic press for that people. Many of WikiLeaks's activities have done just this for the citizens of the United States.

This is not to say that all that WikiLeaks has done, on the present account, is the proper work of the press. For example, WikiLeaks has published a 1975 manual describing the secret rituals of the Alpha Sigma Tau sorority⁴⁰. Steven Aftergood has argued that “[t]his is not whistleblowing and it is not journalism. It is a kind of information vandalism⁴¹.” Whether or not this last description is apt, publishing an old sorority manual does not readily fit the account of press activity elaborated in the previous section. It is also arguable that its release of “The Afghan War Diary” fell short of the standards of proper press work. A number of international human rights groups, including The Afghan Independent Human Rights Commission and Amnesty International, criticized WikiLeaks for failing to redact the names of Afghan civilians from the diary⁴². The concern was that the inclusion of these individuals' names could threaten their safety. If part of the press's work is to avoid creating these sorts of threats, then WikiLeaks's failure to redact the names constitutes a failure to satisfy the norms that govern press activity. On the present account, however, this failure is narrowly and specifically related to these potential individual harms. As noted above, this should be kept separate from the role the press plays in monitoring and reporting on governmental activities. Though it may be at fault for failing to redact the names, WikiLeaks did not, on the present account, perform any similar wrongdoing by releasing the other contents of the diary.

Not everything that WikiLeaks has done, then, clearly counts as press activity, and it has not performed all of its press activity well. Nevertheless, much of what it has done counts on the Rousseauian model I have developed here as press activity, precisely because it serves to render governmental activities transparent. A full analysis of the legitimacy of all of WikiLeaks's activities would require a separate (and substantially longer) monograph. My hope is that the present essay has provided an adequate framework for such an analysis.

NOTES

- ¹ Many individuals and institutions have helped me with this project; I hope these acknowledgements do not omit anyone whom I should thank. First and foremost, I thank Kerry Morsek for encouraging me to pursue these issues seriously. I thank the University of Idaho's Seed Grant Program for funding the project's initial research and Brendan O'Donnell for his assistance under the Grant. Thanks to the following for the opportunity to present earlier drafts of this essay: the University of Idaho, especially Janice Anderson, Kenton Bird, Clinton Culp, Douglas Lind, Michael O'Rourke, and Dinah Zeiger; Vanderbilt University's Social and Political Thought Workshop, especially Andrew Forcehimes and Robert Talisse; Ohio State University's COMPAS Program, especially Don Hubin, Kevin Scharp, and Piers Turner; and LUISS Guido Carli's Visiting Scholars Program, especially Valentina Gentile, Manohar Kumar, Sebastiano Maffettone, and Daniele Santoro. Special thanks are in order to Daniele for being such a gracious host while I was in Rome. I also thank Matthew Chrisman, Jonah Johnson, Ben Lawrence, and Jamsheed Siyar for their help along the way. Finally, I thank Marc-Antoine Dilhac, Pierre-Yves Néron, and the rest of the team working on this special issue of *Les Ateliers de l'éthique/The Ethics Forum* for their invitation to participate and for their advice on the final draft.
- ² <http://wikileaks.org/About.html> [accessed March 13 2014].
- ³ For King's statement on the matter, see O'Brien, Michael, "Republican wants WikiLeaks Labeled as Terrorist Group," *The Hill*, 29 November 2010, <http://thehill.com/blogs/blog-briefing-room/news/130863-top-republican-designate-WikiLeaks-as-a-terrorist-org> [accessed 13 March 2014].
- ⁴ For an excellent discussion of these details, see Benkler, Yochai, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 46, no. 2, 2011, p. 311-397.
- ⁵ Cohen, Joshua, *Rousseau: A Free Community of Equals*, New York, Oxford University Press, 2010.
- ⁶ Although statements such as "Hitler is an outcome of Rousseau" (Russell, Bertrand, *A History of Western Philosophy*, London, George Allen and Unwin Ltd., 1945, p. 163) no longer capture the prevailing opinion of the value of Rousseau's political thought, he is far from being universally regarded as a hero. Even those who presently champion his work are not uniform in their praise or interpretation. For example, whereas Jonathan Marks reads Rousseau as primarily examining what it would mean for a naturally imperfect being, the human, to be naturally perfected (see his *Perfection and Disharmony in the Thought of Jean-Jacques*, New York, Cambridge University Press, 2008); David Lay Williams argues that the proper way to understand Rousseau is as a modern Platonist (see his *Rousseau's Platonic Enlightenment*, State College, PA, Pennsylvania State University Press, 2008). Joseph Reisert claims the primary concern in Rousseau's work is to articulate an adequate notion of virtue (see his *Jean-Jacques Rousseau: A Friend of Virtue*, Ithaca, NY, Cornell University Press, 2003); Matthew Simpson argues that Rousseau's central aim is to resolve tensions between collectivism and individualism (see his *Rousseau's Theory of Freedom*, New York, Continuum, 2006). I shall do my best to remain neutral on all of these issues.
- ⁷ There is an obvious sense in which my topic here can be put under the head "free-speech issue," but it differs from the subject matter typically labeled as such. Typically, free-speech issues concern the limits of free speech and the sorts of harms speech acts can cause. Noteworthy examples include Rae Langton's work on pornography (see her "Whose Right? Ronald Dworkin, Women, and Pornographers," *Philosophy & Public Affairs*, vol. 19, no. 4, 1990, p. 311-359 and "Speech Acts and Unspeakable Acts," *Philosophy & Public Affairs*, vol. 22, no. 4, 1993, p. 293-330); Joshua Cohen's work on hate speech (see his "Freedom of Expression," *Philosophy & Public Affairs*, vol. 22, no. 3, 1993, p. 207-263); Sarah Sorial's work on sedition ("Can Saying Something Make it So? The Nature of Seditious Harm," *Law and Philosophy*, vol. 29, no. 3, 2010, p. 273-305) and the anthology *Extreme Speech and Democracy* edited by Ivan Hare and James Weinstein, Oxford, Oxford University Press, 2009.

- ⁸ The phrase, which is ubiquitous in the economics literature on institutions, is typically traced to the work of Douglas North (see, e.g., his *Institutions, Institutional Change, and Economic Performance*, New York, Cambridge University Press, 1990). The “rules of the game” view is embraced by anyone who holds, as Avner Greif does, that institutions are “a system of rules, beliefs, norms, and organizations that together generate a regularity of (social) behavior” (Greif, Avner, *Institutions and the Path to the Modern Economy—Lessons from Medieval Trade*, New York, Cambridge University Press, 2006, p. 39). For other proponents of this sort of view, see Hodgson, Geoffrey, “What Are Institutions?,” *Journal of Economic Issues*, vol. 40, no. 1, 2006, p. 1-25; Aoki, Masahiko, “Endogenizing Institutions and Institutional Changes,” *Journal of Institutional Economics*, vol. 3, no. 1, 2007, p. 1-31) and Voigt, Stefan, “How (Not) to Measure Institutions,” *Journal of Institutional Economics*, vol. 9, no. 1, 2013, p. 1-26). Coincidentally, Cohen is the co-author of a study titled *Rules of the Game*, Boston, South End Press, 1986, but its topic is the policy of the U.S. towards Central America in the 1980s.
- ⁹ Searle, John, “What is an Institution?,” *Journal of Institutional Economics*, vol. 1, no. 1, 2005, p. 1–22. See section 3 for the discussion of constitutive rules.
- ¹⁰ For Searle’s discussion of deontic powers, see section 4 of “What is an Institution?,” *op. cit.*.
- ¹¹ Searle might not disagree. He does not present his characterization as a general analysis of the English term ‘institution’, for he is only interested in “[...] getting at the underlying glue that holds human societies together” (*Ibid.*, p. 18). I take no stand on whether my claims about institutional functions get at this “glue.”
- ¹² As is often the case with this sort of discussion, my goal here is not to take a stand on what the historical Rousseau believed; rather, it is to develop a vocabulary suitable for characterizing democratic institutions.
- ¹³ Frederick Neuhauser also takes this as the point of departure for understanding the General Will in “Freedom, Dependence, and the General Will,” *The Philosophical Review*, vol. 102, no. 3, 1993, p. 363-395, 367. As should be clear by my order of presentation, I side with Cohen and Neuhauser on this matter, but there is a long-standing tradition that takes an enumeration of the problems with the concept of the General Will as the proper starting point for discussion of the topic. For examples of this, see Riley, Patrick, “A Possible Explanation of Rousseau’s General Will,” *The American Political Science Review*, vol. 64, no. 1, 1970, p. 86-97, 86-87 and Jones, W. T., “Rousseau’s General Will and the Problem of Consent,” *Journal of the History of Philosophy*, vol. 25, no. 1, 1987, p. 105-30, 105.
- ¹⁴ *Social Contract*, I.6.4. I follow Cohen in giving book/chapter/paragraph references to *The Social Contract*, which I will abbreviate ‘SC’ throughout, and in quoting from Victor Gourevitch’s translation (*The Discourses and Other Early Political Writings*, New York, Cambridge University Press, 1997). Cohen quotes this passage in *Rousseau: A Free Community of Equals*, *op. cit.*, p. 11.
- ¹⁵ That a multitude makes its own laws is only one necessary condition on those laws defining a General Will. For a good discussion of other necessary conditions and specifically of why mere majority-based decision-making does not suffice to define a General Will, see Dagger, Richard, “Understanding the General Will,” *The Western Political Quarterly*, vol. 34, no. 3, 1981, p. 359-371. On the very possibility of a multitude being capable of giving itself a General Will, see Inston, Kevin, “Representing the Unrepresentable: Rousseau’s Legislator and the Impossible Object of the People,” *Contemporary Political Theory*, vol. 9, no. 4, 2010, p. 393-413. What I will say here relies on no specific view about the conditions under which a General Will is properly formed.
- ¹⁶ Rousseau, Jean-Jacques, “Discourse on The Origin of Inequality,” in V. Gourevitch (ed.), *The Discourses and Other Early Political Writings*, New York, Cambridge University Press, 1997, p. 197.
- ¹⁷ Cohen takes this focus on temptation to lie at the heart of Rousseau’s moral thought. On this, see Cohen, *Rousseau: A Free Community of Equals*, *op. cit.*, p. 144-145.
- ¹⁸ *Ibid.*, p. 160.

- ¹⁹ Rousseau, Jean-Jacques, *Letters Written from the Mountain*, translated by C. Kelly and J. Bush in *Collected Writings of Rousseau, Vol. 9*, Hanover, NH, University Press of New England, 2001, p. 265. Cohen quotes this passage in Cohen, *Rousseau: A Free Community of Equals, op. cit.*, p. 138, 173.
- ²⁰ It is at least historically interesting to note that although Rousseau claimed that this is a “sworn oath” of the people, it seems he did not have a particularly liberal view about press freedom. Helena Rosenblatt has recently argued that, to the contrary, Rousseau himself had no general qualms about state censorship (see her “Rousseau, Constant, and the Emergence of the Modern Notion of Freedom of Speech,” in Elizabeth Powers (ed.), *Freedom of Speech: The History of an Idea*, Lewisburg, PA, Bucknell University Press, 2011, p. 133-164). If Rosenblatt is correct, there is no modern conception of the free press in French philosophy until the 19th century writings of Benjamin Constant. This history complements Leonard Levy’s account of the history of the U.S. Constitution’s First Amendment in his *Emergence of a Free Press*, New York, Oxford University Press, 1985. According to Levy, the framers of the Constitution had no well-developed view of the role of a free press in a self-governing society, and the beliefs they did have on the matter were not particularly liberal. To the contrary, Levy provides extensive evidence that most of the framers did not take the First Amendment to forbid the criminalization of criticizing the government.
- ²¹ In David Heald’s terminology, my topic is thus “downward-inward” transparency (see his “Varieties of Transparency,” *Proceedings of the British Academy*, vol. 135, 2006, p. 25-43, 27-28). For related recent work on transparency, see Finel, Bernard and Kristin Lord, “The Surprising Logic of Transparency,” *International Studies Quarterly*, vol. 43, no. 2, 1999, p. 315-339 and Etzoni, Amitai, “Is Transparency the Best Disinfectant?,” *The Journal of Political Philosophy*, vol. 18, no. 4, 2010, p. 389-404.
- ²² This was reported in Tremlett, Giles, “Spanish Court Opens Investigation of Guantánamo Torture Allegations,” *The Guardian*, 29 April 2009, <http://www.theguardian.com/world/2009/apr/29/spain-court-guantanamo-detainees-torture> [accessed 13 March 2014].
- ²³ See http://www.wikileaks.org/plusd/cables/09BRUSSELS1666_a.html [accessed 13 March 2014].
- ²⁴ See Tremlett, Giles, “Wikileaks: US Pressured Spain over CIA Rendition and Guantánamo Torture,” *The Guardian*, 1 December 2010, <http://www.theguardian.com/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition> [accessed 13 March 2014].
- ²⁵ Stone, Geoffrey, “Government Secrecy vs. Freedom of the Press,” *First Amendment Center First Report*, vol. 7, no. 1, 2006, p. 1-34, 13, footnotes omitted. Stone brings this argument directly to bear on WikiLeaks in “WikiLeaks, the Proposed SHEILD Act, and the First Amendment,” *Journal of National Security and Law Policy*, vol. 5, no. 1, 27 May 2011, <http://jnslp.com/2011/05/27/WikiLeaks-the-proposed-shield-act-and-the-first-amendment/> [accessed 13 March 2014], see esp. sec. 4. I have chosen here to exposit “Government Secrecy vs. Freedom of the Press” instead of the WikiLeaks paper because the latter does not include a passage that presents Stone’s view quite as clearly and concisely as the present quote.
- ²⁶ Stone, “Government Secrecy vs. Freedom of the Press,” *op. cit.*, p. 13. For Bickel’s own presentation of the model, see his *The Morality of Consent*, New Haven, CT, Yale University Press, 1977, p. 79-83. I take the phrase ‘equilibrium model’ from Cass Sunstein—see his “Government Control of Information,” *California Law Review*, vol. 74, no. 3, 1986, p. 889-921.
- ²⁷ One might worry here that the press itself, given its power, might become a locus of power capable of being exploited to satisfy its members’ individual wills instead of the General Will. How is its power to be checked? The idea that a still further institution would monitor and disclose its activities sets off an unacceptable regress, but it is not the only option for checking the press’s power. As Cohen observes (see *Rousseau: A Community of Free Equals, op. cit.*, p. 139 ff.), Rousseau recommends a second strategy for avoiding an over-concentration of institutional power, which is fragmentation. This strategy comes up in the course of Rousseau’s discussion of political “factions,” where he says that it is best that there be no such factions, but if they must exist, “[...] it is wise to multiply their number and to pre-

vent inequality among them” (*SC*, II.3.4). Following this line of thought, it is wise to institutionalize the press as a large number of independent presses, each of whose power is thus checked by the combined power of the rest.

- ²⁸ For details on the submission process, see <http://www.wikileaks.org/wiki/WikiLeaks: Submissions> [accessed 13 March 2014].
- ²⁹ Stone himself seems to agree: see his “WikiLeaks, the Proposed SHEILD Act, and the First Amendment,” *op. cit.* I say “seems to” because Stone does not explicitly mention WikiLeaks outside of this essay’s introduction, but the arguments amount to a defense of WikiLeaks’s right to publish the secrets it receives by legitimate means.
- ³⁰ See *SC*, III.2 on the notion of corporate wills.
- ³¹ Although there are important differences between their cases, the same analysis applies to Chelsea Manning, the source of, *inter alia*, WikiLeaks’s U.S. Embassy Cables release.
- ³² I thank Kevin Scharp for pressing me on this issue.
- ³³ *New York Times v. United States*, 403 U.S. 713 (1971), 739. This is the Pentagon Papers case.
- ³⁴ Sunstein, “Government Control of Information,” *op. cit.*, p. 903. Sunstein makes several other insightful criticisms of the equilibrium model in this paper.
- ³⁵ So, to quote Jonathan Klein, “a guy sitting in his living room in his pajamas writing what he thinks” is not, simply by virtue of not working for a traditional media outlet, incapable of engaging in press activity. In saying this, I intend to follow at least the spirit of the notion of journalistic privilege outlined in *Von Bulow v. Von Bulow*, 811 F.2d 136 (1987). For an insightful discussion of the matter, see Benkler, “A Free and Irresponsible Press,” *op. cit.*, p.356-363. The Klein quote is from *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> [accessed 13 March 2014]).
- ³⁶ I thus reject Jason Peter’s argument that, because WikiLeaks does not engage in traditional newswriting, its activities are not press activities (see his “WikiLeaks Would not Qualify to Claim Federal Reporter’s Privilege in Any Form,” *Federal Communications Law Journal*, vol. 63, no. 3, 2011, p. 668-696). I likewise reject former New York Times Executive Editor William Keller’s characterization of WikiLeaks as merely providing “raw material for journalists” but not itself counting as a press institution (<http://www.nytimes.com/2012/02/20/opinion/keller-wikileaks-a-postscript.html> [accessed 13 March 2014]).
- ³⁷ *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Stone discusses this in “Government Secrecy vs. Freedom of the Press,” *op. cit.*, p. 21-22.
- ³⁸ The historical development in the U.S. of these arguments is Levy’s central topic in *Emergence of a Free Press*. For a detailed modern example of the defense, see Meiklejohn, Alexander, *Free Speech and its Relation to Self-Government*, New York, Harper and Brothers, 1948.
- ³⁹ *Near v. Minnesota*, 283 U.S. 697 (1931), 716.
- ⁴⁰ WikiLeaks, *The Secret Ritual of Alpha Sigma Tau, 1975*, 2009, http://WikiLeaks.org/wiki/The_secret_Ritual_of_Alpha_Sigma_Tau,_1975 [accessed 13 March 2014].
- ⁴¹ Aftergood, Steven, “Wikileaks Fails ‘Due Diligence’ Review,” *Secrecy News*, 28 June 2010, http://www.fas.org/blog/secrecy/2010/06/WikiLeaks_review.html [accessed 13 March 2014].
- ⁴² Taylor, Jerome, “Human Rights Groups ask Wikileaks to Censor Files,” *The Independent*, 11 August 2010, <http://www.independent.co.uk/news/world/politics/human-rights-groups-ask-WikiLeaks-to-censor-files-2049098.html> [accessed 13 March 2014].