

The Use and Abuse of Technology: Reconsidering the Ethics of Civil Disobedience,  
Leaking, and Intellectual Property for the Information Age

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Dissertation submitted in partial fulfillment of  
the requirements for the degree of Doctor of Philosophy in the Department of  
Political Science in the Graduate School  
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ABSTRACT

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## Abstract

The suspicion that the advent of the internet marks some sort of qualitative change in the development of the human affairs motivates much diagnosis but less instruction about the contemporary political moment. Are there normative implications to recent advances in information technology? This dissertation examines three political conflicts over the use of the internet in a liberal democratic society. Each controversy reflects a basic disagreement about the appropriate domain of the public sphere: whether to accommodate electronic forms of civil disobedience, to treat digital information as intellectual property, or to sanction the act of leaking. Each chapter of the dissertation uses the work and writings of a political activist for insight into competing claims over what should count as a use or abuse of new technology. Electronic methods of political protest clarify an important feature of the justification of civil disobedience that scholars should take into consideration even in the more traditional circumstances in which it is practiced. Current and historical controversies surrounding the ethics of leaking call into question who should have the authority to decide what the public has the right to know. And the free software movement challenges long-standing assumptions about the justification of intellectual property and the public interest bargain at the heart of it. Together, these cases illustrate the normative implications to recent advances in information technology.

## Dedication

*For a girl, whom in chasing to distant places led me to  
many of the best thoughts imperfectly recorded here.*

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# 1. Introduction

The advent of seemingly revolutionary technology fascinates people who live through the stages of its development. There is never a lack of commentators offering their forecasts of the political, economic, or social changes that are likely to follow. Underlying these predictions and speculations it is often possible to see a sort of latent hope, or dread, that the changes we live through will somehow leave an indelible mark on the history of human affairs. Just twenty years after Gutenberg's invention of the printing press, for example, the sentiments of both hope and dread collide in a letter written by Niccolo Perotti, an Italian classicist, to his friend:

I have lately kept praising the age in which we live, because of the great, indeed divine gift of the new kind of writing which was recently brought to us from Germany. In fact, I saw a single man printing in a single month as much as could be written by hand by several persons in a year... It was for this reason that I was led to hope that within a short time we should have such a large quantity of books that there wouldn't be a single work which could not be procured because of lack of means or scarcity...

Yet—oh false and all too human thoughts—I see that things turned out quite differently from what I had hoped. Because now that anyone is free to print whatever they wish, they often disregard that which is best and instead write, merely for the sake of entertainment, what would best be forgotten, or, better still be *erased* from all books. And even when they write something worthwhile they twist it and corrupt it to the point where it would be much better to do without such books, rather than having a thousand copies spreading falsehoods over the whole world.<sup>1</sup>

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<sup>1</sup> Niccolo Perotti in correspondence to Francesco Guarnerio, in 1471. Quoted in Robert Darnton, *The Case for Books: Past, Present, and Future* (New York: PublicAffairs, 2009), xiv.

In both respects, there is some truth to what Perotti observed about the significance of the invention of the printing press. A shift in the means of production in the knowledge industry, from the scribes of monasteries to the market-oriented skilled laborers of the print workshop, dramatically changed how early-modern Europeans engaged in intellectual life. Before the printing press, the life of an intellectual was ordinarily tied to the religious setting of the monastery, and the scholar was burdened by the physical labor of transcription required for the preservation of knowledge. After the printing press, intellectual life became increasingly independent of the monastery. The former priority given to the preservation of knowledge soon gave way to a newfound hope in the recovery ancient wisdom, and later, to a sort of faith in the accumulation and progress of knowledge that came to characterize the Enlightenment period.<sup>2</sup>

Perotti also gave expression to concerns that many others would come to share. The efficiency of the printing press led to an unprecedented abundance of books, encouraging a wider and more diverse public sphere than ever before.<sup>3</sup> But at the same time, it gave rise to a chorus of critics who bemoaned, as Gottfried Leibniz put it in 1680, “that horrible mass of books which keeps on growing.”<sup>4</sup> Since the very beginning of printing, it had become a common refrain to hear about the psychological, or even physiological, dangers of reading too much, too widely, or too deeply.<sup>5</sup> From

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<sup>2</sup> Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe* (Cambridge; New York: Cambridge University Press, 1979).

<sup>3</sup> James Van Horn Melton, *The Rise of the Public in Enlightenment Europe* (Cambridge, England: Cambridge University Press, 2001).

<sup>4</sup> G. W. Leibniz, *Leibniz Selections*, ed. Philip P. Wiener (New York: Scribner, 1951), 29–30.

<sup>5</sup> Adrian Johns, “The Physiology of Reading,” in *Books and the Sciences in History*, ed. Marina Frasca-Spada and Nick Jardine (Cambridge: Cambridge University Press, 2000), 291–341.

well-known intellectuals, to everyday teachers, one would often be reminded to only use books in moderation—or risk enervating your body and spirit, inflaming your passions, and losing track of your own moral compass. Notable thinkers applied themselves to finding solutions to the problem with books. Numerous strategies were developed for coping with the problem of too many books (or “information overload” as we might say today).<sup>6</sup> For example, one of John Locke's most successful works was a book describing his method for indexing reading notes, entitled *A New Method of Making Common-Place-Books*.<sup>7</sup>

Like any number of other witnesses to revolutionary inventions, Perotti was thus able to see in the advent of printing both the promise of its use and the consequence of its abuse. Of course, his vision was limited. There were consequences to the abundance of books that Perotti could not yet have even imagined. Out of quantitative improvements to the production of books, for example, would come qualitative changes in the practice of scholarship. It was not just the potential access to many different books that would have such dramatic consequences across Europe, but also the potential access to many versions of the same book. The newfound opportunity to compare printed copies of different ancient manuscripts transformed classical scholarship, corrected centuries-old errors, and, especially, called into question the theological authority of the Catholic Church. For lay scholars to be able to critically

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<sup>6</sup> Ann Blair, “Reading Strategies for Coping with Information Overload ca. 1550-1700,” *Journal of the History of Ideas* 64, no. 1 (2003): 11–28; Richard Yeo, “A Solution to the Multitude of Books: Ephraim Chambers’s Cyclopaedia (1728) as ‘the Best Book in the Universe,’” *Journal of the History of Ideas*, 64, no. 1 (2003): 61–72.

<sup>7</sup> Originally published in 1685 as “Methodes Nouvelles de Dresser des Recueils” in *Le Clerc's Bibliotheque Universelle II*.

examine Latin translations of the Bible by reference to the grammar and philology of the original Greek and Hebrew was, in the scheme of things that set the stage for the Reformation, as significant as the inability of the Catholic Church to successfully censor the great mass of heretical books that kept on growing.<sup>8</sup> In the short period of time he witnessed, Perotti saw something of the social and political significance of the printing press. But although we may wish to discern the tide of change from our experience, it is difficult to judge from only the waves that pass us by.

One could point to other advances in communication technology that instigated reflection on its social and political consequences. In the *Iliad*, which existed through oral tradition long before it was set into the particular form we attribute to the author named Homer, there is just a single passing reference to the idea of a system of writing. It is described as if it were a powerful tool wielded by Proetus, the king of Argos. Proetus sends away Bellerophon to carry a written message to the king of Lycia that instructs its recipient to kill the messenger: “[Proetus] gave him tokens, / murderous signs, scratched in a folded tablet.”<sup>9</sup> The significance of the reference to writing suggests that the contemporary Greek mind would have marveled at the thought that mere scratches on a wax tablet were enough to kill a man. Hundreds of years later, the Greeks democratized the technology of writing.<sup>10</sup> Although they adopted many features of the Phoenician system of writing, they added a very significant

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<sup>8</sup> Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd ed. (Cambridge, England: Cambridge University Press, 1983), 176–84.

<sup>9</sup> Homer, *The Iliad*, ed. Bernard Knox, trans. Robert Fagles (New York: Penguin Books, 1990), (6.198-199).

<sup>10</sup> Eric A. Havelock, *Origins of Western Literacy* (Toronto: Ontario Institute for Studies in Education, 1976).

improvement of their own. They separated the base sound of a syllable (the “vowel”) from the sound that is made to begin or end it when we partly obstruct our breath (the “con-sonant”). By representing both the vowel and the consonant, the Greek alphabet made it easier to learn to read and write by greatly limiting the set of symbols we need to learn in order to represent speech in written form.

With an expansion of literacy and a greater cultural production of written material, we see early critique of new forms of communication in the ancient Greeks as well. Plato would later give expression to a criticism of writing attributed to Socrates, that “it will introduce forgetfulness into the soul of those who learn it; they will not practice using their memory because they will put their trust in writing... instead of trying to remember from the inside, completely on their own” (*Phaedrus*, 274c-275e). For Socrates, books are a problematic source of education because authors are unable to respond to readers. Their arguments are too easily refuted or dismissed in the absence of an advocate. That this critique appears in a written dialogue suggests that Plato also engaged his contemporaries in a debate about the appropriate role of writing.<sup>11</sup> The relevance of the *Phaedrus* to Plato’s larger corpus of work raises paradoxical questions about human dependence on any medium of communication that has influenced writers down through history, and still today. Jean-Jacques Rousseau, for example, would later launch himself to intellectual celebrity off of his contrarian reflections on whether European society had benefited from the explosion in

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<sup>11</sup> On the significance of the *Phaedrus* in this debate, see William L. Benoit, “Isocrates and Plato on Rhetoric and Rhetorical Education,” *Rhetoric Society Quarterly* 21, no. 1 (1991): 60–71; LaRue Van Hook, “Alcidamas versus Isocrates: The Spoken versus the Written Word,” *The Classical Weekly* 12, no. 12 (1919): 89–94; R. L. Howland, “The Attack on Isocrates in the *Phaedrus*,” *The Classical Quarterly* 31, no. 3 (1937): 151–59.

the use of books during the eighteenth-century.<sup>12</sup> He would later declaim that “I hate books,” in his own book on education.<sup>13</sup> We can read such paradoxical critiques as a sign that authors like Plato and Rousseau thought critically about their own authorship at a time when technological advances were rapidly changing the norms of reading and writing.

One can read anew the political thought of many authors, or eras, with eye for their implicit claims about the political significance of new technology. Not long after Rousseau, but in response to new developments, John Stuart Mill would later warn of the dangers of technological advances that enabled cheap newspapers and other mass media. These new forms of communication promoted the assimilation of individuals to public opinion and undermined the aims of human development and a free society. “Improvements in the means of communication promote it,” he argued, “by bringing the inhabitants of distant places into personal contact, and keeping up a rapid flow of changes of residence between one place and another.”<sup>14</sup> Underlying Mill’s defense of the freedom of thought and discussion are implicit assumptions about the technology of the day. At a critical point in his argument, when confronted with the objection that the liberty of discussion need only apply to the “teachers of mankind,” Mill suggests

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<sup>12</sup> Rousseau became an intellectual celebrity after the publication of his *Discourse on the Sciences and Arts*, which had just won an academic prize from the Academy of Dijon in 1749. In the *Letter to Grimm*, Rousseau explains that his reflection about the story of the ancient Egyptian god Thoth came from “reasoning from a passage in Plato,” in Jean-Jacques Rousseau, *Discourse on the Sciences and Arts: (First Discourse) and Polemics*, ed. Roger D. Masters and Christopher Kelly, trans. Judith R. Bush, vol. 2, *The Collected Writings of Rousseau* (Hanover: University Press of New England, Dartmouth, 1992), 87–88. See the beginning of the second part of the *Discourse on the Sciences and Arts* for Rousseau’s version of the myth told by Socrates in Plato’s *Phaedrus*, 274c-275e.

<sup>13</sup> Jean-Jacques Rousseau, *Emile, or, On Education*, trans. Allan Bloom (New York: Basic Books, 1979), 184.

<sup>14</sup> John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Company, 1978), 70.

that there are technical limitations to consider. “In the present state of the world,” he claims, “it is practically impossible that writings which are read by the instructed can be kept from the uninstructed.” In other words, even if Mill were to concede that only *some* people need to be at liberty to read and debate anything it would not change his conclusions. It is not possible to turn the clock back to a time when intellectual life existed in cloistered settings: “If the teachers of mankind are to be cognizant of all that they ought to know, everything must be free to be written and published without restraint.”<sup>15</sup> The use the technology that would provide complete liberty of discussion among intellectuals would inevitably provide the same liberty for everyone else. It would not be technically possible to provide the one without the other.

By the same token, Alexis de Tocqueville saw promise in the potential of mass media, like local newspapers, to bring like-minded citizens together in a modern democracy.<sup>16</sup> The “penny press” was littered with tabloid-style gossip and sensationalized coverage of crime, but also offered genuine human-interest stories and served to integrate the middle and working classes into the idea of a reading public.<sup>17</sup> At their best, according to Tocqueville, local newspapers served a restorative and protective function in a democracy. They safeguarded vulnerable freedoms in a democracy, serving as a vehicle to express outrage over the intrusions of the majority

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<sup>15</sup> *Ibid.*, 37.

<sup>16</sup> Thomas David Bunting, “A Bible, an Ax, and a Tablet: Tocqueville’s Newspapers and Everyday Political Discourse,” *Perspectives on Political Science* 46, no. 4 (October 2, 2017): 257–69.

<sup>17</sup> Tocqueville’s account of newspapers in early American society has been challenged insofar as the functions he attributes to what were then slightly more expensive local “newspapers” (around six cents) would be more accurately attributed to the “penny press,” which tended to also serve up the sort of content that might have been less savory to an aristocrat like Tocqueville; Michael Schudson, *The Good Citizen: A History of American Civic Life* (New York: Martin Kessler Books, 1998), 116–26.

into individual liberty. Newspapers could also restore citizens from the atomized condition of their daily lives to a place where they might see their mutual interests. Cheap newspapers, Tocqueville thought, made it possible for citizens of a modern democracy to see their self-interest rightly understood. The implicit claim about the technology of newspapers was central to the reasons why Tocqueville remained optimistic about fate of democracy in the modern world. With respect to newspapers, he wrote, “We should underrate their importance if we thought they just guaranteed liberty; they maintain civilization.”<sup>18</sup>

More recent history and current events provide a much more rapid succession of technological advances, and thoughtful reflection on their social and political consequences. In the 1920s, the automobile was blamed for distracting students from their studies, and even causing some students to drop out. In 1926, a community group met to discuss whether the telephone “makes men more active or more lazy?” and whether the telephone “breaks up home life and the old practice of visiting friends?”<sup>19</sup> In the 1930s, the radio was heralded as a democratizing technology and powerful instrument for civic education. But within the decade, it was being blamed for spreading fake news and empowering far-right authoritarian politics.<sup>20</sup> The parallels to many older concerns about books are also evident throughout popular media and scholarly research today: about the physiological impact of video games on children,

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<sup>18</sup> Alexis de Tocqueville, *Democracy in America*, ed. and trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 517.

<sup>19</sup> Claude S. Fischer, *America Calling: A Social History of the Telephone to 1940* (Berkeley: University of California Press, 1992), 1–3.

<sup>20</sup> A. Brad Schwartz, *Broadcast Hysteria: Orson Welles’s War of the Worlds and the Art of Fake News* (New York: Hill and Wang, 2015); David Goodman, *Radio’s Civic Ambition: American Broadcasting and Democracy in the 1930s* (New York: Oxford University Press, 2011).



the neurological effects of internet addiction, or the political significance of social media, among many others.<sup>21</sup>

What role does technology play in the development of human affairs? History attests to the continuing relevance of this question—in the various forms it appears—as the material of human culture has changed over time. By the middle of the twentieth century, however, this question had provoked interest in its more general form. The study of technology and society is pursued today as much out of an interest in any particular technology as it is for the purpose of better understanding the diffusion and influence of technology in general.

Broadly understood, intellectual study of the role of technology in politics and society can be characterized as taking one of three approaches.<sup>22</sup> One approach treats the technology in question as an external or autonomous force. The impact of technology can be discretely understood by reference to the characteristics of its mechanical properties. A second approach views technology as the embodiment of a cultural logic. The uses and effects of new technologies are thus understood to express an underlying trend—usually associated with the concept of modernity. On this view, it might even seem more accurate to say that people develop technology because of the underlying trend—we create technology that fits the way we think. A third approach stresses the indeterminacy of technological change. It asks us to consider how social

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<sup>21</sup> Nicholas Carr, *The Shallows: What the Internet Is Doing to Our Brains* (New York: W.W. Norton, 2011); Malcolm Gladwell, “Small Change,” *The New Yorker*, October 4, 2010.

<sup>22</sup> These distinctions follow those made in Fischer, *America Calling*; George H. Daniels, “The Big Questions in the History of American Technology,” *Technology and Culture* 11, no. 1 (1970): 1–21.

and political conflicts can influence how people either develop or employ new technologies.

The first approach is typically concerned with explaining how the advent of new technology impacts the existing social, economic, or political order. By identifying the elements of a society that are altered by technological change, historians and economists who adopt this approach often seek to explain how one impact leads to another, and how a sequence of effects can add up to a more far-reaching transformation of the existing order. In this sense, the role of a technology is like a “billiard-ball” because the direction of its force is discernible, even if its collision with the various elements of society can produce unintended consequences.<sup>23</sup> As a classic example, Lynn White has controversially argued that the development of the stirrup indirectly led to the rise of feudalism in Europe. The stability and control provided by the stirrup enabled warriors to engage in mounted combat more effectively, and to take advantage of more deadly weapons that could be used from horseback, like the long-sword and the lance. These changes led in turn to greater demand for horses, to the confiscation of Church land for breeding, and, eventually, to “a new form of western European society dominated by an aristocracy of warriors endowed with land so that they might fight in a new and highly specialized way.”<sup>24</sup> Or more prosaically, as Claude Fischer notes, we might point to the cascading effects of the automobile as an

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<sup>23</sup> William F. Ogburn, “How Technology Causes Social Change,” in *Technology and Social Change*, ed. F. R. Allen, 1957, 12–26.

<sup>24</sup> Lynn Jr. White, *Medieval Technology and Social Change* (London: Oxford University Press, 1964).

illustration of how the introduction of a technology can operate as a sort of exogenous shock.<sup>25</sup> The automobile reduced the demand for horses, and therefore also the demand for feed grain, thus influencing farmers to produce edible grains instead, which led to the reduction of food prices. The chain of effects might continue, but the idea suggests that the force of the initial impact becomes attenuated and more difficult to discern the further it is followed.

To treat the introduction of technology as a sort of external force that impacts a society often entails a conceptual commitment to a deterministic and economically rational point of view. People will employ a technology if it is economically rational for them to do so. With enough comparative advantage, a new technology can seem to act with a force of its own—changing behavior by altering the calculus of the rational interest, even for those who resist its adoption. After a period of “cultural lag,” during which social practices adapt to the altered set of rational-choice preferences, the prevailing uses of a technology will tend to accord with economic efficiency. In other words, if a device is well-suited to a particular application, then it will tend to be used in that way.

However, some scholars have rejected technological determinism without abandoning the view of technology as an external force. In this sense, the impact of a technology is still definitively tied to its comparative advantage; but whether and how it is applied will depend on the particular purposes of social groups. Technology is an external force, but it is a force that is applied by actors who develop it for their own

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<sup>25</sup> Fischer, *America Calling*, 8.

purposes. Rather obviously, this is simply to say that it matters how individual actors decide to use and develop technology. How much it appears to matter varies between authors. One might still view the choices of individuals to be somewhat determined by the choices of other people. As George Daniels puts it, the way people choose to use technology, in aggregate, may still look somewhat deterministic because “the direction in which the society is going determines the nature of technological innovations.”<sup>26</sup> For example, groups that controlled the automobile, tire, and oil industries in the 1930s and 1940s strategically asserted their financial and political power to successfully eliminate urban public transit initiatives that competed with motor buses, like the electric streetcar. Their intervention ensured that the motor bus became the dominant and preferred mode of public transportation—despite the worse economic efficiency of motor buses at the time.<sup>27</sup>

Many scholars would allow for a certain amount of determinacy in their understanding of the effects of technological change. They would acknowledge that the nature or structure of material items can have consequences. How these consequences are experienced by a society will nevertheless depend upon the development of the technology by individual actors and social groups. In the context of American culture, for instance, the development of the washing machine moved laundry facilities into the domestic privacy of the home. But the already existing social practices of communal laundering might well have persisted. At the time,

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<sup>26</sup> Daniels, “The Big Questions in the History of American Technology,” 3.

<sup>27</sup> David J. St. Clair, “The Motorization and Decline of Urban Public Transit, 1935-1950,” *The Journal of Economic History* 41, no. 3 (1981): 579–600.

contemporary American culture and the overcrowded conditions of urban life were raising medical concerns about personal hygiene and the cleanliness of public spaces. Had that not been the case, like in France, then the inefficient use of personal washing machines might never have become so normal in America.<sup>28</sup> The point is that even if the development of a new technology has some predictable consequences, social groups and cultural conditions may alter its impact for their own purposes.

Lastly, some scholars have thought about technology more in terms of its psychological effects on the cultural or emotional lives of its users. For example, Stephen Kern has famously (and ambitiously) argued that a set of technologies that emerged around the turn of the twentieth century transformed the way that people conceived of time and space.<sup>29</sup> Our register of time shifted from a public to a private experience, and our conception of space changed insofar as distance was not perceived to be as much of a barrier. The electric light minimized the significance of the time of day; motorized transport enlarged our idea of the everyday world; the telegraph enabled instantaneous communication; and the cinema and the telephone projected the perspective of an individual to distant places. These shifts in the perception of time and space, Kern argues, also contributed to psychological distress and political conflict. The essential properties of these technologies—their speed and instantaneity, like the element of surprise in a telephone ring—are reflected in the psyche their users. We wait anxiously for the telephone ring (or the smartphone notification), and lose track of

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<sup>28</sup> Rudi Laermans and Carine Meulders, “The Domestication of Laundering,” in *At Home: An Anthropology of Domestic Space*, ed. Irene Cieraad, 1st ed. (Syracuse: Syracuse University Press, 1999).

<sup>29</sup> Stephen Kern, “Temporality of the July Crisis,” in *The Culture of Time and Space, 1880-1918* (Cambridge: Harvard University Press, 2003).

our circadian rhythm in the glow of the light-bulb (or the blue-light of the computer display). Perhaps again today, as Joshua Meyerowitz has argued, the connection between space and perspective is becoming even more attenuated due to the pervasive use of electronic forms of communication.<sup>30</sup> The loss of a sense of place has undesirable consequences, according to Meyerowitz, like a more homogeneous culture and a diminished expectation of privacy. The physical space each person inhabits is no longer necessarily relevant to their social relationships, or to their participation in cultural and political life.

A second approach seeks to explain the role of technology as an expression or symptom of a more general cultural impulse. The aim is usually to describe a systematic movement of society towards a state of affairs that is characterized in juxtaposition to some traditional feature of premodern life. A particular technology might be emblematic of the entire technological system if it especially expresses the underlying logic of a social order. Modern technology is thus understood through themes like interpersonal alienation, the mechanization of work, the rationalization of society, or the conflict between technology and pastoral happiness.<sup>31</sup> For example, the classicist J. David Bolter associates certain technologies with different phases of human

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<sup>30</sup> Joshua Meyerowitz, *No Sense of Place: The Impact of Electronic Media on Social Behavior* (New York: Oxford University Press, 1985).; see also Marshall McLuhan's similar argument concerning the rise of mass media in, by Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964).

<sup>31</sup> Leo Marx, *The Machine in the Garden: Technology and the Pastoral Ideal in America* (New York: Oxford University Press, 1964).

history and broad historical trends.<sup>32</sup> The potter's wheel serves as a metaphor for the ancient world's sense of limits and the surface of things, and the drop spindle epitomizes their view of technology as a controlled application of power. To the modern era, the engine expresses its dynamic drive to explore; and the computer represents a postmodern view of nature as information and of man as its processor. The advent of any particular technology is not an agent of change itself, but rather a surrogate for the more obscure forces at work.

The view that any specific technology may simply be a manifestation of the larger technological system has led many scholars to an appreciation for its seemingly autonomous influence on political and social development. Kern argued, for example, that the diffusion of technologies around the turn of the twentieth century shifted European conceptions of time and space in ways that instigated the diplomatic failures leading up to the First World War.<sup>33</sup> Although the larger technological system has a determined influence on political society, insight into the role of technology can help to realize or shape the sort of system to which we subject ourselves. To this end, Lewis Mumford distinguishes between two general types of systems that he claims have existed side by side since the beginning of human civilization: “one authoritarian, the other democratic, the first system-centered, immensely powerful, but inherently unstable, the other man-centered, relatively weak, but resourceful and durable.”<sup>34</sup> The tension between these technological systems presents a choice between small-scale

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<sup>32</sup> J. David Bolter, *Turing's Man: Western Culture in the Computer Age* (Chapel Hill, NC: University of North Carolina Press, 1984).

<sup>33</sup> Kern, “Temporality of the July Crisis.”

<sup>34</sup> Lewis Mumford, “Authoritarian and Democratic Technics,” *Technology and Culture* 5, no. 1 (1964): 2.

association and large-scale organization. To Mumford, this amounts to a choice between a system that emphasizes personal autonomy and one that emphasizes institutional regulation. Like Mumford, other scholars have understood technology in relation to the culture that puts it to use. Both Jacques Ellul and Martin Heidegger offered, around the same time, accounts of the relationship between technology and society that reverses the usual idea of causation. Instead of looking for the influence of technology on society, we should consider how people reshape society in order to fit the techniques they have at hand. We adapt social conditions to the machines we want to put to use.<sup>35</sup> The processes and efficiency of a factory, according to this view, will induce a mindset that conceives of large-scale housing projects. The existence of housing projects will in turn reinforce the conditions that make the factory system indispensable. How else could there be enough jobs for the all the people who moved there? Superficial versions of this sort of view of technology can be seen today in so-called “techno-utopian” writers, who describe an inexorable march of technology towards artificial intelligence.<sup>36</sup> New technology has political consequences insofar as the social conditions of a society will accumulate an ever greater dependency on the technologies it has put into use.

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<sup>35</sup> Jacques Ellul, *The Technological Society*, ed. Robert K. Merton, trans. John Wilkinson (New York: Vintage Books, 1964).; Ellul published the book the same year that Martin Heidegger published his essay, “The Question Concerning Technology,” which makes a similar argument about the autonomous influence of technology on society. Ellul vehemently disowned any intellectual connection between Heidegger’s work and his own, pointing to his more optimistic outlook on politics; Samuel Matlack, “Confronting the Technological Society,” *The New Atlantis*, no. 43 (2014): 45–64; Martin Heidegger, “The Question Concerning Technology,” in *Basic Writings*, ed. David Farrell Krell (HarperCollins, 2008).

<sup>36</sup> See for example, Kevin Kelly, *What Technology Wants* (New York: Viking Press, 2010).



If there is a choice to make here—and according to some of these authors, there is not always a choice—then the decision to develop or adopt a technology is value-laden. Mumford, for example, understands the values at stake to involve, among other things, self-government, free communication, access to the common store of knowledge, and “a sense of individual moral responsibility for behavior that affects the whole community.”<sup>37</sup> The problem is that the values implicated in our choice of technology are often not made explicit in much of modern social science and political thought.<sup>38</sup> The trick is to avoid the pitfalls of deterministic thinking without dismissing the idea that technical features can have political properties. To clarify the value-laden choices that technology may present, Langdon Winner has argued that it is necessary to “pay attention to the characteristics of technical objects and the meaning of those characteristics.”<sup>39</sup> Following Winner, we might think about the political properties of a technology in two ways: some inventions, designs, or arrangements of a technical device can serve as a way to settle a political issue; and some technologies are strongly compatible, or incompatible, with particular kinds of political relationships.

That the first sort of object can have a political property is not generally controversial. Many seemingly innocuous details of architecture or public infrastructure demonstrate how, for example, unusually low-hanging bridges on Long Island were deliberately designed to discourage black residents from traveling to the public park at

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<sup>37</sup> Mumford, “Authoritarian and Democratic Technics,” 1; Lewis Mumford, *Technics and Civilization* (New York: Harcourt, 1934).

<sup>38</sup> Langdon Winner, “Technocracy,” in *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought* (Cambridge: MIT Press, 1977), 135–72.

<sup>39</sup> Langdon Winner, “Do Artifacts Have Politics?,” *Daedalus* 109, no. 1 (1980): 123.

Jones Beach, which was favored by the nearby middle-class white residents.<sup>40</sup> But to suggest that the second sort of object can have a political property is more controversial. The idea is that the adoption of some technologies will strongly incline, but not strictly require, its users to organize themselves in a certain way—a way that could be more or less compatible with their political system and values. The invention of nuclear weapons is one of the simplest examples. The mere existence of an atomic bomb creates a compelling demand for a centralized, disciplined, and hierarchical organization that can be trusted to safely control the weapon. Given certain assumptions about the need for a political society like the United States to possess nuclear weapons, the existence of the technology makes peacetime political arrangements prior to WWII seem inconceivable afterwards. Solar energy serves as another example. Environmental activists have argued that solar energy is more compatible with democracy, and egalitarian values, than with coal, oil, and nuclear power. Activists argue that solar energy systems are far easier to build in a decentralized and distributed manner, and are therefore more accommodating to individuals and communities that wish to manage their own affairs.<sup>41</sup> Of course, that is not to say that solar technology is incompatible with industrial forms of organization. By drawing attention to the political properties of technologies, these arguments are qualitatively different than the kind of cost-benefit analysis that is more commonly

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<sup>40</sup> Ibid., 120.

<sup>41</sup> Robert Argue, Barbara Emanuel, and Stephen Graham, *The Sun Builders: A People's Guide to Solar, Wind, and Wood Energy in Canada* (1978), cited in Langdon Winner, *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought* (Cambridge: MIT Press, 1977), 130.

employed either for or against the adoption of a technology. They are political reasons to question the role of technology in shaping human affairs.

Lastly, a third approach views technology as a tool that is developed and used by individuals or social groups. The technical or material properties of a new tool do not determine the consequences of its use. Social groups like inventors, users, government, and media, among others, compete to influence the common use or technical design of the new technology. The outcome is sometimes the product of negotiations between interested parties—a bargain that is often struck between groups with financial or political power, like producers, marketers, and elites with technical expertise. But the mass of ordinary consumers can also shape the role of a technology through their choices to use, not use, or misuse, what is available to them.

The social construction of the role of technology challenges the view that a material thing can itself be an agent of change. There are many counter-examples which undermine deterministic claims about the inexorable logic or material necessity of technological effects. Such counter-examples are a reminder to incorporate people as actors into an analysis of the role of technology, and to consider the social and political conditions which limit their choices.<sup>42</sup> For instance, the development of cinematic films is recognized as having drawn more people into public spaces together. Yet because the advent of the television initiated the opposite trend, it becomes unclear what effect, if any, the cinema continued to have. The answer, according to a social

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<sup>42</sup> Fischer, *America Calling*, 16–17.

constructivist view of technology, is that the cinema never had any effect. People chose to congregate in public spaces to watch movies—then later, they chose to do so less often.

Communication technology has often been understood to have contradictory effects. The production and consumption of radio and movies arguably increased cultural homogeneity; but at the same time, the telephone and automobile arguably fostered provincialism by intensifying contact with local relationships.<sup>43</sup> The social constructivist view is right to point out the many non-obvious and various effects of the choices people make. One might have expected the diffusion of automobiles to decrease the time of commutes to work. But instead of shortening commutes, it enabled Americans buy more spacious housing further away. Televisions, at first, may have encouraged family and neighbors to come together; but as the television became more commonplace it seems to have had the opposite effect of diminishing family time together. The political and social consequences of technological development depend on how people choose to put it to use.

Humility is a virtue that seems lacking in partisans of all three approaches. Each offers insight and provokes reflection. While the two former approaches adopt a more or less deterministic view, the latter approach suggests that our understanding of the uses and misuses of a technology is subject to the outcome of political contestation and to the actions of individuals. Although it would be wrong to quickly dismiss the forecasts of writers with a more deterministic bent to their thinking, the idea of the

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<sup>43</sup> Malcolm M. Willey and Stuart A. Rice, *Communication Agencies and Social Life* (New York: McGraw-Hill, 1933).

social construction of technology offers a much needed corrective to the immodest argument that appears too regularly in the study of technology and society. To think in terms of the political properties of a technology, especially in relation to the conflicts that emerge over how it is put to use, offers a distinct advantage. The benefit of hindsight is not so important. One need not know about the technical advancements that are yet to come, or what features will define a future that has yet to take shape. We can gain clarity about political significance of new technology by considering the values that are at stake in conflicts that emerge over its use and abuse.

The suspicion that the advent of the internet marks some sort of qualitative change in the development of the human affairs motivates much diagnosis but less instruction about the contemporary political moment. It is one thing to recognize new appearances to old problems, and another to regard technological change as potential guidance to different answers. Are there normative implications to recent advances in information technology? This dissertation will examine three political conflicts over the use of the internet in a liberal democratic society. Each controversy reflects a basic disagreement about the appropriate domain of the public sphere: whether to accommodate electronic forms of civil disobedience, to treat digital information as intellectual property, or to sanction the act of leaking. Like the political thought of writers who reflected on the consequences of previous periods of technological change, dissident views about the normative implications of the internet often push against the accepted boundaries of public life. By grounding a study of the political significance of

the internet in specific debates about civil disobedience, intellectual property, and the ethics of leaking, I explain how the opportunities afforded by new information technologies challenge some of our most basic commitments to liberal and democratic values, like personal autonomy and political participation. Each chapter of the dissertation uses the work and writings of a political activist for insight into competing claims over what should count as a use or abuse of new technology. These figures provide useful case studies insofar as they combine political activism with the development of computer software. In different ways, they demonstrate the political significance of new technology by developing it to be compatible with the political values they want to promote.

The next chapter discusses the Electronic Disturbance Theater, a “hacktivist” group of critical theorists and performance artists, who developed a software program for “virtual sit-ins.” The group developed a program called FloodNet to be a “mass demonstration machine,” enabling users to repeatedly send requests to reload a target webpage. They did so with the express intention of adapting a traditional form of civil disobedience to the peculiar problems and opportunities that have accompanied the advent of the internet. Their method of protest pioneered a form of civil disobedience that uses information technology to translate the traditional tactics of trespass and blockage into an “online” context, and amplify the reach of its message. I argue that electronic methods of protest illustrate why it is essential to the justification of civil disobedience to maintain a relative parity between the power of the disobedient to impose their will and the power of the disobeyed to prevent it. This over-looked feature

of civil disobedience is nonetheless relevant to more commonplace circumstances, where the built environment of public life has played an unacknowledged role in its practice and justification.

The third chapter positions us to better evaluate the controversial ethic of leaking championed by Julian Assange, the founder of WikiLeaks. An increasingly contentious figure, Assange has combined his advocacy of leaking with the development of software that facilitates the disclosure of massive troves of confidential documents. The ethic of “mass leaking” that I associate with Assange raises normative questions about the proper relationship between the public and its government which echo those raised by a much earlier figure in the history of American political thought: the founding father of leaking, Benjamin Franklin. The chapter examines the political features of mass leaking which motivated Julian Assange to create WikiLeaks, and compares current controversy to Franklin’s infamous leak of the Hutchinson Letters during the lead-up to the American Revolution. Both were middlemen who facilitated leaks in service to more open and responsive government. In doing so, I address the almost complete scholarly neglect of the principled justification for leaking that Franklin uses to defend what he reportedly considered to be “one of the best actions of his life.” I argue that the core political principle motivating both Franklin and Assange is the same: to invest responsibility in people to decide what the public has the right to know is not to disown questions about ethical leaking, but rather to justify the publication of leaks based on a democratic ethic. Although there are (and were) good reasons to question the prudence of their leaks, to adequately criticize either requires

understanding the democratic commitments that inform their challenges to political authority.

The fourth chapter discusses the politically-motivated development of “free” software by Richard Stallman, a computer programmer responsible for some of the core components of the GNU/Linux operating system. Stallman's development of widely-used software components helped launch a project to provide users with free alternatives to the proprietary software that was once necessary to run a computer. He argues that it is important for users to freely use computers because they have become a ubiquitous part of our everyday lives: from our professions and finances, to reading and learning, or cultural and creative pursuits. The idea of “free” software speaks more generally to a freedom of creative production. In this regard, many legal scholars and political theorists have recently called attention the role of culture in a liberal democracy, and the normative stakes of the ongoing conflict over public access to it. Participating creatively in cultural life is of significant value to more than just professionals. In music, literature, film, or computer programming, the creativity and edification of individuals depends on their access to and understanding of the culture we share in common. To participate in public life, to contribute to the culture that shapes us all, and to carve out a life of our making, requires the freedom to engage with cultural material by studying, modifying, and sharing it.

To study each of these figures and issues serves two purposes. First, it motivates a conceptual reconsideration of each issue and thereby offers discrete contributions to scholarly debate on the accommodation of civil disobedience, the ethics of leaking, and



the justification of intellectual property. Electronic methods of political protest clarify an important feature of the justification of civil disobedience that scholars should take into consideration even in the more traditional circumstances in which it is practiced. Current and historical controversies surrounding WikiLeaks and the Hutchinson Letters reflect the political nature of the ethics of leaking, and suggests a novel solution to the problem of secrecy in a democratic society. And the free software movement, animated by the “hacker culture” values of the computer revolution, challenges long-standing assumptions about the justification of intellectual property and the public interest bargain at the heart of it.

These discrete contributions respond to larger conceptual issues facing liberal democratic societies today. Considered together, they push back against those who would resist efforts to expand the accepted boundaries of public life. Understanding a particular feature of civil disobedience pushes back against those who would otherwise discount electronic methods of protest on the grounds that they are too powerful and disruptive. Understanding the democratic commitments that underpin the ethic of leaking associated with Assange pushes back against those who would dismiss his position on the grounds that it pursues radical transparency as an end in itself. And understanding the political motivations behind the development of free software pushes back against justifications for intellectual property restrictions that are divorced from a conception of the public interest that would value cultural freedoms.

Second, to study these cases illustrates the normative implications of recent advances in information technology. The imbalance of power between the disobedient

and the disobeyed in an electronic context makes it difficult to justify new forms of civil disobedience. But it also challenges our commitment to accommodate and respect the conscientious moral protest of fellow citizens, especially when governments and corporations effectively immunize themselves against these tactics. The technology of mass leaking has normative implications as well. It provides a system that is resilient against attempts to censor the publication of secrets by circumventing various controls over internet communication; and it provides the sources of leaks with a technical assurance of anonymity. When combined with the ease and marginal cost of copying digital information, the resilience and anonymity afforded by these tools creates a pervasive and genuine opportunity to leak documented secrets. For anyone to be able to do so both reliably and secretly makes it possible to imagine new solutions to old problems concerning the use of government secrecy in a democratic society. Lastly, computer and network technologies offer new ways to interact with culture, challenging our expectations about who generally creates and participates in the production of culture, and how they do so. But these changes have been met by increasingly sophisticated technical tools that restrict control over copyrighted material, and an equally significant regulatory shift designed to protect the incumbent industrial model of cultural production. The role of all these technologies is both active and passive: their structure is compatible with liberal and democratic values, but it is only an opportunity they provide. In this respect, the contemporary moment joins that of previous periods, when new means of communication provoked changes in the

production of knowledge and political participation. Across each of these issues, the choice between a more open or closed society remains to be made.

## 2. The Abuse and Prevention of Electronic Forms of Civil Disobedience

### 2.1 Introduction

Although the illegal practice of interfering with or manipulating internet communication has recently become a popular means of political dissent, scholars of civil disobedience have made little mention of the trend. One might reasonably think that this is no cause for question, for nothing about digital communication technology is so different that it suggests the obsolescence of existing theories of civil disobedience. Others have suggested that there is indeed something novel about these “online” forms of political activism.<sup>44</sup> Whatever one thinks of the novelty of these practices, however, is beside the point of this chapter. I argue that the peculiar context of electronic civil disobedience highlights a feature of civil disobedience in general which is apt to be neglected when we take for granted its ordinary physical circumstances. By considering a paradigmatic case of electronic civil disobedience we can see better why it is important that there be a relative parity between the power of the disobedient to impose her will and the power of the disobeyed to prevent it; and that this problem of power asymmetry has important implications for the obligations of

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<sup>44</sup> Stefan Wray, “On Electronic Civil Disobedience,” *Peace Review* 11, no. 1 (March 1, 1999): 107; Andrew Calabrese, “Virtual Nonviolence? Civil Disobedience and Political Violence in the Information Age,” *Info: The Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 6, no. 5 (2004): 326–38; Kenneth E Himma, “Hacking as Politically Motivated Digital Civil Disobedience: Is Hacktivism Morally Justified?,” *Internet Security: Hacking, Counterhacking, and Society* 73 (2007).

the state even in an everyday physical context. By drawing on scholars who examine the ways a built environment shapes relationships and activities in the public sphere, I suggest an approach to a theory of civil disobedience that better accounts for the civil relationship between the state and the disobedient.

In what follows, I will build my argument in two stages. First, I outline a case of politically-motivated electronic disobedience and consider its fit to existing theories of civil disobedience. To this end, I consider various objections to the civility of electronic disobedience that may arise from either a definitional or paradigmatic approach. We may look to a paradigm case of electronic civil disobedience in order to gain a better understanding of the key features of civil disobedience in general. Second, I argue that a peculiar feature of a paradigm case of electronic civil disobedience helps to understand the sort of civility that ought to characterize the relationship between the disobedient and the disobeyed. With this understanding, we may better see what I call *the problem of incivility by design*: when the spaces of protest in society are designed to frustrate or prevent disobedience, the civil relationship between the disobedient and disobeyed is diminished, as are the obligations of civility that follow from it. To accommodate the practice of civil disobedience in our democratic society requires that we reconsider how the design and regulation of information technology can shape the possibilities of political life.

## ***2.2 Denial-of-Service as “Virtual Sit-in”***

A distributed denial-of-service (DDoS) attack is the earliest and one of the most common methods of electronic civil disobedience. Although the means of a DDoS attack may vary, its purpose is usually to make a network resource unavailable to its intended users. When a user communicates with a server—usually in order to load a specific webpage—she sends a packet of information that includes a request for information from the server in response. A denial-of-service to all users attempting to load a webpage is achieved by “flooding,” or saturating, the target servers with requests for responses. The more packet requests an attacker can send, the greater burden she can place on the target of her attacks. The less capacity a target server has to respond to requests—all else being equal—the quicker the server is overwhelmed, and the sooner it must deny service to all other users. The attack needs to be *distributed* because the capacity of servers to respond to requests is usually well beyond the capacity of even the fastest personal computers to send requests. By combining the computing power of many users, a network of computers can overload the capacity of a target server. Moreover, a DDoS attack can be rebuffed if the origin of the attack is identified. A successful denial-of-service thus requires a distribution of attack origins in order to both overpower the bandwidth capacity of its target and hide its origin by mimicking the wide distribution of ordinary users. Generally speaking, if a DDoS attack is successful it will have prevented a website from functioning, temporarily or indefinitely.

There are of course other means of electronic disobedience that are used for the purposes of political dissent.<sup>45</sup> For example, vulnerabilities in the underlying technical design of a website may be exploited to gain administrative control of the servers and thereby vandalize a website—changing its content to embarrass a political opponent or to otherwise communicate a message to anyone who visits the vandalized website. My aim is not to account for the variety of ways to interfere with or manipulate digital communication for the purposes of political dissent. Although these alternative means of electronic disobedience may deserve further inquiry, a DDoS attack warrants special consideration due to its resemblance to a hallmark example of traditional civil disobedience: the sit-ins of the American civil rights movement.

Often described as “virtual sit-ins,” a distributed denial-of-service attack mimics the tactics of trespass and blockage that have made the sit-in strategy a paradigmatic example of civil disobedience. By blocking the normal course of affairs and choosing a symbolic target for trespass, the sit-in strategy has long served as an exemplar of civil disobedience for both scholars and activists. The disobedience is civil due to its non-violent, public, conscientious, and communicative characteristics. Like the civil rights restaurant sit-ins protesting racial segregation, a “virtual sit-in” contests the normal course of affairs by blocking other people from using the same space,<sup>46</sup> and thereby

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<sup>45</sup> Mathias Klang, “Civil Disobedience Online,” *Journal of Information, Communication & Ethics in Society* 2, no. 2 (2004): 75–83.

<sup>46</sup> Some have argued that the use of a “cyberspace as place” metaphor to describe information resources on the internet is dubious. This criticism is motivated by a concern that the unthinking use of terms like “cyberspace” lends itself to the implication of private property, or to a disregard for a more rigorous understanding of the technology in question. Here, I use the metaphor with due caution, since my argument does not suppose that websites are private property nor do I ignore the technical details of electronic disobedience. Mark A. Lemley, “Place and Cyberspace,” *California Law Review* 91, no. 2 (2003): 521–42; Dan Hunter, “Cyberspace as Place and the Tragedy of the Digital Anticommons,” *California Law Review* 91, no. 2 (2003): 439–519; James Boyle, “The Second Enclosure Movement and

draws attention to the reasons motivating the disobedience. In its beginnings, a denial-of-service attack once required the coordination of many protesters to simultaneously access a specific website at a given time, much like a traditional physical sit-in. However, since the development of software to automate the process of repeatedly sending requests to a target website, this high level of organization is no longer necessary. Depending on the software used, the experience of online protest may vary significantly: the software may not require the user to set the target of the protest, to press any buttons to initiate the protest, or to even be present at her computer during the protest.

The analogy of a “virtual sit-in” inspired a group of critical theorists and performance artists to develop software that would accentuate these similarities. In 1998, the Electronic Disturbance Theater (EDT) created *FloodNet*, a software program that directed a user's web browser to send an automated reload request to a target website every few seconds. The group intended the tool to serve as a “‘mass demonstration machine’ (*FloodNet*) that enabled ‘virtual sit-ins.’”<sup>47</sup> On April 10<sup>th</sup> of the same year, the group coordinated more than eight thousand participants in a distributed denial-of-service attack on the website for Mexican President Zedillo, and successfully blocked access to the government website intermittently throughout the day. Another “virtual sit-in” was organized on May 10<sup>th</sup> against the White House website for

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the Construction of the Public Domain,” *Law and Contemporary Problems*, 2003, 63–104; Maureen A. O’Rourke, “Property Rights and Competition on the Internet: In Search of an Appropriate Analogy,” *Berkeley Technology Law Journal* 16, no. 2 (Spring 2001): 561–630.

<sup>47</sup> Ricardo Dominguez, “Electronic Civil Disobedience: Inventing the Future of Online Agitprop Theater,” *Proceedings of the Modern Language Association* 124, no. 5 (2009): 1806–12.



President Clinton; but this time the DDoS attack failed to block access to the website.<sup>48</sup>

The objective of both virtual sit-ins was to demonstrate support for the Zapatistas – a revolutionary leftist group in Mexico – following the seeming complicity of the national government in the Acteal Massacre, and the Clinton administration's continuing support of President Zedillo.

Electronic civil disobedience strategies like the “virtual sit-in” attempt to translate traditional strategies of civil disobedience, like trespass and blockage, into an online context. Not only have activists understood their actions in this way, but they have further understood their tactics to herald a wholesale evolution of the practice, since physical strategies of trespass and blockage have become increasingly obsolete in a digital age. In their 1994 collection of essays, *Electronic Civil Disobedience*, the Critical Art Ensemble (CAE) first treated electronic civil disobedience with conceptual distinction from traditional tactics. Separating the “broad historical context” for civil disobedience from the emerging one of today, the CAE argued that the primary representation of economic and political power had shifted from the literally concrete “halls of power,” and “other architectural structures” of the recent past, to the virtual information flows of today.<sup>49</sup>

This shift is important to the CAE's understanding of civil disobedience for both symbolic and prudential reasons. As the representation of power in the public

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<sup>48</sup> The failure was likely due to the greater capacity of the White House servers to respond to webpage requests, and the U.S. government's use of technical means to disable the sources of the attack. Another virtual sit-in was organized against President Zedillo's website on June 10th, but this time the Mexican government blocked the DDoS attack by disabling the web browsers of anyone using the *FloodNet* tool.

<sup>49</sup> Critical Art Ensemble, *Electronic Civil Disobedience and Other Unpopular Ideas* (Autonomedia, US, 1996), 7.

imagination has shifted to emphasize the information capital of communication networks, the expressive potential of civil disobedience depends upon adapting its strategies to target these new symbolic sites of power. But this shift in the representation of power is not merely symbolic. In their view, economic and political power no longer depends on the “halls of power” as much as it has in the past. Trespassing at Google, for example, does not block or in any way hinder its business of cloud-computing or ad-selling. The point is simply that digital information networks have, more or less, freed many business and government practices from the inconveniences of dealing with physical forms of civil disobedience. Depending of the target of protest, traditional methods of civil disobedience may be more or less effective. The advent of recent information technology has made the efficient exercise of power increasingly independent of any specific physical space.

From these observations, the CAE meant to point out “the problem” with traditional civil disobedience today: power no longer “resides” in structures and buildings to the extent that blockading the “flow of personnel” into the “halls of power” can prevent its operation. Due to the “increasing ability of power to evade the provocations” of civil disobedience, traditional tactics are now “of little consequence so long as information-capital continues to flow.”<sup>50</sup> These challenges, they argue, call for the adaptation of tactics that were designed to be used against flow of personnel through physical spaces. Activists must find a way to protest against the flow of

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<sup>50</sup> Critical Art Ensemble, 9.

information that characterizes the exercise of power today. The tactics of electronic civil disobedience, the CAE explains, are justified because:

They are the same as traditional CD [civil disobedience]. ECD [Electronic civil disobedience] is a nonviolent activity by its very nature, since the oppositional forces never physically confront one another. As in CD, the primary tactics in ECD are trespass and blockage. Exits, entrances, conduits, and other key spaces must be occupied by the contestational force in order to bring pressure on legitimized institutions engaged in unethical or criminal actions. Blocking information conduits is analogous to blocking physical locations; however, electronic blockage can cause financial stress that physical blockage cannot, and it can be used beyond the local level. ECD is CD reinvigorated. What CD once was, ECD is now.<sup>51</sup>

Of course, there is good reason to be skeptical of the claim that electronic civil disobedience replaces its now obsolete analogs of physical protest. As other scholars have noted, an easy distinction between “real” and “virtual” actions lends itself to a mistaken sense of “old” and “new” methods.<sup>52</sup> As Graham Meikle notes, “Net activism has never been *exclusively* Net-centered.”<sup>53</sup> It is often not clear that electronic methods of protest are so independent of actions taken in the “real” world; online activism has often found success when used as a supplement to traditional methods of protest.

Nevertheless, there is also some truth to the sense that electronic civil disobedience promises the empowerment of the disobedient at a time when the

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<sup>51</sup> Critical Art Ensemble, 18.

<sup>52</sup> Laura J Gurak and John Logie, “Internet Protests, from Text to Web,” *Cyberactivism: Online Activism in Theory and Practice*, 2003, 25–46. However, the same sort of mistake is made by supposing that everything new should be understood through the the lens of the old, see Alexandra J Roberts, “Everything New Is Old Again: Brain Fingerprinting and Evidentiary Analogy,” *Yale Journal of Law & Technology* 9 (2006): 234.

<sup>53</sup> Graham Meikle, *Future Active: Media Activism and the Internet* (Annandale, N.S.W.: Pluto Press; Routledge, 2002), 4.

efficacy of traditional tactics have been thrown into question. Electronic civil disobedience empowers protesters because it takes advantage of digital communication technology: it makes the organization of protest cheaper and easier, it fosters political relationships across national borders, and it creates a virtual “space” for a widely dispersed community to take collective action. Moreover, these advantages of network communication coincide with the diminishing effect of traditional forms of disobedience. As the exercise of corporate and government power becomes increasingly independent any physical space or sovereign nation, traditional strategies of trespass and blockage used against the physical infrastructure of corporations and governments become less effective in disturbing the existing economic and political order.

But there are a few reasons to question the conclusion that the electronic context is generally to the advantage of the civil disobedient. Even in an electronic context, powerful authorities (including both corporations and governments) have technical means at their disposal that can frustrate or prevent acts of disobedience. At the same time, the disobedient have at their disposal other technical means to empower their trespass and blockage well beyond what would be the usual power of the disobedient in a traditional physical context. As I will explain, this asymmetry of power between the disobedient and the disobeyed is a peculiar feature of the electronic context that helps to understand a problem at the heart of civil disobedience in general.

### ***2.3 Methodological Approaches to Civil Disobedience***

Given this outline of an early and archetypal example of electronic disobedience, a few objections may be raised about its status as civil disobedience. These objections depend in part upon how one approaches the topic of civil disobedience. Scholarly discussion generally adopts a definitional approach which aims to describe the necessary and sufficient conditions for an action to “count” as civil disobedience. Notably, Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”<sup>54</sup> Of course, much of the substance of any definition lies in the elaboration of its terms; but the definitional approach is instructive insofar as it asks us to construct a model of civil disobedience and judge any particular case of disobedience against that normative ideal. From a definitional approach, one might object that either this particular case of electronic disobedience is not civil, or that any case of electronic disobedience is not civil.

Another approach to the topic of civil disobedience, taken recently by Kimberly Brownlee, is to identify a typical or paradigm case of civil disobedience. By identifying “a class of actions that are clear examples of civil disobedience” and describing the features exemplified in such a case, the paradigmatic approach aims to help us to gain an idea of what civil disobedience *is*. Thus the paradigmatic approach resists objections that arise from a definitional approach which tend to exclude particular cases of

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<sup>54</sup> John Rawls, *A Theory of Justice*, revised (Harvard University Press, 2009), 364.

disobedience due to their complexity or peculiarity. Or as Brownlee critically suggests, the definitional approach tends to anticipate evaluation by building a theorist's preferred example of civil disobedience into the definition.<sup>55</sup> The paradigmatic approach thereby avoids “the dialectic of generalisation and counterexample” that characterizes the definitional approach and the objections that arise from it. This latter approach is appropriate to both the aim of this chapter and the nature of the case examined: to specify a feature of civil disobedience in general that is exemplified by a clear but peculiar case of electronic civil disobedience.

A few possible objections that arise from a definitional approach should nonetheless be addressed. Despite taking a paradigmatic approach civil disobedience, some objections arising from a definitional approach ought to be taken seriously. If a typical case of electronic disobedience – or a specific example like the one discussed above – clearly fails to satisfy a necessary condition of civil disobedience, then adopting the less restrictive paradigmatic approach ought to be viewed with suspicion. In other words, some categorical objections may be nonetheless relevant due to the restriction of the paradigmatic approach to “clear examples of civil disobedience.” Thus, following Rawls, we might object to the Electronic Disturbance Theater's support of the revolutionary (and sometimes violently militant) Zapatista Army of National Liberation. The objection would be that since the Zapatistas are a revolutionary and sometimes violent group, then the views of the Electronic Disturbance Theater and the

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<sup>55</sup> For example, when Rawls considers the place of civil disobedience within a “nearly just society” he anticipates his conclusion that the civilly disobedient act openly and without hiding their plans from law enforcement authorities.

participants of the virtual sit-in do not demonstrate a non-violence that is requisite to the civil character of disobedience.

One might view the principled message of the disobedience to be distinct from the political ideology of the group that organized the protest. Regardless of the broader political views of the Electronic Disturbance Theater or other virtual sit-in participants, it is reasonable to understand the central message of the disobedience to be a protest against the Mexican government's seeming complicity in the human rights abuses perpetrated by government funded paramilitary groups working against the Zapatistas. It is this claim of human rights injustice that *FloodNet* was designed to emphasize when used to repeatedly request certain information from the servers of the Mexican government website. The programmer of *FloodNet*, Brett Stalbaum, explained:

FloodNet is an example of conceptual net-art that empowers people through activist/artistic expression. By the selection of phrases for use in building the “bad” urls, for example using “human\_rights” to form the url “http://www.gb.mx/human\_rights,” the FloodNet is able to upload messages to server error logs by intentionally asking for a non-existent url. This causes the server to return messages like “human\_rights not found on this server.”<sup>56</sup>

Regardless of the details about the EDT's broader political commitments to violent resistance, one should understand their claim in this case to satisfy the non-violent criteria in most definitions of civil disobedience.

However, the manner in which the claim of human rights injustice was expressed raises another objection to DDoS attacks and electronic disobedience in

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<sup>56</sup> Dominguez, “Electronic Civil Disobedience,” 1807.

general. The objection would be that the performance of electronic disobedience is fundamentally private, or hidden, and therefore contrary to the public character of civil disobedience. The “conceptual net-art” of *FloodNet* – which communicated the reasons for the protest when the disobedience occurred – was visible (or “heard”) only by the systems administrator of the target website or the disobedient participants themselves. Moreover, even if a virtual sit-in were to successfully block access to the target website, there would be no immediate indication to an ordinary user why the website is inaccessible. The hidden or private nature of the disobedience raises suspicion about the intent of the protester: whether or not the disobedience is perceived as well-meaning towards society is colored by the privacy of the act, with the protesters sitting in their homes by their computers.

Many so-called “hacktivists” have contributed to a suspicion about their intent by masking their disobedience in anonymity, or by using the pseudonyms they have adopted as a part of their online identities. As Klang has noted about the *Electrohippie Collective*, activists often “do not hide themselves or their actions but at the same time they do not advertise their identities.”<sup>57</sup> The online communities that have given rise to many acts of electronic civil disobedience often encourage anonymity or pseudonymity among their members. Even though many do not take steps to meaningfully prevent law enforcement

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<sup>57</sup> The *Electrohippies*, a group that has conducted DDoS attacks, understand the importance of not hiding their real identities from law enforcement but choose to remain pseudonymous to at least the larger public. They explain that “we do not try to bury our identities from law enforcement authorities any authority could, if it chose to, track us down in a few hours. However, because some of us work in the IT industry, we do not make our general membership known because this would endanger our livelihoods.” Quoted in Klang, “Civil Disobedience Online.”



officers from discovering their real identities, their actions are often perceived to be intentionally concealed from public view.<sup>58</sup> The technical skills required by some strategies of electronic disobedience may also contribute to a sense that protesters employ obscure tactics for malicious purposes.

Depending on the extent to which one thinks a civil disobedient ought to reveal her identity and submit herself to criminal punishment, the private nature of electronic disobedience may seem to detract from her demonstration of fidelity to the law. A Rawlsian approach to civil disobedience would find the private nature of these acts to be problematic on the grounds that the disobedient does not offer herself up to authorities, or because concealed disobedience raises suspicion about the sincerity and good faith of her beliefs. On the other hand, other scholars may be more forgiving of the privacy of the electronic context. Michael Walzer's appreciation for the relationship of the disobedient to her activist community suggests that the obligations of solidarity may have priority over her obligations to the larger society. If the norms of an online community encourage anonymity, then an activist may justifiably obscure her identity for the sake of solidarity; or if a member's reputation and standing in the group is based upon the consistent use of a pseudonym, then the practice of pseudonymity serves to hold activists accountable to their online community.<sup>59</sup>

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<sup>58</sup> Parmy Olson, *We Are Anonymous: Inside the Hacker World of LulzSec, Anonymous, and the Global Cyber Insurgency*, 1st ed. (New York: Little, Brown and Co., 2012).

<sup>59</sup> Michael Walzer, "The Obligation to Disobey," *Ethics* 77, no. 3 (1967): 163–75. See also Olson's discussion of the norms governing the Anonymous collective, or the reputation-value of online monikers used by the LulzSec "hacktivist" group, Olson, *We Are Anonymous*.

In this sense, the online norms of anonymity and pseudonymity may be understood to serve a similar purpose to real identities: the purposeful use of anonymity encourages each individual to represent the views of the collective, and pseudonymity holds each individual accountable to the accrued reputation of her online moniker. To be sure, if the disobedient takes steps to meaningfully hide their real identities from law enforcement, then such justifications for anonymity or pseudonymity would become highly suspect. The point is that the justification of concealing real identity in an online context may be independent of whether or not the state is able to identify and punish protesters.

Having addressed a few significant objections that arise from the definitional approach, it is still necessary to address how a virtual sit-in exemplifies the paradigmatic features of civil disobedience. Brownlee argues that one can gain an idea of what civil disobedience is by pointing to actions that exemplify certain features: “these actions involve (1) conscientiousness and (2) communicative breaches of law for the purpose of (3) demonstrating protest against a law and/or (4) persuading lawmakers to change the law.”<sup>60</sup> Her claim is that it would be absurd to doubt that actions with these features are civil disobedience, for it is by pointing to such actions that we gain an idea of what civil disobedience *is*. Brownlee emphasizes the conscientious and communicative aspects of civil disobedience, but notes that what actions should count as a paradigm case may vary “in the extent to which the key features are

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<sup>60</sup> Kimberley Brownlee, “Features of a Paradigm Case of Civil Disobedience,” *Res Publica* 10, no. 4 (December 1, 2004): 338.

exemplified.”<sup>61</sup> Conscientiousness is an attitude characterized by sincerity and seriousness that constrains the actions and intentions of the disobedient in accordance with her values and beliefs. The mark of conscientiousness, according to Brownlee, also makes an impression on the communicative aspect of civil disobedience. Sincerity and seriousness typically lead a civil disobedient to consider the content and reception of her message, since the success of her disobedience depends upon the manner and mode of her communication. Brownlee further argues that the communicative aspect of civil disobedience is related to the state's communication of disapproval through lawful punishment: “both processes reflect things about the parties engaged in them.”<sup>62</sup> While civil disobedience is understood to express a person's sincere and serious adherence to certain values, lawful punishment of that disobedience also expresses a society's values and condemnation of wrong-doing. Following Andrew Sabl, Brownlee argues that the communicative aspect of both civil disobedience and lawful punishment has a “forward-looking element”; whereas the communicative aspect of civil disobedience aims to bring about change in the law and to prevent development of more unjust laws, the communicative aspect of lawful punishment aims to reform the wrong-doer or prevent more disobedience.<sup>63</sup>

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<sup>61</sup> Brownlee, 339.

<sup>62</sup> Brownlee, 345.

<sup>63</sup> Brownlee, 346; Andrew Sabl, “Looking Forward to Justice: Rawlsian Civil Disobedience and Its Non-Rawlsian Lessons,” *Journal of Political Philosophy* 9, no. 3 (September 1, 2001): 307–30.

Electronic civil disobedience exemplifies these key features. The example of the Electronic Disturbance Theater illustrates how the union of technical computer skills with conscientious political activism led to the translation of hallmark strategies of civil disobedience into an electronic context. As Manion and Goodrum note, many other groups of politically-motivated hackers—or “hacktivists”—commonly speak in the name of a shared “cooperative and liberal ideology” that champions issues of social justice, human rights, political decentralization, freedom of information, and aims to counteract the commercialization of the internet.<sup>64</sup> The “hacker ethic” that often informs the justification of civil disobedience for these groups serves to conscientiously police their own community. For example, many leading hacktivist groups collectively denounced the implication by one member of their community that the injustices in Iraq and China justified virtual violence or “cyberwar.”<sup>65</sup> Sincerity and seriousness often lead the electronic civil disobedient to strategically limit the scope of their actions to non-violent measures. The mere “destruction” of information is considered to be anathema to the hacker’s ethic of creative misuse of existing tools. To delete information, render a computer system permanently inoperable, or interfere with an information infrastructure in a way that threatens to harm people, would

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<sup>64</sup> Mark Manion and Abby Goodrum, “Terrorism or Civil Disobedience: Toward a Hacktivist Ethic,” *SIGCAS Comput. Soc.* 30, no. 2 (June 2000): 14. For more on the ideology that animates much electronic civil disobedience, see Steven Levy, *Hackers: Heroes of the Computer Revolution* (Garden City, N.Y.: Anchor Press/Doubleday, 1984).

<sup>65</sup> “Joint Statement by 2600, The Chaos Computer Club, The Cult of Dead Cow, !Hispahack, L0pht Heavy Industries, Phrack and Pulhas,” cited in Manion and Goodrum, “Terrorism or Civil Disobedience,” 17.

undermine the communicative purpose of a politically-motivated hack. By appropriating websites (“cyberspaces”) or manipulating technology to abuse its intended use, electronic modes of civil disobedience are often specifically chosen to demonstrate protest against laws that govern the acceptable uses of information technology. In this sense, denial-of-service attacks are especially appropriate for challenging the private ownership of cyberspace or the seeming commercialization of the internet. Similarly, the illegal circumvention of digital copyright protections is especially suited to protest the ownership of culture and the legal regime of intellectual property. Thus the recent emergence of electronic civil disobedience as a popular means of dissent is tied to its potential to exemplify the paradigmatic features of civil disobedience: the conscientious motivations of the hacker are related to her strategy of electronic civil disobedience.

#### ***2.4 A Peculiar Feature of Electronic Forms of Civil Disobedience***

As I have argued above, a typical or paradigmatic case of electronic disobedience exemplifies the key features of civil disobedience, and thus we may point to such cases to gain an idea of what civil disobedience *is*. There is nothing fundamentally different about the practice of disobedience in an electronic context that suggests the need to fix or update existing theories of civil disobedience. Acts of electronic disobedience can exemplify the paradigmatic features of civil disobedience

like their traditional “real world” analogues. Nevertheless, what we stand to learn from the typical case of electronic civil disobedience is a better understanding of the practice as it has always been. The paradigmatic case I have discussed provides a lens through which we may sharpen our understanding of civil disobedience in general.

In what follows, I argue that a peculiar feature of disobedience in an electronic context illustrates a problem that is apt to be overlooked by an analysis of civil disobedience in physical spaces. What is peculiar about the electronic context is that its technical design empowers both the state and the disobedient to an extent that would be extraordinary in traditional circumstances. On the one hand, the state may use technical measures to frustrate and even prevent either the act of disobedience or the disturbance that results; and on the other hand, the disobedient may use technical measures to gain an extraordinary power to disobey and cause a disturbance. However, the electronic context for disobedience does not always empower the state and the disobedient equally. The architecture of digital communication technology yields an asymmetry of power between the disobedient and the disobeyed. Sometimes the electronic context empowers those who seek to prevent disobedience, while at other times it empowers those who would commit it.

How does technological design empower the disobedient in an electronic context? Here, the paradigmatic case of a “virtual sit-in” is instructive. Consider three ordinary limits to the power (or capacity) of a physical sit-in to cause a disturbance through the tactics of trespass and blockage. First, the power of the protest is incrementally related to the number of people who participate in the disobedience. The

more people who block an entrance, sit at a lunch-counter, or chain themselves to a tree, the greater the power of the protest to disturb the normal course of affairs. Second, the power of each individual protester is meaningfully limited by their bodily condition. The size and weight of a body, the volume of a voice, as well as characteristics that might bias how communication is received (gender, race, age, disfigurement, disability, etc.), set limits to the power of any single person to disobey or cause a disturbance. Finally, and perhaps most interestingly, there is certain amount of infeasible power to the body which the physical context never nullifies. Laws may be passed to prevent black Americans from entering segregated restaurants, and law enforcement may stand guard by the door, but nothing may ultimately negate the choice to cross the entrance or the will to refuse to stand up when ordered to leave. Despite what one may think of the state's rightful claim to authority, even Hobbes could not deny a man the disobedience still available to him as he is escorted to the gallows.

The electronic context does not limit the disobedient in these ordinary ways. The limitations upon the power of any single person or group of people to disobey and cause a disturbance are different. Due to the design of the electronic context, many physical characteristics that might influence the reception of communication are generally not apparent: gender, race, age, disability and disfigurement are usually unknown by default. Many scholars have commented on both the possible advantages and disadvantages of using the internet as a medium of communication given the

absence of these physical characteristics.<sup>66</sup> The electronic context is advantageous to the civil disobedient who may wish to be heard without reference to her physical attributes.

Most significantly, the technical design of the electronic context changes the limits of an individual's power to disobey. The use of *botnets*—an automated network of computers used to complete repetitive tasks, like a DDoS attack—may be centrally controlled to commit electronic civil disobedience.<sup>67</sup> Although the Electronic Disturbance Theater, and other similar groups, have organized “virtual sit-ins” and created software that coordinates the action of only one computer per participant, such moderation is no longer the norm.<sup>68</sup> In part, the change is due to advances in software and computer technology that make it easier to remotely coordinate a large network of computers. Moreover, the proliferation of malware and the widespread use of personal computers have made botnets larger and more numerous.<sup>69</sup> Thus, the analogy of a “virtual sit-in” is perhaps too far stretched when a DDoS attack is conducted by a single person who centrally controls a large botnet. It would be quite extraordinary if a

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<sup>66</sup> Amy Bruckman, “Gender Swapping on the Internet,” *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace*, 1996, 317–26; Nancy K Baym, *Personal Connections in the Digital Age* (John Wiley & Sons, 2015); Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (New York: Simon & Schuster, 1995); Searle Huh and Dmitri Williams, “Dude Looks like a Lady: Gender Swapping in an Online Game,” in *Online Worlds: Convergence of the Real and the Virtual* (Springer, 2010), 161–74.

<sup>67</sup> Although many botnets involve the illegal control of personal computers by a third-party, legal botnets are also used to set up communication channels like Internet Relay Chat (IRC), or lend computing power to a collective cause. Software tools like the Low Orbit Ion Cannon (LOIC) essentially function as a legal botnet that uses each computer with the consent of its owner to carry-out DDoS attacks; see Molly Sauter, “‘LOIC Will Tear Us Apart’: The Impact of Tool Design and Media Portrayals in the Success of Activist DDOS Attacks,” *American Behavioral Scientist* 57, no. 7 (July 1, 2013): 983–1007.

<sup>68</sup> R. Kelly Garrett, “Protest in an Information Society: A Review of Literature on Social Movements and New ICTs,” *Information, Communication & Society* 9, no. 2 (April 1, 2006): 202–24.

<sup>69</sup> Dan Goodin, “Fueled by Super Botnets, DDoS Attacks Grow Meaner and Ever-More Powerful,” *Ars Technica*, April 17, 2013.



single person were able to block access to an entire building by growing to the size of hundreds of people or by amplifying her voice to the level of a large crowd. We would rightly judge such extraordinary use of power to be uncivil. But due to the limits of power inherent to a physical context, the civility of such extraordinary acts of disobedience is not a question that generally arises. The rarity of this sort of consideration seems to inform the Rawlsian notion of the “problem of fairness” with civil disobedience. Rawls argued that the civility of disobedience may in rare circumstances depend upon whether an activist chooses a tactic that is aimed to moderate the expected disturbance to society.<sup>70</sup> In any case, the point is that the electronic context empowers the disobedient to impose her will with greater effect and thereby produces an asymmetry of power between the disobedient and the disobeyed.

At the same time, technological design also empowers the disobeyed in an electronic context. The usual targets of disobedience, both governments and corporations, may use technical measures to prevent electronic disobedience from occurring. For example, a website server may employ software tools to prevent a DDoS attack from overwhelming its capacity to function normally. When the Electronic Disturbance Theater organized a “virtual sit-in” against the United States, the DDoS attack failed to render the White House website inoperable. The group suggests that the protest failed because the U.S. government servers were designed to identify the

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<sup>70</sup> According to Rawls, the third condition of a justification of a civil disobedience requires that “civil disobedience should be restricted to those cases where the dissenter is willing to affirm that everyone else similarly subjected to the same degree of injustice has the right to protest in a similar way.” The basic idea is that a certain tactic of civil disobedience is not justified if its widespread use would end up seriously undermining social order. Civil disobedients should not choose tactics that are extraordinarily disruptive—at least in comparison to other common tactics, and in consideration of the expected popularity of the protest; Rawls, *A Theory of Justice*, 250–51.

sources of the DDoS attack and cause the web browsers of the “virtual sit-in” participants to crash, thereby stopping the attack. Just as technology has empowered the civil disobedient to cause electronic disturbance, so too has technology also empowered authorities to frustrate and even prevent electronic disobedience.

In this way, political values are inscribed into the architecture of the internet: code becomes law.<sup>71</sup> As Lessig and others have argued, there is an important difference between laws that govern physical spaces and the code that governs virtual spaces. While a law may proscribe a pilot from flying his airplane too low above someone else's property, a pilot may still disobey that law and risk suffering the consequences. But the code that governs a virtual environment (like *Second Life*) might actually prevent a virtual pilot from flying below a certain height. Or to imagine a more provocative example, code might design (or “govern”) a virtual space to prevent an online avatar with a certain color of skin from entering a restaurant—thereby removing the choice to disobey the law in the first place. As Lessig explains, the code can design the virtual space to simply make it impossible to disobey:

There isn't a choice about obeying the rule or not, any more than there's a choice about obeying gravity... So code is law here. That code/law enforces its control directly. But obviously this code (like law) changes. The key is to recognize that this change in the code is (unlike the laws of nature) crafted to reflect the choices and values of the coders.<sup>72</sup>

In this way, technical measures can effectively immunize governments and corporations from electronic civil disobedience. It may simply be impossible to commit

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<sup>71</sup> Lawrence Lessig, *Code*, version 2.0 (New York: Basic Books, 2006).

<sup>72</sup> Lessig, 110.

electronic civil disobedience against states and corporations with enough resources (and reasons) to ensure the frustration or prevention of electronic disobedience in general.

Thus there can be a great disparity of power between the disobedient and the disobeyed in an electronic context—but not always in the same way. Botnets and easier organization facilitated by internet technology sometimes provide an advantage to the disobedient, whose ability to engage in online protest against smaller governments and corporations is often amplified. However, governments and corporations with greater resources may use technical measures to frustrate or even prevent electronic disobedience, immunizing themselves against online protest. At one extreme, the disobedient are disproportionately empowered in the electronic context. It would be right to question the civility of electronic disobedience when one individual has used a botnet to amplify the power of her protest to an extraordinary level. At the other extreme, the disobeyed are disproportionately empowered when technical capabilities prevent electronic disobedience from causing disturbance. Here too, we should question the civility of the design – the code, or architecture of the technology – and whether the state is justified when it frustrates or prevents acts of civil disobedience. It is a problem when incivility is by design, for it confuses our evaluation of the act of civil disobedience itself.

## *2.5 The Problem of Incivility by Design*

The context of electronic civil disobedience is peculiar because it aggravates a problem for a theory of civil disobedience in general. The civility that characterizes the relationship between the disobeyed and the disobedient is built upon an expectation of the other's continuing good faith. But when public spaces are built in ways that frustrate or prevent civil disobedience, the implicit bargain between the disobedient and disobeyed subtly shifts in favor of the state. The design of the circumstances of civil disobedience—the built environment of public life—can diminish the potential of civil disobedience as a mode of political expression, as a means of communication, and even as a possibility of action. When the circumstances of civil disobedience are built in ways that diminish its significance, the state fails to demonstrate the same type of a fidelity that it expects of its disobedient citizens. It is a problem for a theory of civil disobedience when the state breeds incivility into the design of public spaces. The answer to the problem lies in balancing the obligations of the civil disobedient against the obstacles that frustrate or prevent her conscientious and communicative purposes.

Scholars have long been concerned with the concept of civility, and the extent to which it limits the range of acceptable behavior available to the civil disobedient. Yet scholars have generally focused on the obligations of the disobedient to show fidelity to the rule of law, the state, or her society. For instance, the concept of civility is commonly understood to obligate a civil disobedient to accept punishment from the state or to appeal to widely accepted political principles of justice. But these obligations

are just one side of the equation when we assess the relationship of civility between the disobedient and the disobeyed. The context of electronic civil disobedience clarifies how the obligation of civility also obtains to the state. What does it mean for the state to demonstrate civility towards the civil disobedient, including the potentially civil disobedient? This question has understandably received little attention from scholars of civil disobedience because the state's role in shaping the circumstances of civil disobedience is easily taken for granted.

To be sure, scholars have not ignored the question of the proper treatment of civil disobedients by a liberal democratic state; but scholarly discussion is generally focused on the issue of criminal punishment and penalty.<sup>73</sup> Motivated by this lack of a sustained analysis on the state's responsibilities both prior to and during a protest, William Smith's work on the ethics of policing civil disobedience is an important exception. Smith aims to encourage reflection about how police tactics “shape the environment in which civil disobedience takes place.”<sup>74</sup> He draws on social scientific research that has documented the different ways in which “policing philosophies” influence the attitudes and actions of law enforcement officers, and aim to control protests. In the past decade, police tactics aimed at prevention and control have become the dominant response against protest movements.<sup>75</sup> New methods of control have developed to pre-emptively limit the visibility or disturbance of a protest, or even

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<sup>73</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 206–22; Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987), 271–85; David Lefkowitz, “On a Moral Right to Civil Disobedience,” *Ethics* 117, no. 2 (January 1, 2007): 202–33.

<sup>74</sup> William Smith, “Policing Civil Disobedience,” *Political Studies* 60, no. 4 (December 1, 2012): 826.

<sup>75</sup> David Waddington, *Contemporary Issues in Public Disorder: A Comparative and Historical Approach* (Routledge, 2002); Abby Peterson, “Aspects of the ‘New Penology’ in the Police Response to Major Political Protests in the United States, 1999–2000,” in *The Policing of Transnational Protest*, 2016.

prevent the protest from occurring: various crowd control weaponry, free speech zones, pre-emptive arrests, and restrictions on the timing or location of protests.<sup>76</sup> Instead of resorting to tactics of control and prevention out of an exaggerated fear of public disorder, Smith argues that the policing of civil disobedience ought to adopt a strategy of “negotiated accommodation.” The goal of this policing approach, according to Smith, is to constructively engage the civilly disobedient in dialogue in order to reach an agreement about the proper balance between the values of public order and conscientious protest. To this end, when law enforcement officers engage activists in dialogue prior to or during the protest, they should demonstrate “a conscientious and sincere commitment” to the democratic good of accommodating civil disobedience.

Smith makes an important contribution to a theory of civil disobedience by drawing attention to the civility of state actions both prior to and during the act of disobedience. However, the deliberative processes he proposes as an alternative to more heavy-handed police tactics may only serve as a subtler method of control over activist expression. As Iris Marion Young has argued, to the extent that structural inequalities condition deliberative processes, responsible citizens may be justified in continuing to protest outside of forums that are nevertheless formally open and accessible:

Under conditions of structural inequality, normal processes of deliberation often in practice restrict access to agents with greater resources, knowledge, or

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<sup>76</sup> Alex Vitale, “The Command and Control and Miami Models at the 2004 Republican National Convention: New Forms of Policing Protests,” *Mobilization: An International Quarterly* 12, no. 4 (December 1, 2007): 403–15; Clark McPhail, David Schweingruber, and John McCarthy, “Policing Protest in the United States: 1960-1995,” *Policing Protest: The Control of Mass Demonstrations in Western Democracies* 6 (1998): 49–69.

connections to those with greater control over the forum.<sup>77</sup>

Indeed, Smith recognizes the risk that the practice of “negotiated accommodation” could merely serve as a subtler means of police control. Police may abuse their position of authority in negotiations with protesters to gain control over the terms of their agreement with activists. By “holding negotiations on police premises, controlling the agenda of meetings and encouraging organisers of street demonstrations or marches to occupy sites or follow routes favoured by the police” the deliberative processes Smith describes may not, in practice, accept any serious political challenge to the status-quo or disruption of public order.

Although the ideal of a sincere negotiation of the terms of civil disobedience is admirable, even if achieved in practice it risks undermining the authenticity of the activist. Ideally, according to Smith, the product of a negotiation between the police and protesters would amount to “a choreographed spectacle, whereby each side performs a role that enables it to secure its objectives to some degree.”<sup>78</sup> A potentially uncomfortable and even dangerous disruption to the normal course of affairs in society is thereby transformed into symbolic expression. To accommodate civil disobedience in this way would respect its status as a form of expression to be entered into the wider political discourse, but would strip civil disobedience of its role outside of

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<sup>77</sup> Iris Marion Young, “Activist Challenges to Deliberative Democracy,” *Political Theory* 29, no. 5 (October 2001): 670–90. More recently, Robin Celikates draws a similar distinction between “symbolic politics” and “real confrontation.” Robin Celikates, “Democratizing Civil Disobedience,” *Philosophy & Social Criticism* 42, no. 10 (December 1, 2016): 982–94.

<sup>78</sup> Smith, “Policing Civil Disobedience,” 833.

deliberative processes as an activist mode of opposition and disruption.<sup>79</sup>

Nevertheless, Smith at least ideally envisions the police engaging activists in a “genuine dialogue” with a civility that is akin to that expected of the disobedient. Both parties are expected to accommodate the claims of the other—to respect the value of public order and the good of civil disobedience.

Thus the problem of incivility by design is seen in the structure of deliberative processes and the tactics used by police to control a physical site of protest. Recent scholarship has made important contributions to our understanding of the way the design of physical spaces—the built environment of public life—shapes the way we communicate and develop political relationships. Of course, the idea that institutional design shapes political behavior has animated the study of politics since Aristotle; and theorists since Bentham and Foucault have appreciated how architectural design plays a role in the construction of subjective experience. More recently, Susan Bickford has expanded on contemporary theorizing of the public sphere by examining how the concrete architecture of city and residential spaces constitutes “a space of attention orientation.”<sup>80</sup> If cities are typically “the places where strangers regularly encounter one another,” the built environment of city spaces shapes a citizen's perception of people and the problems that are present in public life.

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<sup>79</sup> Young, “Activist Challenges to Deliberative Democracy,” 671.

<sup>80</sup> Susan Bickford, “Constructing Inequality: City Spaces and the Architecture of Citizenship,” *Political Theory* 28, no. 3 (June 2000): 355–76.



Bickford argues that certain contemporary practices of city-building help to construct “hyperrealized notions of home and purified versions of public space” that aim to banish “fear, discomfort, or uncertainty” from everyday life. For example, the fashion of gated communities promotes social uniformity and promises an oasis of safety from the problems that lie outside its walls. Similarly, the architecture of malls and streets are designed to facilitate technological surveillance, and may inadvertently (or purposefully) strengthen biased policing that serves to make outsiders feel unwelcome. Finally, according to Bickford, some “prickly” spaces are designed to frustrate certain types of people or behavior: sprinkler systems, lack of shade, an absence of public toilets or water, and “bum-proof benches” that make it impossible to lie down. By themselves, each of these examples are perhaps innocent details in the design of public space. Together, these practices illustrate how the built environment may intentionally or unintentionally serve to “enact deep forms of segregation” between citizens, both materially and ideologically. City-planning and the design of public spaces shape the limits and possibilities of democratic expression. Yet the moral dilemmas that follow from questions of design are not easily avoided. Design choices are often unavoidable, for even the decision *not* to create a public space may betray a set of political values opposed to civil disobedience and political dissent.

The concept of civility generates an obligation of the state to remain vulnerable to civil disobedience, much like it requires of the disobedient to remain vulnerable to the law. The balance between the obligations of both parties is the essence of civility between the two. This reciprocal relationship is

what sustains the obligations of each toward the other. Thus, if one fails to demonstrate sufficient civility to the other, it is reasonable for the other to act in kind. This dynamic has long been recognized from the perspective of the state and society: the less civil the disobedience, the greater the prerogative of the state to punish accordingly, or the less the public ought to be expected to take seriously the communication of dissent.

The electronic context for civil disobedience clarifies how this relationship of civility is also sustained by the way the state relates to its potentially disobedient citizens. It is more clear in the case of virtual sit-ins, for example, how the built environment of the electronic context may afford the state various ways to frustrate or prevent acts of civil disobedience. When the state uses technological design to obviate more moderate tactics of civil disobedience—like those of the Electronic Disturbance Theater—then tactics that we might otherwise judge to be uncivil, excessive, or extraordinary, are perhaps a measured and justified response to the state's incivility. To rightly assess the civility of a disobedient act, we ought to consider the relationship between the act of disobedience and its built environment. To the extent that the circumstances of civil disobedience are designed to frustrate or prevent acts of disobedience, the obligation of the disobedient to demonstrate civility is relatively diminished. The more the state actively or passively fosters a physical context that prevents or frustrates the practice of civil disobedience, the greater the prerogative of the disobedient to cause disturbance, or the less she ought to

be expected to accept punishment from the state. Both the disobedient and the disobeyed are obligated in like fashion to the *civil* character of their continuing relationship. Although the problem of incivility by design is aggravated in an electronic context, it should also inform our judgment of civil disobedience in physical settings.

By considering the electronic context as a built environment that can shape the power of the disobedient to impose her will and the power of the state to prevent it, we may better understand the nature of the political relationship at the core of civil disobedience. From this perspective, we may notice the many ways in which the physical context has limited the opportunities for the state or the disobedient to exercise an extraordinary power to either disobey or prevent disobedience. The human body places limits on the power of any single person to disturb the normal course of affairs, but also provides a prerogative of resistance that even the most powerful state cannot defeat. Yet the physical world is nonetheless a built environment, too. The architecture and design of our city spaces, hospitals, prisons, and deliberative forums, shape how and with whom we interact. By recognizing the fundamental significance of built environments in shaping or misshaping the civility between the state and the disobedient, we may come to see to what extent the state is obligated to remain vulnerable to disobedience. That is to say, sometimes the state should refrain from designing public spaces or buildings in a way that frustrates or prevents disobedience. Sometimes the state should even

design spaces to the advantage of disobedience, if on balance the difference would improve the opportunity for marginalized dissent to have a more meaningful public stage. These considerations ought to be regarded by theorists as equally important as the demonstration of fidelity to the law that they expect of the disobedient. Both the state and the disobedient have obligations to one another to show their faith in their continuing relationship – a political relationship that is civil because it supposes that neither party should take measures to dominate the disagreement.

## ***2.6 Conclusion***

The misuse of internet technology for the purpose of political dissent should be regarded as a potentially legitimate practice of civil disobedience. However, I have argued that there are good reasons to question the civility of electronic forms of disobedience—reasons which might lead to a different conclusion if not for an appreciation of the problem of incivility by design. The private and anonymous nature of electronic disobedience, and the extraordinary power to disrupt the normal course of affairs, seem inconsistent with the public character of civil disobedience and the expectation that the disobedient demonstrate her continuing fidelity to the law and society. But by considering the ways that the design of the circumstances of electronic disobedience frustrate or prevent its exercise, these incivilities may be, on balance, a

measured response to the efforts of governments and corporations to immunize and guard themselves against online protest.

That is not to say that the accommodation of civil disobedience in liberal democratic societies requires that states build more public spaces, police them less, or pretend an almost masochistic spectatorship of public disorder. Neither should we expect that governments and corporations remove cybersecurity measures like DDoS protection so that their websites might “properly” malfunction on occasion. Rather, I have argued that our judgment of the civility of disobedience ought to take into account the circumstances that limit its significance or frustrate its practice.

## 3. The Politics of the Ethics of Leaking: The Hutchinson Letters and WikiLeaks

### 3.1 Introduction

In a statement published on May 6<sup>th</sup>, 2016, the anonymous source of the Panama Papers explained his motivation for blowing the whistle in terms of a much larger problem than the fraud and duplicity revealed by the leaks.<sup>81</sup> The problem, he wrote, is that “when it takes a whistleblower to sound the alarm, it is cause for even greater concern,” because it signals that the governmental and economic system are not functioning well: there has been a systemic failure to correct those who both uphold the law and yet “desecrate its spirit”—and, over time, this has led to “a complete erosion of ethical standards.” As wrong-doing becomes normalized, it can be difficult even for individuals confronted with documented evidence to “understand enough about their contents to realize the scale of the injustices they describe.” The statement is noteworthy insofar as it suggests an additional, and unusual, justification for the leak. The source of the Panama Papers insists that while it is important to protect whistle-blowers and make use of their leaks, it is also crucial to see them as a

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<sup>81</sup> John Doe, “The Revolution Will Be Digitized.” The statement was provided to the German newspaper *Süddeutsche Zeitung* (SZ) the International Consortium of Investigative Journalists (ICIJ), and can be found [here](https://panamapapers.icij.org/20160506-john-doe-statement.html) (https://panamapapers.icij.org/20160506-john-doe-statement.html). The identity of the leaker(s) remains unknown, but the close resemblance of the more recent “Paradise Papers” leak has refueled speculation. Both the Panama and Paradise Papers were initially provided to journalists at *Süddeutsche Zeitung*, but there has been no comment on the source of the second leak. The law firms of Appleby and Mossack Fonseca both claim, as would be expected, that the documents were stolen through a sophisticated hacking operation by an external actor.

canaries in a coal mine. The leak of a massive trove of confidential information from a Panamanian law firm was meant to expose the system that generates injustices in the first place.

Many commentators have praised the leak of the Panama Papers for its responsible disclosure to an independent group of professional journalists, in contrast to the irresponsible practices of WikiLeaks.<sup>82</sup> In this sense, the Panama Papers signaled a rejection of the new type of leak trafficked by WikiLeaks: the kind preferred by naive idealists, who neglect the burdens of responsible disclosure and disregard common-sense expectations of privacy. Like Edward Snowden's decision to leak to a pair of responsible critics of Western intelligence agencies, the leak of the Panama Papers to the International Consortium of Investigative Journalists was often praised for its deliberate break from the ethic of WikiLeaks. Meanwhile, according to this view, Julian Assange has continued to publish leaks with an indiscretion that it calls into question not only his professional ethics but also his personal character, as well as those of his sources.

These criticisms of WikiLeaks raise important questions, but they cannot be adequately made without considering the political claim behind its ethic of leaking. To that end, this chapter examines the political features of mass leaking which inspired Julian Assange to create WikiLeaks. Traditionally, the disclosure of confidential information has been justified on the basis that the leak is made in the public interest.

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<sup>82</sup> See for example, Jim Rutenberg, "Panama Papers Leak Signals a Shift in Mainstream Journalism," *The New York Times*, April 10, 2016. ([link](#)); Micah White, "The Panama Papers: Leaktivism's Coming of Age," *The Guardian*, April 5, 2016. ([link](#)); Niraj Chokshi, "Snowden and WikiLeaks Clash Over How to Disclose Secrets," *The New York Times*, July 29, 2016. ([link](#))

Recent high-profile revelations like the Panama Papers, the Snowden files, or the Iraq War Logs, can be characterized as “mass leaks” in the sense that they disclosed a mass of documents that does not have a defined focus on particular cases of wrong-doing. Their massive quality is valuable for the insight it provides into the ordinary inner-workings of secretive organizations. Although each of these leaks differs in ways that are ethically significant, they share a political significance that is consistent with the normative revolution that Assange hoped to inaugurate. By developing software for political purposes, Assange designed WikiLeaks as an institution that shapes the possibilities of political participation and challenges our understanding of the acceptable uses of information technology.

WikiLeaks is meant to promote a more just and open society by creating an environment of mass leaking that is inhospitable to authoritarian modes of governance. Its basic idea is to provide a resilient system for anonymous mass document leaking. The system is resilient against attempts to censor the publication of secrets by circumventing various controls over internet communication; and it provides the sources of leaks with a technical assurance of anonymity. When combined with the ease and marginal cost of copying digital information, the resilience and anonymity of WikiLeaks creates a pervasive and genuine opportunity to leak and publish documented secrets. To be sure, this opportunity is not unique to WikiLeaks. The tools responsible for providing people with a greater assurance of anonymity and publication have become diffuse throughout a variety of media outlets and independent actors. Nonetheless, WikiLeaks is the product of an intentionally political turn to the



development of these tools to facilitate leaking. Assange aimed to shape political systems by removing any significant deterrent to leaking—except for the discretionary responsibility of individuals themselves. To invest responsibility in people to make decisions about what belongs in the public domain is not to disown questions about ethical leaking, but rather to justify the publication of leaks based on a democratic ethic. WikiLeaks institutionalizes the values of civic responsibility and democratic accountability by providing citizens with the discretionary authority to access and disclose information for the purpose of participating in public life.

Through an engagement with the political writings of Julian Assange, I argue that the ideas behind WikiLeaks prompt us to reconsider the ethics of leaking in light of the political properties of a set of communication technologies, involving especially the internet. The recent phenomena of mass leaking is instructive about our fidelity to certain democratic values. It is a sort of litmus test for the strength of our commitment to civic responsibility and political participation, as new technologies increasingly afford for their realization. Moreover, restrictions upon the publication of confidential information can corrupt the political attitudes towards public information that are essential to a healthy democratic society. But this sort of political approach to the ethics of leaking is not new: Benjamin Franklin justified his leak of the Hutchinson Letters on similar grounds in the lead-up to the American Revolution. Like Assange, Franklin acted as a middleman who facilitated leaks in service to a more open and responsive government, and a more democratic culture. Although there are (and were) good reasons to question the prudence of their leaks, criticisms of Franklin and Assange have

largely failed to recognize and address the democratic commitments that inform their challenges to political authority.

### ***3.2 Benjamin Franklin and the Hutchinson Letters Affair***

Franklin's decision to send thirteen letters, primarily authored by Thomas Hutchinson and Andrew Oliver, to Thomas Cushing, the speaker of the Massachusetts Assembly, is widely recognized as a pivotal moment in Franklin's life, his political thought, and the immediate events leading up to the American Revolution.<sup>83</sup> For Franklin, the leak led to his dismissal as Deputy Postmaster General for the American colonies, and undermined his standing in British political circles to the point of pushing him to return to Pennsylvania. The Solicitor General's diatribe against Franklin before the Privy Council was the greatest public humiliation of his life, and an extraordinary reversal for the man who was hailed on both sides of the Atlantic as "the first Great Man of Letters" produced by America.<sup>84</sup> For Franklin's political commitments, the reaction of leading members of Parliament to the leak convinced him that reconciliation was impossible, and drove him to embrace revolution for the purpose of political independence (rather than for the purpose of a negotiated reunification).

<sup>83</sup> Douglas Anderson, *The Unfinished Life of Benjamin Franklin* (Baltimore, MD: Johns Hopkins University Press, 2012), 106; Edwin S. (Edwin Scott) Gaustad, *Benjamin Franklin* (New York, NY: Oxford University Press, 2006), 75–83; Bernhard Knollenberg, *Growth of the American Revolution: 1766-1775*. (New York, NY: Free Press, 1975), 111–16; Sheila L. Skemp, *The Making of a Patriot: Benjamin Franklin at the Cockpit* (New York, NY: Oxford University Press, 2013), 151–56; Esmond Wright, *Franklin of Philadelphia* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1986), 228.

<sup>84</sup> As David Hume memorably put it: "America has sent us many good things, Gold, Silver, Sugar, Tobacco, Indigo... But you [Franklin] are the first Philosopher, and indeed the first Great Man of Letters for whom we are beholden."

Newspapers in London accused Franklin of treason, and Lord Dartmouth directed General Gage to look for any evidence to support an indictment in Franklin's correspondence with radical members of the Massachusetts Assembly.<sup>85</sup> Although he was never indicted on that charge, the clause in the U.S. Constitution defining treason as an "overt Act" is arguably attributable to Franklin's experience of what he considered to be partisan accusations.<sup>86</sup> Soon after returning to America, Franklin was involved in revising the Pennsylvania Declaration of Rights, which enshrined the strongest and most democratic language protecting free expression among the constitutions of the American colonies. It specifically provided for the right of "the People" to the freedom of writing and publication, in addition to that of speech. This language of the Pennsylvania Constitution, born from the aftermath of Franklin's leak and Pennsylvanians' support of it, later served as the blueprint for one of the three proposals drafted by Madison that was eventually chosen, revised, and then adopted as the First Amendment.

Contemporary reception of the Hutchinson letters also recognized their great significance. John Adams, who, by late 1773, had already begun to take a more revolutionary stance towards relations with Britain, often referred to the leak as "the miraculous acquisition of the Letters."<sup>87</sup> Even Lord North, who led Britain through most

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<sup>85</sup> Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, MA: Harvard University Press, 1974), 254n50.

<sup>86</sup> It is mentioned in Madison's notes that Franklin broke his usual silence to speak in favor of defining treason as an overt act (Article III, §3): "Doctr Franklin wished this amendment to take place — prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." Max Farrand, *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press, 1911), 348; Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (Cary: Oxford University Press, 1990), 149.

<sup>87</sup> Robert Charles Winthrop, "Remarks at a Meeting of the Massachusetts Historical Society, February 14, 1878," *Proceedings of the Massachusetts Historical Society* 16 (1878): 44.

of the war, reportedly blamed Hutchinson and his letters for bringing about the revolution.<sup>88</sup> Copies of the letters were widely published throughout the colonies and enjoyed a press run of five editions. By some estimates, they became the twelfth most popular pamphlet in colonial America, out of a total of around 1500 pamphlets published between 1750 and 1783—not far short of John Dickinson’s celebrated *Letters from a Farmer in Pennsylvania*.<sup>89</sup> The revelations contained in the letters were seen by many to motivate and substantiate the “Boston Pamphlet,” which made an unprecedented request to remove colonial officers appointed by the Crown (namely, Hutchinson and Oliver). The publication of the letters was also a direct instigating cause of the Boston Tea Party, having lent credence to the conspiratorial suspicions of Bostonians about Governor Hutchinson’s policy to force the *Dartmouth* to unload its tea.<sup>90</sup> And since Parliament responded to the Boston Pamphlet and the Tea Party by passing the Massachusetts Government Act, one of the so-called “Intolerable Acts,” thus setting the stage for armed conflict to break out, it is not that far of a stretch to suggest that the leak of the Hutchinson Letters was a mainspring of the American Revolution.

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<sup>88</sup> Bailyn, *The Ordeal of Thomas Hutchinson*, 5.

<sup>89</sup> Bernard Bailyn, *Pamphlets of the American Revolution, 1750-1776* (Cambridge, MA: Belknap Press of Harvard University, 1965); G. Jack Gravlee and James R. Irvine, eds., *Pamphlets and the American Revolution: Rhetoric, Politics, Literature, and the Popular Press* (Delmar, NY: Scholars’ Facsimiles & Reprints, 1976), viii–ix. However, it is difficult to determine the size of any particular printing, so the quantity of each press run is uncertain. Thomas R. Adams, *American Independence, the Growth of an Idea: A Bibliographical Study of the American Political Pamphlets Printed between 1764 and 1776 Dealing with the Dispute between Great Britain and Her Colonies* (Providence, RI: Belknap University Press, 1965), 69–70.

<sup>90</sup> Bernhard Knollenberg, “Did Samuel Adams Provoke the Boston Tea Party and the Clash at Lexington?,” *American Antiquarian Society*, 1960, 493–503; Bailyn, *The Ordeal of Thomas Hutchinson*, 259–61.

The backlash against the leak in England was harsh, and the sentiments the affair inspired in Americans were long-lasting. When Franklin was brought before the Privy Council to account for his role in the publication of the letters, the tiny room in Whitehall known as the “Cockpit” was over-crowded with many of the most notable public figures and thinkers of the day—including Edmund Burke, Joseph Priestley, and a young Jeremy Bentham. The debate that ensued over the ethical justification of the leak was, in many ways, a reflection of the growing divide between Britain and her increasingly disobedient colonies. Burke notably described the diatribe against Franklin as a “furious philippic” that heightened his concern for the fate of British liberties.<sup>91</sup> Franklin was surprised by the attack on his ethical character, and did not forget the disdain with which he was treated by the British political elite. It left enough of a sore spot that he would later mark the occasion of signing the treaty of alliance with France by intentionally wearing the same “Manchester velvet” coat that he had worn in the Cockpit that day, when a room full of lords had come to see him put in his rightful place.<sup>92</sup> Even after independence was won, Franklin’s momentous leak of the Hutchinson Letters remained a salient moment in the American public imagination. It

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<sup>91</sup> Edmund Burke, “Letter to General Charles Lee, Philadelphia,” February 1, 1774; James Prior, *Memoir of the Life and Character of the Right Hon. Edmund Burke, with Specimens of His Poetry and Letters, and an Estimate of His Genius and Talents, Compared with Those of His Great Contemporaries.*, 3rd ed., vol. 1 (London: H. and E. Sheffield, 1839), 151; Skemp, *The Making of a Patriot*, 29. Burke was often at political odds with Wedderburn, whose invective rhetoric towards the colonies was surely on his mind when he later remarked that “Do not dream that your letters of office, and your instructions, and your suspending clauses, are the things that hold together the great contexture of the mysterious whole. These things do not make your government. Dead instruments, passive tools as they are, it is the spirit of the English communion that gives all their life and efficacy to them... Magnanimity in politics is not seldom the truest wisdom; and a great empire and little minds go ill together.” Edmund Burke, “Speech on Conciliation with America,” March 22, 1775.

<sup>92</sup> Richard Meade Bache, “Franklin’s Ceremonial Coat,” *The Pennsylvania Magazine of History and Biography* 23, no. 4 (1899): 444–52.

became a popular rumor, which persisted for over a century, that Franklin “stuck it” to the British once again by wearing the same velvet coat to the signing of the Treaty of Paris—the idea being that Franklin took the opportunity to remind those haughty British lords of their comeuppance for having treated him, and colonial outrage over the letters in general, so dismissively.<sup>93</sup> When the letters were first published, the democratic revolution in America was still in its adolescence, but Franklin, and Americans more generally, had already begun to perceive political relationships in a new way. And what they saw during the “affair of the letters” did not inspire respect for the established order. The popular myth of Franklin’s “last laugh” suggests that, in the minds of Americans, there was a natural connection between their newly won political independence and the vindication of a leak that Franklin had never bothered to thoroughly justify.

Franklin did, however, provide some justification. He was quite confident that the disclosure of the letters was both excusable given the circumstances and justified in principle. Joseph Priestley, who was perhaps the closest of Franklin’s confidantes during his time as a colonial agent in London, reported that Franklin was defiant, telling Priestley that “he had never before been so sensible of the power of a good conscience,” and that he considered the leak to be “one of the best actions of his life.”<sup>94</sup> But Franklin was wary of wading into public debates to defend himself against specious criticisms. He had learned from experience that it is best to ignore unjustified

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<sup>93</sup> Winthrop, “Remarks at a Meeting of the Massachusetts Historical Society, February 14, 1878,” 50.

<sup>94</sup> Joseph Priestley, “Letter to the Editor of the Monthly Magazine,” November 10, 1782; Joseph Priestley, “Letter to the Editor of the Monthly Magazine,” November 10, 1802; Benjamin Franklin, *Memoirs of the Life and Writings of Benjamin Franklin*, ed. William Temple Franklin, vol. 1 (London: A.J. Valpy, 1818), 184–86.

censures, since “Spots of Dirt thrown upon my Character” will “all rub off when they are dry.”<sup>95</sup> He thus decided to refrain from responding to his critics.

Of course, not everyone considered the justification of the leak to be so clear. Notwithstanding Franklin’s self-confidence, many of his friends encouraged him to defend his conduct.<sup>96</sup> So he began to do just that. Using a common rhetorical tactic of the day, Franklin sent in pseudonymous letters to the editor that attempted to defend the leak, he published extracts of his private correspondence to reassure his countrymen back in America of his intentions, and he composed a longer “vindication” of his actions. But he never finished the latter composition. Fighting broke out at Lexington and Concord within a few days of his return to America, and more weighty matters quickly demanded his time and attention. He nevertheless planned to include a completed version in his autobiography; but by the time of his death, he had only just begun to write about the period of his life spent in London.<sup>97</sup>

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<sup>95</sup> Franklin’s most notable critics included Solicitor General Alexander Wedderburn, in England, and Dr. Josiah Tucker, in America. Besides Wedderburn’s speech against Franklin at the Cockpit, Tucker had been a long-standing critic of Franklin’s stubborn “method” of pursuing American interests in London; Josiah Tucker, “To Benjamin Franklin from Josiah Tucker, 24 February 1774,” in *The Papers of Benjamin Franklin: January 1, 1774, through March 22, 1775*, ed. William B. Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 123; Benjamin Franklin, “From Benjamin Franklin to Josiah Tucker, 26 February 1774,” in *The Papers of Benjamin Franklin: January 1, 1774, through March 22, 1775*, ed. William B. Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 125–28. The maxim also appears in Franklin’s *Poor Richard’s Almanac* (1757): “Act uprightly, and despise Calumny; Dirt may stick to / a Mud Wall, but not to polish’d Marble.”

<sup>96</sup> David Hume, a friend of Franklin’s, wrote to Adam Smith that he could not believe Franklin was guilty of the sort of treachery Wedderburn claimed, but wondered whether Franklin’s political passions had got the better of his judgment. John Y. T. Greig, ed., *The Letters of David Hume*, vol. 2 (Oxford, 1932), 286–87. Hume also wrote to William Strahan and Sir John Pringle on the matter, inquiring about Franklin’s motivations, to which Pringle responded with a qualified defense of the leak. John H. Burton, ed., *Letters of Eminent Persons Addressed to David Hume* (Edinburgh and London, 1849), 270–71.

<sup>97</sup>As the war continued, Jan Ingenhousz persisted in asking Franklin to publish his defense of the leak, to which Franklin explained (in 1777) that he no longer felt compelled to vindicate himself: “The Injuries, too, that my Country has suffer’d, have absorb’d private Resentments.” Benjamin Franklin, “Tract Relative to the Affair of Hutchinson’s Letters, [1774],” in *The Papers of Benjamin Franklin: January 1, 1774, through March 22, 1775*, ed. William B. Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 414–35.

### 3.2.1 The Letters in Franklin's Political Thought

Given the historical significance of the Hutchinson Letters, and their bearing on Franklin's life, one would need to be forgiven for supposing that political theorists might have something to say about the matter. And while historians have come down on either side of the debate—either sympathetic to Franklin's case or that of his critics<sup>98</sup>—their accounts of the affair tend to judge Franklin with an emphasis on the particular circumstances of his case, leaving aside a consideration of the political principles that he believed would justify his leak and others like it. Presumably, that is where political theorists might have something to say. But in major studies of Franklin's political thought, the whole affair is almost completely ignored.

Any mention of the leak is brushed aside as a rare misstep or miscalculation on Franklin's part. Lorraine Pangle skips the affair in one breath, simply noting that Franklin returned to Philadelphia from London “within weeks of his last fruitless

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<sup>98</sup> Historians sympathetic to Franklin include, John Chester Miller, *Sam Adams: Pioneer in Propaganda* (Stanford, CA: Stanford University Press, 1960); G. B. Warden, *Boston, 1689-1776* (Boston, MA: Little, Brown, 1970); Ellen Elizabeth Brennan, *Plural Office-Holding in Massachusetts, 1760-1780, Its Relation to the "Separation" of Departments of Government* (Chapel Hill, NC: University of North Carolina Press, 1945). Whereas a variety of other authors consider Hutchinson to be unfairly maligned, or the published letters to be misrepresentative of the views he expressed either publicly or in the rest of his confidential correspondence, Bailyn, *The Ordeal of Thomas Hutchinson*; John Langdon Sibley, “Andrew Oliver,” in *Sibley's Harvard Graduates, in the Classes of 1722-1725*, ed. Clifford K. Shipton, vol. 7 (Boston, MA: Harvard University Press, 1945), 392–411; John Langdon Sibley, “Thomas Hutchinson,” in *Sibley's Harvard Graduates, in the Classes of 1726-1730*, ed. Clifford K. Shipton, vol. 8 (Boston, MA: Harvard University Press, 1945), 166–85; James K. Hosmer, *The Life of Thomas Hutchinson, Royal Governor of the Province of Massachusetts Bay* (Boston: Houghton, Mifflin & Co., 1896); Carol Berkin, *Jonathan Sewall: Odyssey of an American Loyalist* (New York, NY: Columbia University Press, 1974).



attempt at reconciliation.”<sup>99</sup> Kevin Slack makes no mention of the leak, despite emphasizing that Franklin had come to the conclusion during his time as colonial agent in London that, as Franklin put it, “something must be try’d and some Risque run, rather than sit down quietly.”<sup>100</sup> Jerry Weinberger almost entirely ignores the leak, dismissing it as an ill-considered scheme, formulated with the “harebrained intention” to deflect blame from Parliament, which “served only to exacerbate the imperial crisis.”<sup>101</sup> Even the authoritative anthology of Franklin’s political thought includes only two paragraphs of the unfinished tract—and the chosen excerpts represent merely the introductory remarks of the piece, which do not speak to his justification of the leak itself. That might seem to be an innocuous editorial decision if it not for the summary of the piece, which questionably portrays the whole affair as having “caught” Franklin in a violation of trust—a point which Franklin specifically denies in the remainder of the essay.<sup>102</sup>

Why so much neglect of Franklin’s role as America’s first great leaker? Many commentators seem to think, not unreasonably, that Franklin’s decision to leak the

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<sup>99</sup> Lorraine Smith Pangle, *The Political Philosophy of Benjamin Franklin* (Baltimore, MD: Johns Hopkins University Press, 2007), 155. Pangle elsewhere seems to imply, by citation of the unfinished tract, that Franklin’s position with regard to the petition to remove Hutchinson and Oliver from office was merely that it was what colonials *perceived* to be fair (p. 146).

<sup>100</sup> Kevin Slack, *Benjamin Franklin, Natural Right, and the Art of Virtue* (Rochester, NY: University of Rochester Press, 2017), 203. The words are from a letter of Franklin’s, quoted by Slack.

<sup>101</sup> Jerry Weinberger, *Benjamin Franklin Unmasked: On the Unity of His Moral, Religious, and Political Thought* (Lawrence: University Press of Kansas, 2005), 11–12, 221.

<sup>102</sup> The unfinished tract on the Hutchinson Letters is comparable in length to other short essays published by Franklin in the London press (and included in the anthology). Ralph Ketcham’s editorial introduction to the piece also describes its purpose as being to state “the principles upon which [Franklin] based his agency.” That is curious way to phrase it, since those principles are intended to defend his decision to leak to the letters and are not framed in a way that is exclusive to his role as an agent of colonial assemblies. Benjamin Franklin, *The Political Thought of Benjamin Franklin*, ed. Ralph Ketcham (Indianapolis: Hackett Publishing Company, 2003), 275–77.

letters is inconsistent with his famously pragmatic approach to politics. The dramatic and unintended consequences of the leak would thus suggest that he exercised unusually poor judgment in the matter. And since those who study Franklin's political thought are often drawn to his pragmatism, the leak is perhaps also inconsistent with the sensibilities of the scholars who study him. But to dismiss the leak on account of either his pragmatic judgment, or our own, would be wrong on both accounts. Franklin not only argued that the leak had the effect that he originally intended, but he also provided principled reasons that would justify his leak and others like it. To overlook this would be a shame because the reasons he provides are as provocative today as they were then. Franklin and his allies may have won the revolution, and the Hutchinson letters may have been the miracle that got them going, but the principles that justified the leak have continued to fight for recognition.

That is not to depreciate the many scholarly contributions to our understanding of Franklin's political thought. In the past few decades, there has been a growing interest in Franklin among political theorists. These contributions have pushed beyond the simple reading of Franklin as the embodiment of American materialism and utilitarianism. This latter view of Franklin, which often critically associates the virtues outlined in his *Autobiography* with the values of capitalism and the "American Dream," has been popular among intellectual historians and literary scholars who largely dismiss the value of Franklin's writings as little more than the product of their time.<sup>103</sup> For example, Max Weber understood Franklin to be unintentionally articulating

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<sup>103</sup> Jerry Weinberger, "Benjamin Franklin and Political Theory," in *Companion to Benjamin Franklin*, ed. David Waldstreicher, vol. 54, Wiley Blackwell Companions to American History (Wiley-Blackwell,

a secularized version of the Protestant Ethic; Alasdair MacIntyre unfavorably contrasted Franklin's utilitarian approach to the virtues with the internal *telos* of Aristotelian ethics; and D. H. Lawrence famously criticized Franklin as a "dry, moral, utilitarian little democrat" whose industrious American-spirit made for an impoverished soul and a nation of troglodytes.<sup>104</sup>

More recent scholarship has investigated the depth and coherence of Franklin's political thought and philosophy—a task made difficult by the fact that he never wrote a stand-alone treatise on politics. Although he wrote more than any of the other Founders, Franklin's political writings almost always took the form of a short pamphlet or pseudonymous letter, usually addressed to a discrete issue of public concern, and were often tied to his work as a paid agent for colonial legislatures. But it is now widely appreciated that Franklin was more careful and thoughtful with his writing than early commentators gave him credit. His written works, especially the *Autobiography*, give the sense that he wrote with calculated restraint on contentious political issues of the time, and with regard to deeper philosophical and religious dilemmas.<sup>105</sup> Despite these difficulties, scholars have developed a more or less cohesive portrait of Franklin as a political egalitarian, a somewhat-skeptical Enlightenment rationalist, and, eventually, a committed democrat.

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2011), 430–62; Gordon S. Wood, *The Americanization of Benjamin Franklin* (New York: Penguin Press, 2004), 4–8.

<sup>104</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (London: Bloomsbury, 2013), 216–17; Max Weber and Anthony Giddons, eds., *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London: Routledge, 2001), 18–19, 61–70; D. H. Lawrence, *Studies in Classic American Literature*, ed. Ezra Greenspan, Lindeth Vasey, and John Worthen (Cambridge, MA: Cambridge University Press, 2003), 30.

<sup>105</sup> Wood, *The Americanization of Benjamin Franklin*, 13–16; Alfred Owen Aldridge, *Benjamin Franklin and Nature's God*, (Durham, NC: Duke University Press, 1967); Weinberger, *Benjamin Franklin Unmasked*.

The most recent work by political theorists has generally aimed to situate Franklin's political thought within the Enlightenment's turn to modernity, and to describe the model of American democratic citizenship that he develops in his *Autobiography* and other political writings. Ralph Lerner and Steven Forde focus on the political implications of Franklin's approach to education. Lerner finds Franklin's politics to be consistent with the views of other founders, like John Adams, who understood the American experiment to require a revolution in thought among everyday people as much as among their political leaders. Franklin believed that the American people must be guided, but ultimately trusted, to exercise the good judgment that is essential for republican government.<sup>106</sup> In this regard, Lerner and Forde both aim to explain the sort of political leadership that would be consistent with Franklin's democratic politics and egalitarian values: the use of honest rhetoric rather than dissembling strategy, a high-minded motivation to public service, and an accommodating attitude towards political disagreement.<sup>107</sup>

Another set of scholars are concerned with making sense of the seeming disconnect between the modern and classical aspects of Franklin's politics. Scholars have sometimes understood him to be either fully modern (embracing a rationalist vision of progress and mastery over nature), or a thinker who is sensitive to classical republican concerns about civic virtue. Jerry Weinberger, Lorraine Pangle, and Alan

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<sup>106</sup> Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* (Ithaca, NY: Cornell University Press, 1987), 36–38, 54–59.

<sup>107</sup> Steven Forde, "Benjamin Franklin's *Autobiography* and the Education of America," *American Political Science Review* 86, no. 2 (1992): 357–68; Steven Forde, "Benjamin Franklin: A Model American and an American Model," in *History of American Political Thought*, ed. D. Frost and J. Kikkenga (Lexington, KY, 2003), 80–92; Ralph Lerner, "Dr. Janus," in *Reappraising Benjamin Franklin: A Bicentennial Perspective*, ed. J.A. Leo Lemay (Newark, DE, 1993), 415–24.

Houston each place Franklin somewhere in between the liberal or republican politics that would be more easily ascribed to Madison and Jefferson.<sup>108</sup> Weinberger argues that although Franklin rejected the doctrine of natural rights, his experiences confronting a dysfunctional and self-interested political elite in both Pennsylvania and England gave him a strong and visceral egalitarian turn of mind.<sup>109</sup> Pangle likewise sees Franklin as a defender of English liberties, but one who is reluctant to use the language of rights. As a self-made man, Franklin was offended by the political privileges claimed by what he derisively called “hereditary legislators.” His prudence made him a natural mediator of disagreement between the colonists and Parliament, but his democratic sentiments eventually came into collision with his growing sense of a need for a responsive government.<sup>110</sup> In sum, recent work in political theory has developed a picture of Franklin’s political thought that juxtaposes his modern, pragmatic, and rational political judgments to the classical republican, egalitarian, and civic values that formed his more principled commitments.

The foregoing discussion has aimed to establish that Franklin’s leak of the Hutchinson letters was both historically significant and ethically contentious, but that Franklin’s justification for leaking has been given surprisingly little weight in our understanding of his political thought. In what follows, I hope to remedy this oversight by considering the arguments Franklin made in various letters to the press, and in the unfinished draft of the “vindication” he planned to publish. The justifications he

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<sup>108</sup> Alan Houston, *Benjamin Franklin and the Politics of Improvement* (New Haven, CT: Yale University Press, 2008), 219–21.

<sup>109</sup> The debate over the doctrine of natural rights was a central question to the dispute between the American colonists and Great Britain; Weinberger, *Benjamin Franklin Unmasked*, 231–34, 239–42.

<sup>110</sup> Pangle, *The Political Philosophy of Benjamin Franklin*, 134–35, 141–42, 145–47, 153.

provides are of two types: those related to the particular circumstances of the case, and the principled reasons that would justify his leak and others like it. I will argue that this latter type, of a principled nature, is especially worth consideration because of its democratic implications. It is a neglected consideration that nonetheless continues to frame debates about the ethics of leaking today.

What principles informed Franklin's ethic of leaking? In short, the core of Franklin's argument was simply that correspondence on public affairs between men of public influence can have no claim against disclosure by those whose interest is concerned—that is to say, by members of the public. He suggests that it would be a perversion of representative government for it to give encouragement to faction and deception by protecting “the seal of secrecy.” In other words, Franklin justifies his leak and others like it by appealing to the idea that subjects of a representative government should be able to disclose confidential information when it is done in the public interest.

What might we learn from revisiting the so-called “affair of the letters” in eighteenth-century America? The episode reveals more than just an historical dispute or one man's views about the ethics of leaking. Contemporary reception of the letters, and Franklin's defense of his conduct, speaks to the changing patterns by which we conceptualize the relationship of the public to its government. Hutchinson and Franklin were key figures on opposite sides of an eighteenth century debate over the nature and extent of political authority. Not only were the revelations contained in the letters relevant to this debate, but their disclosure, publication, and reception were themselves

a manifestation of the ideological shift in American political thought towards a more responsive and participatory form of government. It is no coincidence that the genesis of the American political experiment led its progenitors to call into question who should have the authority to decide what the public has the right to know. To understand the relationship between Franklin's leak and American democracy it is thus necessary to say more about the historical context of the letters.

### 3.2.2 The Historical Context of the Letters

The story of the Hutchinson Letters Affair could find its place within various historical narratives of the American Revolution, but for the present purpose it is best contextualized as a flash point in the ideological conflict between Great Britain and her American colonies.<sup>111</sup> As Bernard Bailyn and other historians have persuasively shown, at the heart of this battle of ideas was the question of the proper extent of Parliament's authority over the colonies. Disagreement over this question pushed American colonists to develop a radically transformed conception of political representation,

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<sup>111</sup> The most comprehensive account of the Hutchinson Letters Affair is that provided by Bailyn, *The Ordeal of Thomas Hutchinson*, 222–73. However, the ideological interpretation of the American Revolution developed by Bailyn and others, sometimes referred to as “Neo-Whig” interpretation, is not the only register through which one might take account of the Hutchinson Letters Affair. The episode also lends itself to better understanding the social history of loyalist opposition, Thomas Hutchinson being the most prominent (and reviled) of them; Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge: Belknap Press, 2014). It was a salient and memorable event in the minds of everyday political observers too, as the furious newspaper annotations of the shopkeeper Harbottle Dorr amply demonstrate. “The Annotated Newspapers of Harbottle Dorr, Jr.” *The Massachusetts Historical Society*, ([link](#)) The grievances against Hutchinson can also be read as stemming from class conflict, given Hutchinson's high status and influence in the commercial and political life of Massachusetts. It was a widespread suspicion, John Adams among the believers, that Hutchinson and his ilk were conspiring with Parliament to establish a formal peerage in America.

constitutionalism, and sovereign authority. As an agent of the Massachusetts Assembly in London, Franklin was a central figure in these debates—working to negotiate with the radical colonists and the hard-line opposition in Parliament. His disclosure of the Hutchinson Letters was a response to the impasse he confronted in mediating between them. But the debate he instigated over the justification of the leak would come to reflect the central challenge made by the ideological movement in America to the traditional conception of political authority in English political thought: that there does not need to be a final source of political authority in a representative government. The people can and should retain some say over the government that represents them.

Of the three ideological disagreements characterizing the debates leading up to the American Revolution, the debate over representation and taxation is the most well-known. Parliament defended its taxation of the colonists by virtue of their “virtual representation” within the legislative body. The colonists were thought to be represented regardless of whether they had chosen their representatives. Of course many American colonists did not see things in this way. The early history of British North America had by this point provided a different sort of political experience. It had established among the colonists a more traditional view of representation as something more like attorneyship, in which representatives were thought to be strictly accountable for the use of power that is delegated to them. Although this view was consistent with earlier periods of English politics, the American colonists pushed its logic to more radical conclusions—eventually arguing that a representative assembly should be a



portrait of the people at large, and should change to always reflect its size, interest, and variety. In this regard, virtual representation was not plausible when the interest and makeup of Parliament were so different from that of the colonists. Colonial pamphleteers gradually transformed the concept of representation by implying that consent was continuous, that the people were no longer, as Bailyn explains, “merely an ultimate check on government, they *were* in some sense the government... it was *by* the people as well as *for* the people; it gained its authority from their continuous consent.”<sup>112</sup>

The radical new way in which colonists began to speak of political representation gave rise to a related debate about the concept of constitutionalism. Up until the 1760s, the idea of a British constitution was almost uniformly understood as a general system rather than a set of principles. Authors referred to a “constitution” as some general combination laws, customs, and institutions which provided for a balance of power between different members of the political community. In this sense, Parliament was itself a part of the British constitution rather than a creation of it, and so its legislative authority was not thought to be limited by any higher source of authority. But in response to a series of political crises over taxes, culminating with the Stamp Act in 1765, colonial pamphleteers tried to mark out a distinction between a law-making institution like Parliament and the more fundamental rules which govern (or should govern) the boundaries of power in the British political system. These boundaries were at first explained by reference to the liberties inherited by all Englishmen: colonists

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<sup>112</sup> Bailyn, *Pamphlets of the American Revolution, 1750-1776*, 98.

appealed to tradition and common law in order to set the boundaries of legitimate political authority. But these authors faced mounting criticisms which called into question the historical accuracy and logical consistency of their arguments. They were eventually pushed to defend their claims by abstracting the idea of British constitutional liberties to the level of universal natural right.

Although these shifts in the meaning of representation and constitutionalism were significant in the development of American political thought, they were still ancillary to the debate over the nature and location of sovereign authority. “In the final analysis,” Bailyn notes, “it was over this issue that the Revolution was fought.”<sup>113</sup> It was also over this issue that the disclosure of the Hutchinson Letters produced such a scandal in Massachusetts and throughout the American colonies. The dispute over the concept of sovereignty began as a question of where ultimate power in the state resides, but became a debate about whether that authority is divisible. The predominant view of sovereignty at the time, and throughout the British Empire, was that in every political society there must be a single, unqualified, and final authority residing in some institution or another. The traditional location of such absolute and arbitrary power was the Crown.<sup>114</sup> But with the overthrow of James II during the Glorious Revolution of 1688, a rival conception of Parliamentary sovereignty had triumphed. The Whig members of Parliament who conspired against the King justified their action through a

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<sup>113</sup> Bailyn, 115; Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1968), 200–202, 216–17; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1969), 347–49.

<sup>114</sup> The arbitrariness of absolute power had become an accepted characteristic of sovereignty only since the mid-seventeenth century, when theorists including Hobbes and Filmer stripped any moral restraints from the idea of sovereignty.

theory of parliamentary supremacy—a theory which lodged supreme legislative authority in Parliament instead of the King.<sup>115</sup> This view would come to have repercussions on the administration of British colonies. James II, and monarchs before him, had resisted efforts by Parliament to exercise greater authority over colonial affairs. But by the time of the Stamp Act crisis in 1765, when colonial pamphleteers began to think about whether there were any limits to the sovereign authority of Parliament, the Whig conception of parliamentary supremacy had long since become orthodoxy. Any suggestion that Parliament overstepped its authority by imposing taxes on the American colonies was viewed as subversive of government: either Parliament had complete legislative authority over its colonies, or America was its own kingdom. Colonial authors, seeking to explain their intuition that there should be limits to what Parliament could do in America, tried to draw a conceptual distinction between valid and invalid exercises of legislative power but without denying the supremacy of Parliament. The difficulty of maintaining such distinctions eventually led them take the

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<sup>115</sup> The idea that sovereign authority resided in Parliament as opposed to the King appealed to a particular narrative of English history. According to this view, the “ancient constitution” had established the English as a free people. Despite the fact that these liberties had been more or less respected by English monarchs over time, it was argued that there was nevertheless an uninterrupted claim to these ancient liberties. James II could therefore be deposed because he had assumed a power to dispense or suspend laws, a power which rightfully belonged to Parliament; J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, England: Cambridge University Press, 1957). Colonial pamphleteers and revolutionary leaders understood their cause to be consistent with this Whig interpretation of English history, seeing the Glorious Revolution as having reestablished the ideal constitution only to be subsequently corrupted by eighteenth century politics. Thus colonial pamphleteers characteristically saw their claims to be consistent with the true character of the ancient constitution; H. Trevor Colbourn, “Thomas Jefferson’s Use of the Past,” *The William and Mary Quarterly* 15, no. 1 (1958): 56–70; H. Trevor Colbourn, “John Dickinson, Historical Revolutionary,” *The Pennsylvania Magazine of History and Biography* 83, no. 3 (1959): 271–92; Bailyn, *Pamphlets of the American Revolution, 1750-1776*, 53.

position that would become the basis for federalism: that sovereign authority is divisible, and the separation of powers guards against the abuse of it.<sup>116</sup>

It was on this issue that Franklin and Hutchinson became prominent voices on opposite sides of the debate. The positions they took in these debates formed the basis for critics to later ascribe ideological motivation to either Hutchinson's correspondence with ministry officials or Franklin's decision to leak the letters.

By 1765, when Parliament passed the Stamp Act, Franklin had recently returned to London to serve as an agent for the Pennsylvania Assembly and to continue his previous efforts to oppose the interests of the proprietary government controlled by the heirs of William Penn. But with uproar in the colonies over the new tax, Parliament looked to Franklin as someone uniquely qualified to explain the reasons for the unrest. Testifying for three-hours before the House of Commons, Franklin provided a defense of American grievances that made him famous throughout the colonies.<sup>117</sup> Most significantly, he defended the distinction between "internal" and "external" taxation—an aspect of the debate that had come to represent colonial resistance to parliamentary supremacy.<sup>118</sup>

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<sup>116</sup> Andrew C. McLaughlin, "The Background of American Federalism," *American Political Science Review* 12, no. 2 (May 1918): 215–40; Bailyn, *Pamphlets of the American Revolution, 1750-1776*, 123–38.

<sup>117</sup> Franklin's defense of colonial grievances before the Privy Council also saved him from losing the support of many colonial leaders, who had begun to mistrust his commitment to American interests after the passage of the Stamp Act. Franklin had taken the opportunity to get a family member appointed as a customs official for the new tax.

<sup>118</sup> An external tax, Franklin explained, was a duty on imported goods. An internal tax, like that imposed on printed materials by requiring officially "stamped" paper, was a duty on the people. The difference, Franklin argued, was "very great" because unlike a tax on commodities which people may simply decline to purchase, "an internal tax is forced from the people without their consent, if not laid by their own representatives."

The distinction was not necessarily coherent, but it brought together the latent ideological issues underlying colonial resistance. A right to lay internal taxes on the colonies, Franklin argued, “was never supposed to be in Parliament, as we are not represented there.” But to most Whig politicians in England, the reason for rejecting internal taxes appeared to undermine the sovereignty of Parliament. If the consent of the people gave constitutional legitimacy to a legislative body, and Parliament did not represent the interests of the colonists, then any legislation could be called into question. And if the power of Parliament were limited in one respect then it could be limited in others. The colonists might apply the same reasoning to external taxes. Confronted with this implication to his argument, Franklin responded that the colonists “at present do not reason so,” but warned that “in time they may possibly be convinced by these arguments.”<sup>119</sup> Parliament did not heed the advice.<sup>120</sup> The crisis was eventually resolved the following year with the repeal of the Stamp Act, but the ideological differences were not. Confronted by a stubborn and organized colonial resistance, the stamp tax had failed. Yet Parliament nonetheless insisted on the conceptual justification of it. Passed in conjunction with the repeal of the tax, the Declaratory Act of 1766 reasserted that Parliament “had, hath, and of right ought to have, full power

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<sup>119</sup> Bailyn, *Pamphlets of the American Revolution, 1750-1776*, 127; Edmund S. Morgan & Helen M. Morgan; with a new preface by Edmund S. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill, NC: University of North Carolina Press, 1953).

<sup>120</sup> Almost a decade later, Burke was still delivering what was essentially the same message, warning other members of Parliament that “if... you sophisticate and poison the very source of government, by urging subtle deductions, and consequences odious to those you govern, from the unlimited and illimitable nature of supreme sovereignty, you will teach them by these means to call that sovereignty itself in question... If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face. No-body will be argued into slavery.” Edmund Burke, “On American Taxation,” in *Select Works of Edmund Burke*, A New Imprint of the Payne Edition. Foreword and Biographical Note by Francis Canavan, vol. 1 (Indianapolis: Liberty Fund, 1999), 215.

and authority to make laws and statutes of sufficient force and vitality to bind the colonies and people of America... in all cases whatsoever.”

This assertion of parliamentary supremacy was at least nominally true, and so the position that Hutchinson would take in the debate was quite reasonable, and consistent with respectable British opinion of the mid-eighteenth century. Both the King and Parliament had long exercised control over some colonial affairs. High offices were always appointed by the crown, and actions by colonial legislatures had to be either legalized or annulled by the King. Parliament had set rules for trade and navigation, and was responsible for the creation of institutions like the postal system. But the involvement of Parliament in colonial affairs was incidental at best, and did not exclude the exercise of legislative power by lesser authorities. Colonial legislatures had customarily exercised the power to tax anything other than overseas trade and acted as an authority over much of the substance of everyday life. The affairs of the colonies were thus anomalous within the British Empire insofar as political authority was widely decentralized but still governed by a presumably absolute and indivisible sovereign body.

By the end of the Seven Years' War, in 1763, Parliament began to take a different approach to the colonies in North America. England had spent significant resources defeating French forces in North America and looked to the rising wealth of the American colonies for reimbursement. The new policies met with resistance not only because of the burdens they placed on colonists, but because they challenged the settled way of life and were contrary to a century of political experience throughout the

colonies. The debate over the nature and location of sovereign authority was, for the colonists, an effort “to express in logical form, to state in the language of constitutional theory, the truth of the world they knew.”<sup>121</sup> But there was no conceptual framework or vocabulary that readily described this reality or that could form a coherent protest against the existing political order. The arguments of the colonists were thus often half-formed, as they searched for the ideas that could make sense of their political intuitions and a way to defend what they had grown to expect.

So when Hutchinson waded into the politics of resistance during the Stamp Act Crisis, aiming to bring the people back to just notions of government and correct their understanding of the British constitutional system, he was expounding an argument that took for granted ordinary assumptions about the nature of political authority that had long since marked the boundaries of ideological disagreement. During the Stamp Act crisis he worked to moderate the way in which the Massachusetts legislature framed its petition to Parliament, which asked for relief from the “internal” taxation imposed upon them. While presiding over the drafting of the petition in the Council, Hutchinson argued tirelessly against those who wanted to confront Parliament by turning the debate into a matter of principle. Wary of provoking Parliament with radical arguments, Hutchinson advocated for a more prudential approach. He pushed through a version of the petition deferent to the idea of parliamentary supremacy—framing the issue as a matter of favor, rather than a claim of right. But when his strategy ultimately

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<sup>121</sup> Bailyn, *Pamphlets of the American Revolution, 1750-1776*, 120.

failed to stop the Stamp Act, Hutchinson came under suspicion for the influential role he had played in the drafting of the petition. To the embarrassment of many radical leaders in Boston, other colonies, like New York, had delivered a far more principled and assertive petition. In hindsight, it looked to some as if the Stamp Act might have been stopped if all the colonies had shown a firm commitment to principle and asserted what they understood to be their rights.

Some began to suspect that all of Hutchinson's efforts must have been secretly designed to encourage the Stamp Act rather than defeat it. His professed opposition to the Stamp Act was, according to his critics, merely a public cover for his secret support of it. Such rumors seemed to be all but confirmed once it was announced that the new stamp master would be Hutchinson's brother-in-law and protégé, Andrew Oliver. There were even claims that direct evidence of Hutchinson's treachery existed: it was said that letters he had secretly written to London had been confidentially returned and were quietly circulating in Boston.<sup>122</sup> After several months of riots and protests in response to the stamp tax, both men came under threat of mob violence. The Sons of Liberty hanged Oliver in effigy from the Liberty Tree, and demanded that he publicly resign his commission as stamp master; and after a mob ransacked Oliver's residence it moved to confront Hutchinson in front of his mansion, demanding that he "declare to

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<sup>122</sup> The rumor that there was a leak of Hutchinson's private correspondence with officials in London would have been scandalous, but not surprising. Both sides attempted to intercept letters and use them to their advantage, whether by publication or not. Hutchinson's rise to the level of governor was instigated by a leak similar to the one that eventually led to his own disgrace. Bailyn, *The Ideological Origins of the American Revolution*, 62–65; Francis G. Walett, "Governor Bernard's Undoing: An Earlier Hutchinson Letters Affair," *New England Quarterly* 38, no. 2 (June 1, 1965): 217–226; Colin Nicolson, "Governor Francis Bernard, the Massachusetts Friends of Government, and the Advent of the Revolution," *Proceedings of the Massachusetts Historical Society* 103 (1991): 24–113.



them I had never wrote to England in favor of the Stamp Act.” Hutchinson was in fact innocent of the accusation. But he nevertheless refused to deny it as a matter of principle. He thought he should not be obliged “to give an answer to all the questions that may be put me by every lawless person.”<sup>123</sup> The suspicion that there was a conspiracy afoot to undermine the British liberties of American colonists persisted. Anyone looking for a conspiracy that would explain why Parliament had, it seemed, all of a sudden encroached on the rightful domain of colonial politics, soon began to see Hutchinson at the very bottom of it. His firm grip on the distribution of public office and his ideological defense of parliamentary supremacy made him into a poster-child for the political establishment. Twelve days after he was confronted by the mob, they returned to ransack his house.

Hutchinson meanwhile tried to understand the cascade of events fueling the radical opposition. His failure to steady the ship of state, to steer public opinion back on course by confronting the radical populist faction with reasoned arguments and well-established political doctrines, begged some sort of explanation. In part to excuse himself in the eyes of ministry officials back in London, but also to make sense of the nascent spirit of resistance growing around him, Hutchinson sought an explanation for the public’s intransigent opposition to Parliament. He came to see the political turmoil in Massachusetts as the machinations of a small group of fanatical authors and self-interested merchants. In the letters he sent to London in the aftermath of the Stamp Act

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<sup>123</sup> Thomas Hutchinson to —, August 16, 1765, XXVI, 145a, 145b; quoted in Bailyn, *The Ordeal of Thomas Hutchinson*, 68–69.

Crisis, from 1767 to 1769, he repeatedly explains political events in these terms and strongly advises that something must be done to save public opinion from their manipulative efforts. But when ministry officials balked at the suggestion, preferring not to force the issue, Hutchinson was left out to dry as he increasingly became the target of public ire.

The problem, Hutchinson came to believe, was that radical authors had poisoned the public's understanding of British government. They misunderstood the basic principles behind its constitutional system and the nature of the agreement that led to the founding of the Massachusetts colony. When news was received from England that the governor's salary was henceforward to be set and paid by the Crown, instead of by the legislature, the Assembly passed a resolution denouncing the move as "a dangerous innovation" which would destroy "the balance of power which is essential to all free governments." It would free the governor from dependence on the legislature, and thus enable him to take actions contrary to the public interest.<sup>124</sup> But this concern over the independence of executive power, Hutchinson explained to them, misunderstood the balance of power in the British constitutional system. What checked the abuse of power by any one branch was the necessity to obtain the concurrence of each acting within their own sphere of power. For the governor to continue to be financially dependent on the legislature would upset the balance of power—not the other way around.

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<sup>124</sup> Thomas Hutchinson, "Report of the Committee of the Assembly, July 1772," in *The History of the Colony and Province of Massachusetts-Bay*, vol. III (Cambridge: Harvard University Press, 1936), 405.

Shortly after Hutchinson gave his reply to the Assembly's resolves, the situation grew out of hand. Further news arrived that judges were also to receive their salaries from the Crown, prompting more outrage and suspicion. The Boston Town Meeting demanded that Hutchinson officially verify whether or not the news was true—whether changes were being made “tending rapidly to compleat the system of their slavery.”<sup>125</sup> But Hutchinson refused to discuss matters of state with them, responding that “It is by no Means proper for me to say before the Inhabitants of any Town whatsoever... any Part of my Correspondence as Governor of the Province, or to acquaint them whether I have or have not received any Advices relating to the public Affairs of the Government.”<sup>126</sup> Playing off popular suspicions of Hutchinson and his rise to power, radical leaders like Samuel Adams raised the spectre of a secret plot to strip the colonists of their rights and liberties. The Boston Town Meeting, deciding to take action before it was too late to confront any such sinister plot, published and distributed the “Boston Pamphlet,” which took a stand on the rights of American colonists, explicitly denied the supremacy of Parliament, and complained of the governor's failure to be transparent with information of public concern. Both Houses of the Massachusetts legislature soon thereafter petitioned the ministry's Board of Trade to remove Hutchinson and Oliver from their offices as governor and lieutenant governor, arguing that they had lost the public's trust. That petition in turn produced the hearing before the Privy Council at which Franklin was excoriated for his role in the

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<sup>125</sup> “The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston, in Town Meeting Assembled” (Boston, MA, 1772), Appendix I.

<sup>126</sup> “The Boston Pamphlet,” Appendix II.

leak of Hutchinson's letters and blamed for precipitating the public's loss of trust in their governor.<sup>127</sup>

Shocked by the Boston Pamphlet's brazen denial of parliamentary supremacy, its flirtation with the idea of political independence, and the attempt by radicals to enlist the support of other towns, Hutchinson decided to take a final stand by delivering a series of official speeches to the General Assembly. His purpose, as he made clear, would be to present "irresistible evidence" in favor of parliamentary supremacy and to expose the seditious implications to believing otherwise, since he knew "of no line that can be drawn between the supreme authority of Parliament and the total independence of the Colonies."<sup>128</sup> He wanted to expose the faulty logic of those who believed that there could be two or more independent legislatures in a single state. And if the authority of Parliament must be accepted, he argued, then the mere exercise of its authority cannot be an infringement of liberty simply because it appears unfair or wrongheaded. To disobey on those grounds alone would lead to the dissolution of government in general. There are better ways to seek redress, Hutchinson insisted, through appropriate channels, "in such ways and forms as the established rules of the Constitution prescribe or allow in order to make any matters alleged to be grievances appear to be really such"—although he suspected that that it was "rather the meer exercise of this authority which is complained of as a grievance." He concluded his

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<sup>127</sup> William B. Wilcox, ed., *The Papers of Benjamin Franklin, January 1 through December 31, 1773*, vol. 20 (New Haven: Yale University Press, 1976), 539–41. The Board of Trade later dismissed the petition to remove Hutchinson and Oliver as "groundless." Kenneth Lawing Penegar, *Political Trial of Benjamin Franklin: A Prelude to the American Revolution* (New York, NY: Algora Publishing, 2011), 83–97; John K. Alexander, *Samuel Adams: The Life of an American Revolutionary* (Lanham, MD: Rowman & Littlefield, 2011), 151–52.

<sup>128</sup> Speech of Thomas Hutchinson to the General Assembly of Massachusetts-Bay, January 6, 1773.

speech by assuring the opposition party, and the members of the public swayed by their faulty arguments, that "I have no desire... to preclude you from seeking relief, in a constitutional way, in any cases in which you have heretofore or may hereafter suppose that you are aggrieved, and, although I should not concur with you in sentiment, I will, notwithstanding, do nothing to lessen the weight which your representations may deserve."

The debate between Hutchinson and both houses of the Massachusetts legislature was a watershed moment. It laid bare the growing ideological division between Parliament and the American colonists and provided a ready excuse for radical leaders in Boston to force the issue since Hutchinson had been the one to challenge them on the grounds of principle. Hutchinson's speech, the responses of both the Assembly and Council, and their rejoinders to one another were published widely throughout the colonies, often accompanied by a copy of the "Boston Pamphlet" to which Franklin had written an introduction. Leading ministers in Parliament came to believe, wrongly, that Franklin had also written the petition. And by the time he came before the Privy Council to represent the colonist's petition to remove Hutchinson and Oliver from their offices, Franklin had come under suspicion for orchestrating the entire scandal—from writing the incendiary petition, to provoking the disastrous debate over principles, to engineering a scandal intended to discredit and destroy the career of Hutchinson.

Understanding this growth of the ideological divide between ministry officials and American colonists, as well as Franklin and Hutchinson's role in it, is essential to

appreciating how some rather ordinary political correspondence could seem to reveal so much. The letters were written from 1767 to 1769, a few years after the crisis over the Stamp Act, during a period of prolific and heated debate about the nature and extent of Parliament's authority over the colonies. After the passage of the Declaratory Act, which asserted Parliament's legislative supremacy, ministry officials preferred to ignore the ongoing debates. Although there was continued colonial resistance to acts of Parliament, notably against the Townshend Duties passed in 1767, the new ministries in England did not want to push the issue by responding to the provocative arguments circulating in America. At the same time, however, Hutchinson was becoming a target of colonial ire and resistance, and soon became convinced of the need to directly address the ideas he understood to be subversive of government. Many of the letters Hutchinson wrote during this period, in response to political unrest, were read before sessions of Parliament or made available to its members.<sup>129</sup> Those that found their way into the hands of Franklin were written by Hutchinson and a few of his relatives and friends. His adversarial relationship to the political opposition, culminating with the publication of his letters, eventually made him into the face of what was rumored to be a conspiracy to undermine the British liberties of American colonists

Hutchinson was the head of a powerful and well-connected family, a former assemblyman, speaker of the Massachusetts House, councilor (of the upper legislative chamber), and America's most accomplished historian. He was one of many

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<sup>129</sup> On the ease with which governors' letters could be obtained when laid before Parliament, and Hutchinson's anxiety about the confidentiality of any copies of his correspondence, see Bailyn, *The Ordeal of Thomas Hutchinson*, 221–23.

establishment figures who had adeptly navigated the system of patronage and influence which greased the wheels of the British Empire; though he distinguished himself by accumulating an extraordinary amount of high offices for himself and relatives (among them, his brother-in-law Andrew Oliver). By the time of the Stamp Act in 1765 he was serving as both lieutenant governor and chief justice of the superior court, holding both offices concurrently. His increasing collection of offices (and salaries) caused resentment among many Bostonians outside of the elite political families, and raised novel criticisms of plural office-holding and the separation of powers among his detractors. The young and prideful John Adams, for example, took issue with the fact that Hutchinson had no formal legal training, and began to suspect like many others that corrupt or conspiratorial forces were at work behind his rise to prominence.<sup>130</sup> Yet despite gaining many enemies, Hutchinson was still widely recognized as a judicious and moderate voice of reason—a public figure respected enough to have been sent to represent the colony at the Albany Congress in 1754, where he had worked with Franklin on a plan to unite the colonies.<sup>131</sup>

This good reputation began to change as Hutchinson grappled with the surprisingly strong resistance to the Stamp Act and its aftermath. It was during this period when he would occasionally write letters to the secretary of the colonial affairs office in London commenting on the state of Massachusetts politics, some of which

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<sup>130</sup> Plural office-holding among justices of the superior court was common, and the lieutenant governor only exercised executive power when the governor left the province, so the criticisms of Hutchinson were neither unique to him nor very well-placed. But this did not stop the sentiment from spreading that corrupt and secret forces were at work behind Hutchinson's rise to prominence. Bailyn, 51–54.

<sup>131</sup> It was Hutchinson and Franklin, more than any other representatives at the Albany Congress, who saw the benefits that a union of the colonies would bring and who worked to advance those ideas.

found their way into the hands of Franklin. Although Hutchinson became somewhat of a hated public figure during the Stamp Act crisis, it was not because he supported the tax. In fact he strongly disapproved of it and went to great lengths to oppose it. He may have even influenced the debates in Parliament that led to its repeal. But he did so behind closed doors, through private conversation, letters to correspondents in England, and by writing a treatise full of dense, logical, and economic arguments for its repeal, to be privately circulated among administration officials in London.<sup>132</sup> Publicly, he was better known for defending the ultimate authority of Parliament—a basic principle of government, he argued, that was necessary to respect regardless of whatever he, or anyone else, might think about the Stamp Act itself. Hutchinson steadfastly defended the idea of parliamentary supremacy. He believed it to be the price that must be paid to enjoy British freedoms as far away as in America.

It was from this perspective that Hutchinson wrote to Thomas Whately on various instances of colonial resistance to British authorities to which he added his own thoughts about the misplaced grievances of the public, their ignorance of good principles of government, and the possible need to abridge the British liberties of Americans in order to maintain law and order. Most infamously, two of the letters seemed to support popular suspicions about Hutchinson: that he had been writing to England to conspire against the liberties of American colonists, and that he had actively undermined their campaign to resist taxation and influence Parliament. In one letter, for example, he speaks dismissively of colonial grievances. The Massachusetts Assembly

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<sup>132</sup> Bailyn, *The Ordeal of Thomas Hutchinson*, 62–63.



had recently sent a petition which complained of the two regiments of British soldiers that were expected to arrive in Boston. Hutchinson characterizes the petition as “ill-natured and impotent” and the people’s grievances as “absurd,” “ungrateful,” and “ridiculous.” Why were so many “absurd” complaints gaining traction? Speaking to the core complaint, on the authority of Parliament to impose the taxes, he gives his assessment of Massachusetts politics in general. “The government has been so long in the hands of the populace,” he advises, “that it must come out of them by degrees, at least it will be a work of time to bring the people back to just notions of the nature of government.”<sup>133</sup> It was his considered opinion that the Massachusetts constitution was too democratic, too much power and influence being held by the Assembly ever since the Council (the upper house) had become subject to popular elections. He reiterated this point in more explosive terms a few months later, concluding that “there must be an abridgment of what are called English liberties.”<sup>134</sup>

It was not a position he took lightly. In the same letters, he qualified his call for a stronger response from Parliament by noting that, “I really wish that there may not have been the least degree of severity beyond what is absolutely necessary to maintain... the *dependence* which a colony ought to have upon the parent State.” But he insisted that there was a crisis of law and order, and, in any case, he doubted “whether it is possible to project a system of government in which a colony 3000 miles

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<sup>133</sup> Thomas Hutchinson, “Thomas Hutchinson to ———, August 1768,” in *The Papers of Benjamin Franklin*, January 1 through December 31, 1773, ed. William B. Wilcox, vol. 20 (New Haven: Yale University Press, 1976), 543–545.

<sup>134</sup> Thomas Hutchinson, “Thomas Hutchinson to ———, 20 January 1769,” in *The Papers of Benjamin Franklin*, January 1 through December 31, 1773, ed. William B. Wilcox, vol. 20 (New Haven: Yale University Press, 1976), 20.

distant from the parent state shall enjoy all the liberty of the parent state.”<sup>135</sup> It was in this sense that he wrote that there *must* be an abridgment of the English liberties of the colonists. In other letters, Andrew Oliver took the issue even further, suggesting that the Massachusetts constitutional charter was fundamentally flawed. He recommended establishing a formal system of peerage in Massachusetts, similar to the House of Lords, but without hereditary rights. Peers would be chosen among the wealthy and educated—presumably, it seems, from those established families like the Hutchinson and Oliver clans.

Both men often substantiated their views by conveying a sense that colonial resistance to Parliament was fueled by a small group of radical leaders who manipulated public opinion through incendiary newspapers. According to Hutchinson, disinformation and public ignorance were to blame for the political crisis. Fake news was a thematic point of his letters, “people in general being prejudiced by many false reports and misrepresentations,” and the radical newspapers were to blame.<sup>136</sup> Oliver similarly blamed the political turmoil on a *too*-free press, confidently asserting “an opinion that I have taken up a long time since, that if there be no way to take off the original incendiaries, they will continue to instill their poison into the minds of the people through the vehicle of the BOSTON GAZETTE.”<sup>137</sup> It was that very same newspaper, of which Franklin himself had once been the editor, that would later publish the leaked letters.

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<sup>135</sup> Hutchinson, 20.

<sup>136</sup> Hutchinson, “Thomas Hutchinson to —, August 1768.”

<sup>137</sup> Andrew Oliver to —, February 13, 1769

Did the letters reveal any wrongdoing on the part of Hutchinson? Not exactly. He had of course broken no laws. Neither should the views he expressed in the letters have been especially surprising to anyone who was already familiar with Hutchinson or his associates. He had made plain his views many times before, both publicly and privately. He was a well-known proponent of law and order, using his power as a Chief Justice of the Supreme Court to prosecute smugglers who skirted commercial restrictions on the colonies. And he did not hesitate to use the soap-box of his judicial bench to declaim against public attitudes that facilitated such law-breaking. There was nothing in the letters, technically, that he had not otherwise committed himself to in the speech he had just delivered to the General Assembly. He had, after all, publicly argued that “it is impossible the Rights of English Subjects should be the same, in every respect, in all parts of the Dominions.” Thus even the most scandalous lines found in the letters were, on the face of it, nothing more than less-carefully-worded versions of what he had always maintained.

But the letters did seem to reveal duplicity, to confirm in the eyes of many colonists what they had long suspected but could never prove. Hutchinson seemed to have been working against them all along. Looking back on their past petitions, or aggrieved protests, many colonists reading the letters were suddenly able to peek behind the curtains, to see through the spectacle of politics, to discover that Hutchinson had undermined various attempts to send a message to Parliament.<sup>138</sup> From dismissing

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<sup>138</sup> See for example the marginalia of Harbottle Dorr, a Boston shopkeeper, commenting on the publication of the letters; Bailyn, *The Ordeal of Thomas Hutchinson*, 211.

their complaints about the seizure of one of John Hancock's ships, to ridiculing their protest against customs officials, to downplaying the significance of multiple petitions sent to England, Hutchinson had worked behind the scenes to assure the ministry that colonial outrage was always either misplaced or the product of a loud and noxious minority. It must have seemed the very opposite of what he had promised at the end of his recent speech. Just months before the leak of his letters, Hutchinson had taken it upon himself to expose, as he saw it, the inconsistencies of those who continued to resist the legitimate authority of Parliament. He had then concluded with the assurance that, despite any past or future disagreement, the colonists could always trust him to "do nothing to lessen the weight which your representations may deserve."

Did Hutchinson deserve to be defamed and vilified for the contents of his confidential correspondence? On the one hand, it was surely unfair to caricature Hutchinson as conspiring with malign intent against colonial interests. He had always acted in what he believed to be the best interests of his countrymen, often with success, especially insofar as he was able to be influential in securing the eventual repeal of the Stamp Act. Hutchinson had pursued similar ends as those of the radicals that opposed him; they just disagreed about the best way to achieve them. But on the other hand, Hutchinson had failed to understand the moral indignation aroused by the incipient revolutionary movement around him, and this had led him to dismiss those who demanded a responsiveness and oversight that exceeded the normal expectations of British politics.<sup>139</sup> In the exposure of his letters one can see the principled convictions

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<sup>139</sup> Hutchinson had been unable to understand the "moral basis" for the protests; Bailyn, 378.

and creativity that were necessary to challenge the established order and received wisdom of the day. By confronting Hutchinson, and the traditional authorities he so ably defended, it is no coincidence that Franklin, and the radical members of the Massachusetts Assembly he served, were led to call into question who should have the authority to decide what the public has the right to know. The letters exposed how Hutchinson and Oliver had used their offices, and their positions of influence more generally, to downplay the extent and strength of colonial dissent from Parliament's policies and authority. That this amounted to a scandal, and pivoted both Franklin and America towards a war for political independence, demonstrates the extent to which colonists had long since grown disillusioned with the British political world of privilege and patronage, of limited and arbitrary access to the halls of power.

When Hutchinson came under suspicion in these tumultuous times, the discovery and publication of his letters spoke immediately to the growing sense of a need for a more accountable and transparent administration. A government that was both by and for the people would be made answerable to it. When the ministry made clear that it was rather Franklin who would need to answer for his actions, the ideological division between Britain and her American colonies was manifest. Franklin's defense of his actions would take the form of letters to the press, in both England and America, and reflect the central challenge of American colonists to the traditional conception of authority in English political thought: that there not need to be a final source of political authority in a representative government. People retain some say over the government that represents them. Franklin, for his part, took it upon

himself to decide that the colonists in Massachusetts should know about what one of their most preeminent public men had been secretly telling the ministry.

### 3.2.3 Franklin's Defense of His Conduct

In addition to his unfinished tract, Franklin's defense of the leak takes its most principled form across three published pieces: two letters to the editor published in London, and an extract of his private correspondence published in Boston and Philadelphia that was designed to reassure his countrymen back home of his intentions. The most significant of these is Franklin's official public statement on the affair which was published widely the London press.<sup>140</sup> Rumors about who had obtained the letters had swirled ever since the news first reached England in August of 1773. One man had eventually accused another, and a duel was fought by sword in Hyde Park.<sup>141</sup> To avoid any further injury, Franklin admitted to his role in obtaining and transmitting the letters.

In a brief statement, he denies the grounds over which the duel was fought—that the

<sup>140</sup> It was first published in the *London Chronicle* on December 25, 1773, then subsequently in the *Public Advertiser* (Dec 27) and the *London General Evening Post* (Dec 28)

<sup>141</sup> William Whately had accused John Temple of taking the letters from the papers of his late brother, Thomas Whately, the original recipient of the letters. Thomas Whately had received the letters while serving as the principal assistant to George Grenville during his tenure as Head of the Treasury. He and Grenville had helped to draft and pass the Stamp Act of 1765 and were known to take a hard-line on colonial affairs. Whately had received many letters from colonial officers informing him about the state of affairs in the colonies. Such correspondence was often based on friendship or family, but also facilitated political and business relations. Letters like Hutchinson's were sometimes read to the rest of Parliament and made available to its members. John Temple was a friend of Franklin's from Boston, who had a reputation as a strong opponent of Hutchinson, and had previously been permitted access to Whately's papers. But Temple most likely had nothing to do with the leak. Hutchinson himself was later convinced of Temple's innocence and instead came to suspect Thomas Pownhall, a former governor of Massachusetts and member of Parliament. Bailyn agrees that all the evidence points to Pownhall as the source. The letters in question may not have ever been in the papers of Thomas Whately, as Franklin claims to be the case in his official statement; Bailyn, *The Ordeal of Thomas Hutchinson*, 231, 235–36, 286–87.

correspondence was “of the nature of ‘*private letters between friends*,’” and was thus a breach of trust on the part of whomever had presumably stolen them. In Franklin’s view, the letters were of a different sort:

They were written by public officers to persons in public station, on public affairs, and intended to the procure public measures; they were therefore handed to other public persons who might be influenced by them to produce those measures.<sup>142</sup>

He did not believe that the public measures advocated in the letters were innocuous ones; to Franklin and those he represented, the views expressed in the letters would have a tendency to “to widen the breach” between England and her colonies and make the task of reconciliation more difficult. He goes on to note that the letter writers themselves, Hutchinson and Oliver, had cautioned their recipient against being too careless because they expected that the correspondence might be disclosed if it were to find its way into the hands of colony agents. “That apprehension,” Franklin dryly remarks, “was well founded; for the first Agent who laid his hands on them thought it his duty to transmit them to his Constituents.” Franklin’s official statement on the leak thus focuses on the idea that communication about matters of public concern,

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<sup>142</sup> Benjamin Franklin, “Franklin’s Public Statement about the Hutchinson Letters, 25 December 1773,” in *The Papers of Benjamin Franklin*, ed. William B. Willcox, vol. 20 (New Haven and London: Yale University Press, 1976), 513–16. Franklin’s statement continues: “Their tendency was to incense the Mother Country against her Colonies, and, by the steps recommended, to wident he breach, which they effected. The chief Caution expressed with regard to Privacy, was, to keep their contents from the Colony Agents, who the writers apprehended might return them, or copies of them, to America. That apprehension was, it seems, well founded; for the first Agent who laid his hands on them, thought it his duty to transmit them to his Constituents.” On Franklin’s copy of his statement, he subsequently added a note that the letters themselves reveal that Hutchinson had taken the same liberty when it came to the disclosure of correspondence between Franklin and members of the Massachusetts Assembly: “Governor Hutchinson, as appears by his letters, since found and published in New England, had the same idea of *duty*, when he procured copies of Dr. Franklin’s letters to the assembly, and sent them to the ministry of England.”

especially between those who are in a position of political influence, is fundamentally public. It did not have a legitimate claim against disclosure in the public interest.

But this was not the first time Franklin had commented on the letters. He makes the same argument in an anonymous letter to the editor of the *Public Advertiser*, published shortly after the news first arrived in England. The central point is the same, but he extends it to the idea of good governance in general:

... the Discovery of Governor Hutchinson's and Oliver's Letters points out an easy way of reestablishing Peace and Harmony between Great Britain and her Colonies, and consoling [i.e. encouraging] the Confidence of the latter, by producing all the confidential Letters received from America on public Affairs, and from public Men. It is vain to say, this would be betraying private correspondence, since if the Truth only was written, no Man need be ashamed or afraid of its being known; and if Falsehoods have been maliciously covered under the Cloak of Confidence, 'tis perfectly just the incendiary Writers should be exposed and punished. What a weak, what a wicked Plan of Government is that, which, under the Seal of Secrecy, gives Encouragement to every Species of Malice and Misrepresentation.<sup>143</sup>

The leak, Franklin suggests, could be beneficial to the relationship between the public and its government. The transparency that comes from unexpected disclosures could be used to encourage the confidence of British Americans in the normal operation of their government. In this case, the letters seemed to have revealed that Hutchinson and

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<sup>143</sup> Both Verner Crane and the editors of the Franklin Papers agree that Franklin is the likely author, although it cannot be proven conclusively. But Crane is quite confident in attributing this one to Franklin since it shows "obvious Franklin stigmata," uses language that is repeated in multiple other writings, and "is precisely the case which he made on all occasions, both before and after he revealed his own hand." Benjamin Franklin, "On the Hutchinson Letters, 31 August 1773," in *The Papers of Benjamin Franklin*, ed. William B. Willcox, vol. 20 (New Haven and London: Yale University Press, 1976), 380–81; Benjamin Franklin and Verner W. Crane, *Letters to the Press, 1758-1775* (Chapel Hill: North Carolina Press, 1950), 231–32.



Oliver had distorted the truth for their own purposes. And while the removal of both men might therefore be necessary to reestablish good relations with Massachusetts, the disclosure of other letters from men of public significance might instead reassure Americans that their grievances were being duly relayed to British ministers.

Of course, the suggestion to publish “all the confidential Letters received from America on public Affairs, and from public Men,” was not a serious proposal. Franklin rightly suspected that reconciliation had been impeded by inaccurate reports of the extent of American discontent. Various actors had misleadingly portrayed the dissent and disobedience across the colonies as the contrivance of a small but fanatical minority. Franklin had blamed Lord Hillsborough, among others, for pushing that narrative and covering up the extent and strength of colonial dissent. But the letters exposed the ways in which Hutchinson and Oliver had perhaps been the original source of the misrepresentations of discontent in Massachusetts.<sup>144</sup> It was Franklin’s hope and intent that the leak would reveal to Americans that the injustices they perceived were not maliciously perpetrated by Parliament, but rather “originally planned and recommended by some of their own people.”<sup>145</sup> If what Hutchinson and Oliver had

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<sup>144</sup> What Franklin wrote of Lord Hillsborough in the preface to the Boston Pamphlet might well have been said of Hutchinson and Oliver after the disclosure of their letters: “All Accounts of the Discontent so general in our Colonies, have of late Years been industriously smothered, and concealed here; it seeming to the suit the Views of the American Minister to have it understood, that by his great Abilities all Faction was subdued, all Opposition suppressed, and the whole Country quieted.” Benjamin Franklin, “Preface to the Declaration of the Boston Town Meeting, February 1773,” in *The Papers of Benjamin Franklin* (New Haven and London: Yale University Press, 1976), 82–87.

<sup>145</sup> That is exactly what the title page of the published copy of the letters claimed it would reveal to “the judicious Reader,” who “will discover the fatal Source of the Confusion and Bloodshed in which this Province especially has been involved, and which threatened total Destruction to the Liberties of all *America*.” Benjamin Franklin, “Extract of a Letter from London, [19 February 1774],” in *The Papers of Benjamin Franklin*, ed. William B. Willcox (New Haven and London: Yale University Press, 1978), 112–15.

written in secret were true, Franklin argues, then they would have nothing to fear. But it would be “perfectly just” that they be held accountable to any falsehoods they had “covered under the Cloak of Confidence.” Had they misrepresented the extent or seriousness of colonial grievances, Franklin hoped that Parliament would take the opportunity to blame Hutchinson and Oliver for any ill-conceived policies, remove them from their offices, and reestablish good relations with America. To do otherwise, to stand by the abuse of political power and influence because of the way in which it was exposed, Franklin asserts, would be to give encouragement to faction and deception wherever it enjoys the official sanction of confidentiality, or the “Seal of Secrecy.”

Franklin reiterates these points, and extends his defense of leaking, when he addresses his constituents back in Massachusetts and Pennsylvania. Published in Boston and Philadelphia, the pieces are composed as if they were extracts of an anonymous letter sent from London reporting on the affair at the Cockpit. These supposed “extracts of a letter from London” are thus presented as if they are themselves a leak, or something similar, insofar as they appear to provide someone’s confidential and unvarnished account of events. Like leaked documents, they provide (or seem to provide) a way for the public to get a view of the truth that cuts through the usual dissembling of public figures.<sup>146</sup>

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<sup>146</sup> To Franklin’s credit in this respect, the published “extracts” are more or less faithful to the original letter he had sent to Thomas Cushing, the speaker of the Massachusetts Assembly—albeit adapted to a more general audience. Benjamin Franklin, “From Benjamin Franklin to Thomas Cushing, 15[-19]? February 1774,” in *The Papers of Benjamin Franklin*, ed. William B. Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 86–96.

In the extract published in *The Boston Gazette*, Franklin addresses the accusation levied against him by Solicitor General Alexander Wedderburn, that he had “surreptitiously” stolen the letters. Franklin had already denied the charge.<sup>147</sup> But in speaking to his fellow Americans back home he also denies the premise of the accusation: that it should even matter if the letters were “*infamously* obtain’d.”<sup>148</sup> The position Franklin proceeds to take is that the disclosure of the letters was necessary to substantiate the grievances that the colonists had already expressed, but which had been dismissed or ignored by British ministers. He draws a connection between the justification for leaking and the legitimacy of a system that is supposed to respect the redress of grievances.

The *Treason* thus discover’d, the *Conspirators*  
[Hutchinson and Oliver] were complain’d of... Grievances  
cannot be redress’d unless they are known; and they  
cannot be known but thro’ complaint and petitions; if  
these are deem’d *affronts*, and the messengers punish’d  
as *offending*, who will henceforth send petitions? Who  
will deliver them? The consequences are plain!<sup>149</sup>

“The truth,” Franklin explains, is that he came into possession of the letters “*honorably*,” but the decisive point is that “his intention in sending the letters was *virtuous*.” He had aimed to reconcile America and England by showing that the ill-

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<sup>147</sup> Franklin elsewhere claims that he received the letters from “a gentleman of character and distinction,” likely a member of Parliament who had access to the letters. It is possible he was given the letters by Thomas Pownhall, who would have had access to the originals if they had ever been presented to the House of Commons; Bailyn, *The Ordeal of Thomas Hutchinson*, 224–25.

<sup>148</sup> “But supposing he had *infamously* obtain’d the letters, would that have alter’d the nature of them, their tendency and design? Would that have made them innocent? How weak and ridiculous is this?” Franklin, “From Benjamin Franklin to Thomas Cushing, 15[-19]? February 1774.”

<sup>149</sup> Benjamin Franklin, “Letter from London, [on or after 7 February 1774],” in *The Papers of Benjamin Franklin*, ed. William Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 78–83.

conceived policies could be attributed to the conspiratorial misrepresentations of a few influential men in America.

Franklin was both the messenger of the petition and a facilitator of the leak that substantiated its grievances. These two roles can become jumbled because they are importantly related. Both Franklin and the Privy Council evidently recognized as much. Serving as an unofficial agent for the Massachusetts Assembly, Franklin had brought its petition to remove Hutchinson and Oliver before the King's Privy Council. He was also the middleman responsible for the disclosure of the letters to members of the Massachusetts Assembly.<sup>150</sup> The Privy Councilors had accused Franklin of having "surreptitiously obtained" the letters, but also specifically blamed him for using the leak to instigate a petition "formed upon False and Erroneous allegations... [that is] groundless, Vexatious and Scandalous and calculated only for the Seditious Purpose of keeping up a Spirit of Clamour and Discontent."<sup>151</sup> The subtext to the Privy Council's dismissal of the petition was that the disclosure of the letters had discredited its legitimacy. The report of the Privy Council dismissed the petition to remove Hutchinson and Oliver from their offices, which it characterized as being "founded Solely on the Ground of the Governor and Lieutenant Governor being as they alledged, now become obnoxious to the people of the Province," noting that there was "no other Evidence now produced than the said Resolutions and Letters." In their view, the leak

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<sup>150</sup> Franklin would have expected the group of Boston radicals to eventually publish the letters he sent them.

<sup>151</sup> Privy Council Committee, "The Final Hearing before the Privy Council Committee for Plantation Affairs on the Petition from the Massachusetts House of Representatives for the Removal of Hutchinson and Oliver, 29 January 1774," in *The Papers of Benjamin Franklin*, vol. 21 (New Haven and London: Yale University Press, 1978), 37–70.

was used to engineer a public scandal—without which the petition would have never arisen or gained widespread support. Franklin disagreed. The disclosure of the letters, he suggests, should be compatible with a system of government that is supposed to respect the redress of grievances. The leak was necessary to substantiate and bring to the light those grievances. If anyone is to blame for the controversy and conflict that ensued, it is neither the messenger of the petition nor its informant. It was the misplaced condemnation he received for his involvement in the affair that poisoned the reception of the petition.

In Franklin's view, the justification of the leak cannot be separated from the legitimacy of the petition. Franklin's own description of the abuse he received at Whitehall borrows the same language used by the Privy Council to dismiss the complaints as merely the product of scandal and mischief, "founded only on certain Letters."<sup>152</sup> The leak of the Hutchinson Letters must be compatible with a system of government that is supposed to respect the redress of grievances. For a representative government to privilege the confidentiality of its own affairs, over a claim that public knowledge would substantiate or generate complaint and protest, would encourage the misuse of government office and give license to wrongdoing.

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<sup>152</sup> Franklin writes in the piece published in his account of the affair published in Boston: "The Agent is suffer'd to be abus'd by a *Solicitor*; the Complaint *called*... false, vexatious, scandalous; and the Complainers, factious and seditious." The Privy Councillors had accused Franklin of having "surreptitiously obtained" the letters, but specifically blamed him for using the leak to instigate a petition "formed upon False and Erroneous allegations... [that is] groundless, Vexatious and Scandalous and calculated only for the Seditious Purpose of keeping up a Spirit of Clamour and Discontent." Benjamin Franklin, "Letter from London, [on or after 7 February 1774]," in *The Papers of Benjamin Franklin*, ed. William Willcox, vol. 21 (New Haven and London: Yale University Press, 1978), 78–83; Privy Council Committee, "The Final Hearing before the Privy Council Committee for Plantation Affairs on the Petition from the Massachusetts House of Representatives for the Removal of Hutchinson and Oliver, 29 January 1774."

The current of thought that animated American revolutionary leaders to demand a more open and responsive system of government, to challenge a political world of privilege and limited access, manifested and refined its ideas through confrontations like the one between Franklin and Hutchinson. It was not alone in shaping the course of events to come. Many currents would converge to influence the design of the political experiment that would follow. But the ideas at work in the “affair of the letters” scandalized American colonists, left Franklin in disrepute, and pushed both towards supporting a war for political independence from a system of government that had seemingly failed to register their honest grievances and earnest dissent. And while Franklin’s justifications for leaking did not win the sort of official authority in the new republic that he had denied should matter, the same democratic instinct continues to inform how people think about the ethics of leaking today. Both new and old at once, the ideas informing Julian Assange’s facilitation of leaks through the technology of WikiLeaks has taken up a similar challenge to those who claim an authority to decide what the public has the right to know.

### ***3.3 Julian Assange and the Politics of Mass Leaking***

The argument Assange makes in his early political writings, during the development of WikiLeaks, is focused on his concept of conspiracies.<sup>153</sup> “Conspiracies”

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<sup>153</sup> My analysis in this section is informed by a roughly comprehensive reading of the published work by Assange, including his introductions to edited volumes, speeches, audio and transcript records of interviews (excluding cable television appearances), articles, blog entries on [iq.org](http://iq.org), and his political essays on conspiracies ([pdf](#)).

are not merely the kind of plots devices found in spy novels, but rather closed information networks that provide people with advantages by leveraging knowledge that is not available to the public (or other conspiracies).<sup>154</sup> They include both the archetypical examples of elite political intrigue, but also the more acceptable, tolerable, or innocuous types of organized secrecy—like a fraternity, a criminal investigation, or an extended family unit. Conspiracies can also emerge through the spontaneous coordination of people who restrict access to information for their own advantage. For example, the practice in financial markets of restricting access to information through costly subscriptions to proprietary networks. Regardless of whether a service like a Bloomberg Terminal is a legitimate market activity, the point is that a closed network can emerge out of spontaneous market behavior. It provides advantage over the public to the extent that its members are able to strategically use non-public knowledge. WikiLeaks is not designed to stop or destroy conspiracy, but rather to reduce its efficiency.

At the heart of Assange’s political thought is an interest in information and how advances in communication technology have transformed the political and social organization of modern societies. New means of communication have empowered people to create and sustain more distant and diverse relationships, as well as rapidly transmit accurate information. As a consequence, Assange argues that conspiratorial relationships have become more powerful with the advent of networked information technology. For example, he asks us to consider what would happen “if either the

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<sup>154</sup> Peter Ludlow, “Rethinking Conspiracy: The Political Philosophy of Julian Assange,” manuscript, 3 ([rtf](#)).

[Democratic or Republican Party] gave up their mobile phones, fax and email correspondence—let alone computer systems which manage their subscribes, donors, budgets, polling, call centres and direct mail campaigns?”<sup>155</sup> The result is obvious, according to Assange. The party would fall into disarray, lose most elections to the opposition, and risk rendering itself irrelevant. We might consider a similar scenario for corporations, newspapers, the military, government, and even social relationships in our own lives. Generating and accessing information has become more important in the modern age, and thus the success (or comparative advantage) of these organizations has become increasingly dependent on the power that information provides.

Information technology is empowering, but Assange is also attentive to its disadvantages. First, a disadvantage follows from the view that organizations are increasingly dependent on gaining power through the control of information. If conspiratorial relationships are a more indispensable source of comparative advantage, then secrecy and power feed off each other, creating a greater risk for abuse. Second, another disadvantage follows from the logic of collective action. Even if information technology affords the same advantages to the public as it does to conspiracies, the public might not benefit as much. The benefits from greater public access to information will be limited by two obstacles that are inherent to the human mind: overload and foresight.

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<sup>155</sup> Julian Assange, “Conspiracy as Governance,” December 3, 2006, iq.org ([link](#)), 5.



The problem of information overload, and the limits of foresight, are both aggravated by the need for collective action in response to some, but not all, of the available information. These problems with how people consume information are related to why Assange identifies conspiracies as “the key generative structure of bad governance.”<sup>156</sup> As Finn Brunton remarks, conspiracy is able to take advantage of “our points of failure and overload, as human minds and social creatures” absent any intervention on behalf of the public.<sup>157</sup> WikiLeaks is meant to correct for the inherent disadvantage of the public—compared to closed networks of organized secrecy—in taking effective action with the right information.

The problem of information overload describes a diminished capacity to generate a clear picture of the world due to the excess availability of information. In a series of blog posts, Assange questions whether modern societies have the capacity to identify and understand the truth. His reflections indicate a loss confidence that careful analysis is grounded on a firm enough understanding of the world to lead to the discovery of truth. At times, Assange seems to express a disillusionment with the idea that truth can be dissected from the body of available information: “I once thought that the Truth was a set comprised of all the things that were true, and the big truth could be obtained by taking all its component propositions and evaluating them until nothing remained.”<sup>158</sup> But he is not entirely dismissive of these views. He also expresses

disappointment with the rest of society—people who regard the truth as a “wayward

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<sup>156</sup> Julian Assange, “Conspiracy as Governance,” December 3, 2006, iq.org ([link](#)), 1.

<sup>157</sup> Finn Brunton, “Keyspace: Wikileaks and the Assange Papers,” *Radical Philosophy*, no. 166 (March 1, 2011): 17.

<sup>158</sup> Appears twice in Assange’s now defunct blog: in “Truth on and off the page” on July 12<sup>th</sup>, 2006, and “Irrationality [*sic*] in argument” on August 29<sup>th</sup>, 2007.

sprite that bursts forth from the readers mind for reasons of its own”; and he criticizes the tendency for people to have arbitrary feelings and transient attention, which distract from the pursuit of justice. Rather than abandoning the idea that careful analysis and observation are spades for discovering the truth, the problem is that important artifacts have been buried in secrecy. The problem with political discourse and the exchange of ideas is the distortion caused by imperfect information. Like an economist who questions adherence to free market principles because of its unmet assumptions, Assange is skeptical of any justification for the marketplace of ideas which ignores the systematic exclusion of secret information. When confronted with the problem of overload, it is easier to overlook the absence of important information.

The limits of foresight arise from the difficulty of recognizing how actions in the present will affect future outcomes. To have foresight and make use of it is to have a distilled understanding of a subject—the sort of lesson or wisdom that informs effective action. It is dependent on having trustworthy information about the world, as well as equal access to the social goods essential for education, which provide “the cognitive ability to draw predictive inferences and economic stability to give them a meaningful home.”<sup>159</sup> Just before WikiLeaks went live, Assange traveled by motorcycle along the seaside road up from Saigon to Hanoi. The trip was illuminating, he recalls, for the need to dodge enormous potholes every few seconds. The road decay illustrated a failure of foresight. Potholes are a “run away process,” beginning slowly with the grinding of small stones, which then rapidly grow as they become deeper. It is easier

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<sup>159</sup> Julian Assange, “The Road to Hanoi,” *CounterPunch*, December 5, 2006.

and cheaper to fix potholes when they are small, but we tend to neither notice nor care about them until they are large. Foresight helps to maintain good roads. But in Vietnam, the impetus of foresight is undercut by the constant “psychologically negative encounters with potholes.” Regular encounters with failures of accountability distort what users perceive to be subject to political feedback.

It is not just in Vietnam where the potholes grow deeper. When “secrecy, malfeasance and unequal access have eaten into the first requirement of foresight (‘truth and lots of it’)” the road ahead lies littered with large and unanswered problems. The potholes on the road to Hanoi illustrate what Assange later identifies as the “key generative structure of bad governance”:

Everytime we witness an act that we *feel* to be unjust and *do not act* we become a party to injustice. Those who are repeatedly passive in the face of injustice soon find their character corroded into servility. Most witnessed acts of injustice are associated with bad governance, since when governance is good, unanswered injustice is rare. By the progressive diminution of a people’s character, the impact of reported, but unanswered injustice is far greater than it may initially seem. Modern communications states through their scale, homogeneity and excesses provide their populace with an unprecedented deluge of witnessed, but seemingly unanswerable injustices.<sup>160</sup>

The failures of foresight and overload help to explain the “key generative structure of bad governance.” They enable the growth of small injustices, which grow until they becomes too great, costly, and numerous for an efficient government response. Through a “progressive diminution of a people’s character” the alarm of reported abuses is stifled amidst the “deluge of witnessed, but seemingly unanswerable

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<sup>160</sup> Julian Assange, “Conspiracy as Governance,” 1.

injustices.” Assange therefore resolves that, “To deal with powerful conspiratorial actions we must think ahead and attack the process that leads to them since the actions themselves can not be dealt with.”<sup>161</sup> Pervasive unanswered injustices must be confronted by exposing the system that generates them (and the paralysis of political action) in the first place.

The secrecy of information exchange within conspiracies is essential to securing power and leveraging its advantage over those who are less powerful. The concept of conspiracy describes both authoritarian regimes, as well as the elements of otherwise democratic governments that operate with more authoritarian characteristics—as insular, hierarchical organizations, that can resist independent oversight and democratic accountability. Conspiracy is thus the “primary planning methodology” of authoritarian modes of governance:

Plans which assist authoritarian rule, once discovered, induce further resistance. Hence such schemes are concealed by successful authoritarian powers until resistance is futile or outweighed by the efficiencies of naked power. This collaborative secrecy, working to the detriment of a population, is enough to define their behavior as conspiratorial.

In this sense, Assange speaks only in different terms than those who are concerned with the power of political factions, special interests, regulatory capture, or the “deep state.” They all describe forms of organized secrecy within a political structure that are able to act against the public interest under the cover of the legitimate exercise of authority. By trading on the legitimacy of what are normally viewed as acceptable and

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<sup>161</sup> Julian Assange, “Conspiracy as Governance,” 5.

tolerable forms of secrecy, conspiracies are able to conceal their abuses of power for long enough to avoid any significant public resistance. Its collaborative secrecy allows for the planning of action which publicity would otherwise make impossible.

In order to diminish the advantage of conspiratorial relationships, Assange develops a strategy to reduce the efficiency of collaborative secrecy in general. WikiLeaks is designed to “throttle” the capacity of closed networks to communicate and make efficient use of its advantage over the public. By “constricting (reducing the weight of) those high weight links which bridge regions of equal total conspiratorial power,” mass leaks generate a systematic response from those who depend upon organized secrecy to carry out their plans.<sup>162</sup> The power of conspiracy is reduced by throttling the “weight” of communication between the members (or sections) of a closed network. In practice, the logic of Assange’s abstracted understanding of conspiracy is easier to follow. Consider, for instance, a likely effect of the leaked U.S. diplomatic cables. If the United States becomes suspicious of low or mid-level intelligence officers, with access privileges similar to those held by Private Manning, government agencies will look for ways to restrict or compartmentalize the use of classified information. The highest levels of government will likely maintain normal access, but subordinate members of the network will be increasingly marginalized.<sup>163</sup>

The collaborative potential of the network to carry out plans that require secrecy is

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<sup>162</sup> Julian Assange, “Conspiracy as Governance,” 4.

<sup>163</sup> For example, the Obama Administration developed “psychological profiles” of potential leakers and created a program to encourage government agencies to train workers to identify insider threats, like those who demonstrate “a desire to help the ‘underdog’ or a particular cause.” Jonathan S. Landay and Marisa Taylor, “Obama’s Plan to Predict Future Leakers Unproven, Unlikely to Work,” *McClatchyDC*, n.d. ([link](#)); Karen McVeigh, “Obama’s Efforts to Control Leaks ‘the Most Aggressive since Nixon’, Report Finds,” *The Guardian*, October 10, 2013. ([link](#)).

thereby weakened. It is through such “unstructured attacks” that anonymous mass leaking exerts its influence. If the leaker becomes known, the conspiracy can remove the untrustworthy member; but the potential for more leaks throttles the communication to each conspirator as the maintenance of secrecy becomes less reliable. In this way, Assange argues that indiscriminate and anonymous leaking can attack “conspiracy” in general by diminishing the ability to efficiently share secret information.

Still, even if WikiLeaks functions to reveal plans that might meet public resistance, these secrets are found amid an abundance of harmless or insignificant secrets that are ignored by the public. This is nevertheless consistent with its design. In an essay entitled, “The Non Linear Effects of Leaks on Unjust Systems of Governance,” Assange argues that indiscriminate leaking is more beneficial than harmful:

The more secretive or unjust an organization is, the more leaks induce fear and paranoia in its leadership and planning coterie. This must result in the minimization of efficient internal communications mechanism (an increase in cognitive “secrecy tax”)...

Hence in a world where leaking is easy, secretive or unjust systems are nonlinearly hit relative to open, just systems. Since unjust systems, by their nature induce opponents, and in many places barely have the upper hand, mass leaking leaves them exquisitely vulnerable to those who seek to replace them with more open forms of governance.<sup>164</sup>

In this sense, there two audiences to every leak. It is important to distinguish the public audience of leaks—whom Assange hopes will gain gain information about the world—

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<sup>164</sup> Assange, Julian. “The Non Linear Effects of Leaks on Unjust Systems of Governance.” iq.org 31 December, 2006, ([pdf](#)).

from those who already know and keep the secrets. Even if the public is given the right information, they still might not act against the revealed injustice. In this case, Assange has a second audience in mind. To foment suspicion and paranoia among those who depend on secrecy achieve their ends, it is important for the information to be leaked, rather than stolen or detected. To steal documents would only cause a government, or any conspiracy, to improve its security against external threats. Leaks, in particular, cause the breakdown of trust that is essential to the functioning of closed networks. The conspiratorial structure of government will be induced to share less information or take into account the risk of revelation. The effect will be, as Brunton puts it, “a kind of panopticon turned inside out, where the main guard tower is gone because any given prisoner might be an informer.”<sup>165</sup> The responsibility of oversight is democratized.

Conspiracy being the key generative structure of bad governance, WikiLeaks is designed to create an inhospitable environment in which the more secretive a government, the more its survival is threatened by successful leaking. By strategically undermining the reliability and efficiency of collaborative secrecy, “a conspiracy sufficiently engaged in this manner is no longer able to comprehend its environment and plan robust action.” Since “unjust systems, by their nature induce opponents,” and only revealed injustice can be answered, “mass leaking leaves them exquisitely vulnerable to those who seek to replace them with more open forms of governance.”<sup>166</sup> Assange thereby envisions WikiLeaks as a sort of institutional mechanism to instigate more access to and oversight over the inner workings of government. The environmental effect of

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<sup>165</sup> Brunton, “Keyspace,” 15.

<sup>166</sup> Julian Assange, “Conspiracy as Governance,” 5.

mass leaking helps to balance the disadvantages of overload and foresight that weaken public resistance to conspiracies. Leaks help the public to foresee plans that are adverse to its interests, and to know where to look for conspiracies. As Assange simply puts it: “for man to do anything intelligent he has to know what’s actually going on.”<sup>167</sup>

Of course, one might object that the aims of just and open forms of government are also subverted by an environment of mass leaking. Assange is generally willing to concede this point. Good government benefits from the use of some secrecy, too—just not as much as authoritarian structures of power. Nonetheless, he maintains that modes of governance which rely on secrecy will suffer a “secrecy tax” relative to open governments. Since open government does not depend on avoiding public resistance, even its plans that would benefit from secrecy can still be pursued with publicity. In contrast, conspiracies will be hit with a “secrecy tax.” Secret internal communications will be made less efficient, either because of the increased probability of leaks or due to the restrictive measures implemented in response to mass leaking. Since unjust governments rely upon the secrecy of their aims, their planning methodology and fitness are ill-adapted to a world of mass leaking.

One might also object to Assange’s arguments on a variety of other grounds. It bears mentioning, of course, that the writings of political activists do not usually pretend to amount to rigorous theoretical arguments. Most criticisms can be generally understood as either an empirical or conceptual complaint. Empirically, for example, Assange may be wrong to suppose that leaks undermine bad governments more than

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<sup>167</sup> Julian Assange, “The Non Linear Effects of Leaks on Unjust Systems of Governance.”



good governments, or that all authoritarian governments will be unable to adapt their methods of secrecy to an environment of mass leaking. It is also plausible to argue that Assange is wrong to understand WikiLeaks as a corrective to problems of information—especially insofar as his argument depends on claims about human psychology, or a logical reductionist view of knowledge. Conceptually, there are also good reasons to question the way Assange frames his argument. For instance, one might object to the idea that there is a recognizable common good, or that public resistance to revealed conspiracies can be said to represent the common good. It is also not clear why we should think that all political “conspiracies” are bad. For example, some “special interest” groups might be good. Some of them might even be important to protect, like minority advocacy groups. In a sense, then, “conspiracy” might be the only way to achieve a higher-order public interest. These do not exhaust the possible objections, but they more or less capture a range of important criticisms about Assange and the consequences of mass leaking. However, to understand the justification of WikiLeaks only in terms of its consequences misses the priority of its political claim about democratic values.

Although the consequences of the leaks are important, they are not as instructive about the ethics of leaking as the commitment to democratic values institutionalized by WikiLeaks. In this regard, Assange consistently emphasizes the revolutionary quality of gaining insight into the ordinary functioning of secretive government agencies. Even though the Cablegate leaks are often praised for their role

in spurring the Arab Spring—and the Tunisian revolution, in particular<sup>168</sup>—Assange often insists on thinking beyond the direct consequences of incendiary leaks. Consider, for example, the standard picture of the role of WikiLeaks in the overthrow of the Ben Ali regime: when leaks inform people about abuses of power, people get angry, and then their collective outrage provides the basis for revolutionary action. Responding to this picture of events, Assange complicates the value of leaks:

Actually, the real situation is much more rich and interesting than that. Yes, the demos knows, the population starts to know, and they start to know in a way that's undeniable, and they also start to know that the United States knows, and the United States can't deny what was going on inside Tunisia. And then the elites within the country also know what is going on and know they can't deny it... It's not that the people there didn't know it before, but it became undeniable to everyone, including the United States.<sup>169</sup>

The “undeniability” of leaked documents compels a meeting of the minds between the authorities who knew, and the people who were not supposed to know. As Yochai Benkler has similarly observed about the “see for yourself” characteristic of participatory new media, WikiLeaks provides the tools to participate in political activities that were formerly the exclusive domain of political and professional elites.<sup>170</sup>

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<sup>168</sup> Ibrahim Saleh, “WikiLeaks and the Arab Spring: The Twists and Turns of Media, Culture, and Power,” in *Beyond WikiLeaks: Implications for the Future of Communications, Journalism and Society*, ed. Benedetta Brevini, Arne Hintz, and Patrick McCurdy (Basingstoke, UK: Palgrave Macmillan, 2013), 236–44.

<sup>169</sup> Julian Assange, Amy Goodman, and Slavoj Zizek, “Amy Goodman In Conversation with Julian Assange and Slavoj Zizek,” in *Beyond WikiLeaks: Implications for the Future of Communications, Journalism and Society*, ed. Benedetta Brevini, Arne Hintz, and Patrick McCurdy (Basingstoke, UK: Palgrave Macmillan, 2013), 266–67.

<sup>170</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006), 218; Yochai Benkler, “A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate,” *Harvard Civil Rights - Civil Liberties Law Review* 46, no. 2 (Summer 2011): 311.

“What makes the revelation of secret communications potent,” Assange writes, “is that we were not supposed to read them.”<sup>171</sup> In this sense, the political potency of mass leaking derives from its challenge to the prerogative of political elites and professional diplomats to control the space of public debate and communication. Diplomatic secrecy disables meaningful democratic oversight if we limit ourselves from knowing what the United States really knew about the Ben Ali regime, or if we accept our lack of authorization to verify or substantiate public suspicions. In the case of Tunisia, mass leaking provided undeniable knowledge about the state of the world precisely because it revealed such ordinary internal communications. It broke the spell of relationships of authority in the United States and Tunisia—which had maintained the status-quo by withholding accurate information from more unforgiving publics.

Even if secrecy is used for legitimate purposes, a regular dependence on it can foster anti-democratic attitudes. In this sense, it is noteworthy that the response of the United States to disclosures by WikiLeaks has aggressively discouraged access to the classified information, even after widespread publication. For the United States to adopt that attitude towards secrets which are already revealed, Assange writes, “betrays a belief that its power resides in a disparity of information: ever more for the empire, ever less for its subjects.” Systematic secrecy can breed a sort of expertise that has difficulty respecting participation in public discourse. Moreover, privileged access to information makes it harder to learn from people who do not have the same status.

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<sup>171</sup> Julian Assange, “Introduction,” in *The WikiLeaks Files: The World According to US Empire*, ed. Julian Assange (London: Verso, 2015), 5.

Those with security clearances will tend to ask themselves whether other people would still make the same arguments, or have the same views, if they knew about the relevant secrets. In this regard, the warning Daniel Ellsberg once gave to Henry Kissinger about the danger of top-secret security clearance describes the sort of politics that Assange hopes to undo.

You will deal with a person who doesn't have those security clearances only from the point of view of what you want him to believe and what impression you want him to go away with, since you'll have to lie carefully to him about what you know. In effect, you will have to manipulate him. You'll give up trying to assess what he has to say. The danger is, you'll become something like a moron. You'll become incapable of learning from most people in the world, no matter how much experience they may have in their particular areas that may be much greater than yours.<sup>172</sup>

WikiLeaks is meant to “bridge the gulf between the ‘morons’ with security clearances and nothing to learn, and us, their readers.”<sup>173</sup> Assange practices an ethic of mass leaking in order to challenge the political values that regimes of secrecy reinforce. By creating a pervasive and genuine opportunity to leak and publish documented secrets, WikiLeaks is designed to shape the character of the relationship between a democratic government and its subjects. Although his early political writings emphasize the incompatibility of conspiracies with an environment of mass leaking, Assange has a more positive political claim to make. The technology of mass leaking is strongly compatible with political systems that are committed to the values of civic responsibility and democratic accountability. They are able to accommodate the

<sup>172</sup> Daniel Ellsberg to Henry Kissinger, 1969, quoted in Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Viking Press, 2002), 238.

<sup>173</sup> Assange, “Introduction,” 19.

discretionary responsibility of citizens to judge whether the disclosure of confidential information is in the public interest.

### ***3.4 Conclusion***

WikiLeaks, as understood through the work and writings of Julian Assange, is an instructive case study for thinking about the political significance of recent advances in communication technology. It is an example of a political conflict over the development of technology—a contestation of what should count as the appropriate use, or a proscribed abuse—from which we might gain a more concrete understanding about the values that are at stake in the way we design and regulate information technology. Both the development and regulation of technology can serve to either restrict or expand the possibilities of political participation, and thus shape the relationship between a representative government and its citizens.

In his original conception of WikiLeaks, Assange argued that the technology he worked to develop could promote a more just and open society by creating an environment of mass leaking that is inhospitable to authoritarian modes of governance. Its basic function is to provide a resilient system for anonymous mass document leaking. In developing these tools, Assange aimed to shape political systems by removing any significant deterrent to leaking—except for the discretionary responsibility of individuals themselves. In this regard, he aimed to cement his

ideological commitments into the design and structure of information technology by harnessing the particular political properties of recent advances.

The role of these technologies is both active and passive: their structure is strongly compatible with liberal and democratic values, but it is only an opportunity they provide. In this respect, the contemporary moment joins that of previous periods, when new means of communication provoked changes in the production of knowledge and political participation. These changes encouraged a wider and more diverse public sphere than ever before—but they did not determine those consequences. Today, tools that provide for anonymity and the circumvention of censorship can create an environment that reduces the advantage of using secrecy—especially for the sort of organizations, governments, and corporations whose plans and pursuits depend on the use of secrecy. By creating a pervasive and genuine opportunity to leak and publish documented secrets, Assange aspires to provide the conditions for more open and responsive forms of governance.

This vision for the role of WikiLeaks is consistent with many recent high-profile revelations like the Panama and Paradise Papers, the Snowden files, or the Iraq War Logs. These “mass leaks” were not only quantitatively different than any other leak in the past; they were also different in the sense that the size and content of the leaks offered valuable knowledge independent of any particular case of wrong-doing. Their massive quality is valuable for the insight it provides into the ordinary inner workings of secretive organizations. The emergence of a novel form of leaking raises old but latent questions about the political commitments that inform received wisdom about

the ethics of leaking. It prompts us to reconsider what we understand to be the acceptable uses of information technology, and encourages us to think about discretionary leaking as an opportunity for meaningful political participation. In this sense, Assange has called into question the political commitments that underlie how we think about the ethics of leaking. To invest responsibility in people to make decisions about what belongs in the public domain is not to disown questions about ethical leaking, but rather to justify the publication of leaks based on a democratic ethic. WikiLeaks might thus be understood to institutionalize democratic values like civic responsibility and public accountability by affording citizens the discretionary authority to access or disclose information for the purpose of participating in public life.

How does this understanding of the political claim behind mass leaking fit into accepted views about the ethical disclosure of confidential or classified information in a democratic society? The controversy—if there is a controversy at all—arises out of what appears to be an inherent conflict between government secrecy and democratic values. State secrecy appears to directly conflict with democracy because it undermines the ability of the public to make informed deliberative decisions, as well as the ability of the public to hold their government accountable for actions undertaken behind the veil of secrecy.

Some may think, for a couple of reasons, that this is not much of a problem at all. First, it is reasonable to think that in modern democracies the people choose representatives, not policies. If the representatives have chosen to keep something

secret, then the public has indirectly authorized the use of secrecy. Second, it is reasonable to conclude that in most cases publicly available information is sufficient to make informed judgments about general policy and the performance of our representatives.

However, in practice the use of secrecy should still be troubling to anyone who cares about a representative system of government and an informed public. The fact that the public chooses representatives, and not policies, ignores the reality that secrecy is often used to hide the policy itself. It is problematic to simply fall back on the legitimacy of having chosen a representative when representatives are often reelected—surely more often than we even know—without having owned up to all the secret policies they supported.<sup>174</sup> Moreover, it is far from clear whether the conflict between secrecy and democracy is sufficiently resolved even if it is admitted that the public defers to its representatives. Almost all of the people’s representatives in the United States Congress, for example, are also limited by secrecy to varying degrees. Most are unable to vote on some issues without being able to fully inform themselves; and all are unable to base their judgment on specific feedback from their constituents when the details or existence of the policy are kept secret.<sup>175</sup> Finally, the view that publicly available information is sufficient to make informed judgments should not be reassuring for any issue that has been involved in the long history of abuse by government officials who use secrecy to evade meaningful accountability. There are

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<sup>174</sup> James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *The New York Times*, December 16, 2005; Byron Calame, “Eavesdropping and the Election: An Answer on the Question of Timing,” *The New York Times*, August 13, 2006; Margaret Sullivan, “Lessons in a Surveillance Drama Redux,” *The New York Times*, November 9, 2013, sec. Public Editor.

<sup>175</sup> Dana Priest, “CIA Holds Terror Suspects in Secret Prisons,” *Washington Post*, November 2, 2005.



countless examples of government secrecy being used to conceal wrong-doing.<sup>176</sup> But what may be even worse is the concealment of failed policies—the advantage of ambiguity taken by any government officials who claim to have information that validates their decisions, but which is too sensitive to share publicly.<sup>177</sup> Thus despite the fact that people choose their political representatives, and even though publicly available information is sometimes enough to make informed judgments about general policy, secrecy nevertheless threatens to undermine the democratic relationship between the public and its government.

Given the persistence of the conflict between secrecy and democratic values, two kinds of solutions are available. First, one might simply conclude that more needs to be done to limit the use of secrecy. If secrecy threatens democracy, then democracy should require as much publicity and transparency as possible. “Sunlight is said to be the best of disinfectants,” Justice Brandeis famously wrote, and “electric light the most efficient policeman.”<sup>178</sup> In other words, the solution is to radically limit the government’s use of secrecy. Second, one might only conclude that the public needs a good reason to believe that government secrecy will not be used to conceal wrong-doing or withhold information that is essential for public debate. To take the first option is to agree that secrecy threatens democracy and thus attempt to make

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<sup>176</sup> Jamie Kalven, “Sixteen Shots,” *Slate Magazine*, February 11, 2015; Allan J. McDonald and James R. Hansen, *Truth, Lies, and O-Rings: Inside the Space Shuttle Challenger Disaster* (Gainesville: University Press of Florida, 2012); Stephen Rodrick, “Who Poisoned Flint, Michigan?,” *Rolling Stone*, January 22, 2016; Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (London: Rider, 2007); Seymour M. Hersh, “The Massacre at My Lai: A Mass Killing and Its Coverup,” *The New Yorker*, January 15, 1972.

<sup>177</sup> Mark Mazzetti, “Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations,” *The New York Times*, December 9, 2014.

<sup>178</sup> Louis D. Brandeis, *Other People’s Money and How the Bankers Use It*, ed. Melvin I. Urofsky (Boston: St. Martin’s Press, 1995).

government as transparent as possible. To go with the second option is also to conclude that secrecy threatens democracy. But because secrecy is often indispensable to effective government, it would be imprudent to pursue transparency at almost any cost. Instead, the public needs to be able to trust that some sort of regulatory mechanism will check the legitimate use of secrecy.

In general, proposals for such a credible check on the use of secrecy have looked towards three institutions: Congress, the Courts, or support for some independent group serving as a government watchdog.<sup>179</sup> Each has appealing features but comes with its own downsides. Congress, in particular, offers a relatively democratic way to regulate the use of secrecy but often falls short of that promise for the practical reasons already mentioned. Instead, litigants pursuing greater transparency and legislators seeking to place a check on the growth of executive power have turned to the federal judiciary as a mechanism to oversee the legitimate use of secrecy. But not only have the courts shown themselves to be deferent to executive claims of necessary secrecy, there are also good reasons why the public should not want to depend on the judicial review of government secrets. Judges often find themselves to be unqualified to challenge claims about the harms of disclosure, and when they do make judgments about the costs and benefits of secrecy they jeopardize their already-shaky institutional role as an impartial arbiter. As a last resort, the free press and its class of professional journalists, or other types of independent watchdog groups, like the Office of the

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<sup>179</sup> Rahul Sagar, *Secrets and Leaks* (Princeton University Press, 2013).

Inspector General,<sup>180</sup> have offered another way to guard against the abuse of government secrecy. Over the past fifty years, especially, the press has captured the imagination of the public as a crusader against government wrongdoing and as a courageous speaker of truth to power. While there is no shortage of examples worthy of that acclaim, the mythology of the intrepid and impartial investigative reporter that sprung from Vietnam and Watergate can easily disguise the problems with the press as a custodian and curator of government secrets. Its adopted role as an informal “Fourth Estate” check against the other three has only recently come to dominate the profession—granting it perhaps as much acclaim in some cases as it has lost in objectivity in others.<sup>181</sup> More recently, its ethos has matured into a somewhat paternalistic mission to provide the “contextual” understanding necessary to appreciate the political significance of the news.<sup>182</sup> These cultural and professional changes have set the press up as a final arbiter and gatekeeper, with questionable democratic credentials, for what information should be published and in what way it should be presented.

The takeaway from understanding the design and function of WikiLeaks is to clarify how Assange approaches the conflict between secrecy and democracy in a novel way. Critics of his ethic of leaking have roundly addressed themselves to his approach

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<sup>180</sup> However, the inspectors general are at best a semi-independent watchdog agency, since their work depends on a policy of non-interference from Congress and the willing cooperation of the Executive Branch.

<sup>181</sup> Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law*, 1st ed. (New York: W. W. Norton & Co., 2010).

<sup>182</sup> Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (New York: Basic Books, 2004); Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2015., 2015).

as if he were trying to force radical transparency as a disinfectant, thus returning to that first, and now largely abandoned, approach to the problem with government secrecy. That is not the implication of what Assange has been doing. WikiLeaks is meant to create the conditions that would afford another way for the public to trust that the need for secrecy is legitimate. The technologies that enable mass leaking provide the public with a good reason to believe that there will always be someone to check that secrecy is being used for legitimate purposes. That someone is anyone. We can trust in the appropriate use of secrecy when anybody can decide what the public has the right to know. In the scheme of potential responses, it is an eminently democratic resolution to the conflict between secrecy and democracy.

Of course, everything that is old becomes new again. In the pivotal moments leading up to the American Revolution, Benjamin Franklin saw things in much the same way. His decision to leak thirteen letters, primarily authored by the governor and lieutenant governor of Massachusetts, to radical members of the Massachusetts Assembly, was informed by his democratic and egalitarian instincts. It should not matter how the letters had come to be published, he argued, if his honest intention was to substantiate grievances or bring to light affairs relevant to the public interest. The consequences of Franklin's actions, and his intentions, were also similarly mischaracterized and exaggerated. Alexander Wedderburn, the Solicitor General at the time, excoriated Franklin for essentially supporting radical transparency that could lead to nothing but chaos, anarchy, and the dissolution of effective government.<sup>183</sup> To be

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<sup>183</sup> Privy Council Committee, "The Final Hearing before the Privy Council Committee for Plantation Affairs on the Petition from the Massachusetts House of Representatives for the Removal of Hutchinson

sure, comparisons of the two men or their justifications for leaking will quickly be drawn too far. It is the core argument of both that is the same: a commitment to more open and responsive forms of government depends upon the idea that anybody should be able to decide what the public has the right to know.

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and Oliver, 29 January 1774.”

## 4. Free as in Freedom: Richard Stallman and “Free Software”

### 4.1 Introduction

About a year after Benjamin Franklin’s role in the Hutchinson Letters Affair had been revealed, he quietly decided to leave England for America just before he would have been arrested. Franklin would soon be the subject of investigation for the political crime of treason, when Lord North directed General Gage to look into evidence that might be found in his correspondence with radical members of the Massachusetts Assembly. But it was not the prospect of arrest for a political crime that Franklin escaped, when he boarded a ship bound for Philadelphia. He had been sued for the unauthorized publication of letters that belonged to the estate of Thomas Whately—who had been Hutchinson’s correspondent. William Whately, the heir to his late brother, had brought a chancery suit against Franklin asking the court for a writ of injunction to restrain Franklin and any of his confederates from publishing copies of the letters in England, and to return any profits he had made to the rightful owner of the letters.<sup>184</sup> The suit was based on the implicit claim that Whately not only owned the original letters, but also owned any copies of them.

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<sup>184</sup> To be sure, there is good reason to believe that the lawsuit was nonetheless politically-motivated. It does not appear that Franklin had either kept any copies of the letters, nor planned to publish them in England, nor received any profits from their publication in America; William B. Willcox, ed., “William Whately’s Chancery Suit against Franklin: I. The Bill in Equity, 7 January 1774: Résumé,” in *The Papers of Benjamin Franklin*, Vol. 21, January 1, 1774, through March 22, 1775 (New Haven and London: Yale University Press, 1978), 13–18; Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, MA: Harvard University Press, 1974), 257–58.

It is not all that surprising that the political persecution of a leaker in the eighteenth century took the form of what would today be a copyright lawsuit. The politics of what belongs in the public domain has often been fought on the front lines between private property and the public interest. One might even be tempted to say that today is no different. Yet this chapter will explore exactly that: whether we should reconsider where the line has traditionally been drawn between public access and private control, and whether the values that have guided our reasoning should instruct us any differently today.

One person, in particular, with the help of thousands of volunteers eventually coming to his assistance, has refashioned the revolution in computer technology with the aim of protecting the political freedoms he understands to be at stake. The case of Richard Stallman serves as a provocative, and in many ways a successful, example of the political implications of technological development. By developing the core components of the GNU/Linux operating system and advocating for “free” software, Richard Stallman has challenged many to consider whether the advent of computer technology changes the context in which intellectual property restrictions can be justified. Most specifically, Stallman asks us to reevaluate the public interest in protecting the freedom to use and access software in creative and educational ways. But the logic of his argument is nonetheless relevant to public participation in the system of cultural production more generally. In what follows, I lay out the central argument that motivated Stallman’s development of free software and his criticism of the concept of intellectual property. The political implications of his work and writings

are then assessed in light of recent work by legal scholars and political theorists which has called attention to the importance of public access to cultural resources in a liberal democracy.

## ***4.2 Richard Stallman and “Free” Software***

Richard Stallman is a computer programmer who is among a small cadre of people who can claim to have had a defining impact on the computer and communications revolution that took shape from the late 1970s through the 1980s. But while Bill Gates, Steve Jobs, or Vint Cerf and Tim Berners-Lee, the so-called “fathers of the internet,” may be more familiar names, Stallman’s contribution to the diffusion of general purpose computing throughout society has been no less significant. Through his contribution to the development of the GNU/Linux operating system, and his advocacy of “free” software, he has called attention to the freedoms at stake in the way we design and regulate the use of computers.

In the early days of the computer revolution, before the development of the modern personal computer as most people know it today, the hardware and software of a computer—that is, the “hard” physical components of the computer and the “soft” programmable instructions which guide its function—were packaged together and often designed for a specific purpose. The hardware of a computer would have to be physically rewired to perform a different task, and the hole-punched tape that was fed into the machine would only instruct it to do certain things in a certain way. The idea



that a computer could be used for general purposes, by programming it to simulate the function of any sort of computer, had been around since the 1930s when Alan Turing proposed a “Universal Computing machine.”<sup>185</sup> But until the 1970s computers were largely inaccessible to people on an individual basis, so there was not as much incentive to cater to general and unspecified uses. Businesses sold large “mainframe” computers to governments, corporations and universities, and packaged hardware with software products designed to serve the purposes of their large institutional clients. These were general-purpose computers, but generally used for specific purposes. Nevertheless, an avid hobby community fascinated by the seemingly limitless potential applications of general-purpose computers thrived in certain areas.<sup>186</sup> Computer programmers learned to “hack”—to tinker with and modify, often for a clever or unintended purposes—the programming of these general-purpose computers through their access to universities or other large institutions. They would read and learn from the “source code” of the packaged software: a logical language that can be, through a series of steps, translated into the binary expression of 0-or-1 values which instructs the machine to perform a task. By learning to encode instructions it would be possible to change, fix, and customize the function of computer. Stallman was among these early “hackers,” immersed in a community that was animated by open and collaborative

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<sup>185</sup> David Leavitt, *The Man Who Knew Too Much: Alan Turing and the Invention of the Computer* (W. Norton, 2006); Jonathan Zittrain, *The Future of the Internet and How to Stop It* (New Haven: Yale University Press, 2008).

<sup>186</sup> Atsushi Akera, “Voluntarism and the Fruits of Collaboration: The IBM User Group, Share,” *Technology and Culture* 42, no. 4 (2001): 710–36; Paul Freiberger and Michael Swaine, *Fire in the Valley: The Making of the Personal Computer*, 2nd edition (New York: McGraw-Hill, 2000).

values.<sup>187</sup> But as this early “hacker” culture gave way to commercial pressures that placed increasing restrictions on the use of software, Stallman would become a vocal defender of an increasingly marginalized sub-culture and a harbinger warning of the larger freedoms at stake in its demise.

With the development of the personal computer, first finding commercial success with the Altair in the late 1970s, the link between hardware and software soon disappeared. It made less sense to market computers as a package of hardware and software in order to serve the more idiosyncratic uses of early adopters. The hobbyist culture of “hackers,” which helped to popularize the personal computer, was most interested in experimenting with the software that its members would modify and shared among themselves. The development of software soon became an independent enterprise itself, as the business of selling personal computers boomed. Some software developers in this new industry, notably Bill Gates and Paul Allen of Microsoft, pushed back against the hacker culture of freely sharing, modifying, or otherwise reusing the source code of software on the grounds that it amounted to stealing and undermined the economic incentive to develop good software.<sup>188</sup> Around the same time, both legislators and judges began to treat software as intellectual property. Spurred by calls to boost the profitability of the U.S. software industry in order to take a lead in the global technology sector, legislators modified existing copyright law to cover new

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<sup>187</sup> Coleman describes values and practice of hacking as involving especially “innovation, creativity, collaboration, a commitment to openness, and imaginative problem solving.” E. Gabriella Coleman, *Coding Freedom: The Ethics and Aesthetics of Hacking* (Princeton: Princeton University Press, 2012), 75.

<sup>188</sup> Bill Gates, “Letter to the Homebrew Computer Club”; Paul E. Ceruzzi, *A History of Modern Computing*, 2nd edition (Cambridge: MIT Press, 2003).

technologies, including the “expressive” application of a program’s source code.<sup>189</sup>

Courts similarly reconsidered the nature of computer software, which had thus far been treated as if it were method or formula, like a recipe for making a computer work.

Judges had ruled that software could be copyrighted but not patented. The expression of the software’s source code specified how to make a machine do its job, and could therefore be subject to copyright restrictions. But software did not amount to an idea that could be patented. Unlike copyright, a patent would restrict more than mere expression, providing monopoly control over what the computer does. But over the course of the 1980s, judges began to regard software as a technology that could be invented, like a physical object, thus making it eligible for patent protection<sup>190</sup>. A software patent would provide control over the “idea” of the computer program. The hobbyist culture of computer programming that thrived on open access to computer software soon ran up against these efforts to commercialize a growing industrial sector of the economy.<sup>191</sup>

As the norms and regulations related to computer programming were changing throughout the 1970s towards a more restrictive use of software, Stallman was working at the Artificial Intelligence Lab at MIT. The lab had become a renowned hub for innovation in computer technology. But soon many of the earliest and well-respected “hackers” working at the AI Lab were recruited away to pursue lucrative

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<sup>189</sup> Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (Amherst, NY: Prometheus Books, 2001).; also see U.S. Copyright Act of 1976

<sup>190</sup> Josh Lerner and Adam B. Jaffe, *Innovation and Its Discontents: How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do about It* (Princeton: Princeton University Press, 2004).

<sup>191</sup> John Braithwaite and Peter Drahos, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002).

corporate and entrepreneurial opportunities. They usually continued the sort of work they had previously done openly at the AI Lab, but were forced to sign non-disclosure agreements that prevented them from sharing their work outside of the company or collaborating with their former colleagues. Moreover, the products of their work at these companies would usually be released under more restrictive copyright licenses or patents.<sup>192</sup>

A particularly critical juncture came when Symbolics lured away many of its most notable programmers to pursue a business opportunity that built on their work at the AI Lab. Those who remained, including Stallman, felt betrayed as the newfound professional interests and obligations of their former colleagues prevented them from continuing to collaborate on existing projects, and seemed to betray many of the cultural values that had animated the hacker community at MIT. At the same time, corporations selling hardware to the AI Lab began to deny access to the source code used to run their machines. For example, the lab had long used laser printers from Xerox which Stallman had modified in a variety of ways to suit the needs of the lab. Stallman had himself contributed to the development of the freely available technology behind LISP computers, which Xerox had originally used as a basis for developing their laser printers. Stallman, in turn, had modified and adapted the laser printers to, among other things, send a message to a user when their print-job had completed or to message everybody in the queue if the printer jammed. But when the lab purchased and installed a new version of the printer, Xerox refused to provide access to the source

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<sup>192</sup> Steven Levy, *Hackers: Heroes of the Computer Revolution* (Garden City, N.Y.: Anchor Press/Doubleday, 1984).

code of the software used to run the machine. Without access to the source code Stallman was disabled from modifying or fixing the design or function of the printer<sup>193</sup>. It was experiences like these with Symbolics and Xerox, over the course of many years, that convinced Stallman of the need to be able to freely use and modify computer software. He regarded these changes as an affront to the open and collaborative culture that had defined his work at the AI Lab, as well as hacker culture more generally.

In 1984, Stallman began developing what he called “free software,” and resigned from the lab in order to prevent MIT from claiming proprietary rights over the products of his work. Shortly thereafter he founded the Free Software Foundation, and with the help of other like-minded programmers, began to develop the core components of a new “free” operating system. He modeled the OS on the design of Unix—an increasingly popular OS that ran on a wide range of hardware, but which was under the proprietary control of AT&T. Stallman named his version GNU (a recursive acronym that stands for “GNU’s Not Unix”). He called on other developers to join the cause by laying out the reasons why people should support open access to the source code of software, and the freedom to use, modify, and redistribute versions of it as they choose.

In “The GNU Manifesto,” Stallman addresses a variety of criticisms arising from economic and practical concerns about undoing copyright protections, or expecting that developers would continue to work without adequate compensation. His responses to these objections are thoughtful in their own right, provocative, and laboriously

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<sup>193</sup> Richard Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman*, ed. Joshua Gay (Boston: Free Software Foundation, 2002), 17, 125.

argued over the course of many years of activism thereafter. But the questions these economic and practical criticisms raise, as well as the answers Stallman ultimately puts forward, depend on matters of fact. They ultimately hang on counter-factual speculation about how to best incentivize the creative production of useful software through copyright, or through some other alternative.

They are also somewhat beside the point. The most interesting and provocative reasons he puts forward in favor of free software are those addressed to the political values at stake in our use of computers in a society in which they have become ubiquitous. Free software, as Stallman understands it, “is a matter of liberty, not price.”<sup>194</sup> It involves the freedom to use a computer program in creative ways that would be beneficial to the user or society. According to Stallman, users should be free to run the program for any purpose, to study how the program works by accessing its source code, to redistribute copies of it to others, and to modify the program and release improvements to the public, without needing to ask or pay for permission. These freedoms are not meant to exclude any commercial activity; they only exclude the enforcement of it. It would therefore be consistent to sell copies of free software as long as any copy of the program provides each user with the same freedom to use, distribute, study, and change it as they see fit.<sup>195</sup>

In “The GNU Manifesto,” Stallman explains his motivations to develop an operating system that enables users to make use of a computer in these ways. For him

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<sup>194</sup> Stallman, 41.

<sup>195</sup> For example, the company Red Hat sells custom enterprise versions of the GNU/Linux operating system and provides support services. In 2018, Red Hat was acquired by IBM at a value of \$34 billion.

it is a matter of civic friendship or duty, of solidarity with others in pursuing creative solutions to technical problems—a relationship that corporate marketing arrangements tend to pollute. “I cannot in good conscience sign a nondisclosure agreement or a software license agreement,”<sup>196</sup> Stallman declares. What these arrangements have in common is a proscription so general as to forbid what would otherwise be a costless act of public assistance. Software licenses, like nondisclosure agreements as an accepted feature of employment, would prevent Stallman from sharing what he knows with others simply for the aggrandizement of his own private gain. Stallman focuses here on restrictions on the use of software that limit not only how widely the software might be shared and put to use, but also the qualitative sense in which software serves a purpose. To restrict access to the source code, for example, not only limits whether it can be copied and shared, but also prevents users from learning how the software works or contributing to its development and modification. To impose a licensing agreement would change or undermine the “free” qualities of the software that would otherwise be valuable.

One might look at the nature of such agreements outside the realm of computer software in the same way. Nondisclosure agreements similarly arrange the conditions of a legal settlement such that the parties to it apply the force of public authority so generally that it undermines the public interest. Plaintiffs suing a movie producer for sexual assault, for example, enhance their compensation from the settlement at the potential expense of the public interest. The logic of Stallman’s argument serves as a

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<sup>196</sup> Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman*, 32–33.

reminder that the public not only has an interest in settling disputes, but also in knowing about substantiated grievances, discovering patterns, and understanding a larger picture that would expose longstanding or systemic abuses of power. “In any particular situation,” he counsels, “we have to ask: are we really better off granting such a license? What kind of act are we licensing a person to do?”<sup>197</sup> By questioning why the public should license such an arrangement between people—whether it is license to restrict speech or software—Stallman is asking us to reconsider what is of public value, and, in particular, what is of public value when we design and regulate the use of computers.

The argument Stallman puts forward depends on the technology in question. The reasons why it has historically made sense for the public to temporarily license the right to copy creative works, or control the use of an invention, may not be the same as those we ought to consider today. The heart of the question is the same: “The real established tradition of our society is that copyright cuts into the natural rights of the public—and that this can only be justified for the public’s sake.”<sup>198</sup> Given that the public would by default enjoy the freedom to use, copy, modify, and share the material products of creative production, and to make use of shared ideas, to what extent should we limit ourselves for the sake of some other end—like encouraging the pursuits of authors and inventors? There is no correct or definitive answer to the question. Neither should we expect the decision of a democratic process to perfectly accord with our moral intuition about what would be right. But how we should understand the stakes of

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<sup>197</sup> Stallman, 37.

<sup>198</sup> Stallman, 47.



the public interest, Stallman argues, depends on the sort of technical capability that is widely available.

For the technology and period of time that copyright was originally developed—for books—restrictions on copying did not generally obstruct people who wanted to use books, or obstruct how they would expect to be able to use them. Quite simply, most people wanted to read books and share the few they possessed with friends. They neither had the means nor usually the expectation to be able copy their own books economically. To publish and sell books would require a printing press, which was expensive and unwieldy. Restrictions on who was allowed to print and sell books was thus a small price to pay in order to incentivize the creation of more good books for everyone to read. The implicit bargain today, Stallman argues, is different than it once was with the printing press:

The case of programs today is very different from that of books a hundred years ago. The fact that the easiest way to copy a program is from one neighbor to another, the fact that a program has both source code and object code which are distinct, and the fact that a program is used rather than read and enjoyed, combine to create a situation in which a person who enforces a copyright is harming society as a whole both materially and spiritually.”<sup>199</sup>

As a regulation that largely applies to the industrial production of books, copyright was initially designed as a restriction on publishers, intended to benefit authors, but only insofar as it served a public interest in promoting the progress of the arts and sciences.<sup>200</sup> The idea, and the very need, for such a regulation sprung from

<sup>199</sup> Stallman, 37.

<sup>200</sup> This instrumental justification for copyright, associated especially with the tradition of Anglo-American political thought, was adopted by the framers of the U.S. Constitution after the idea of an

technological advancements that made printed materials cheaply available to the mass public—the first appearance of a widely literate “reading public” in any meaningfully democratic sense of the term.<sup>201</sup> This was not always the case. For example, there is no clearly discernible concept of restrictions on copying in the ancient world because of the nature of the tools available to them, and the sort of literal intellectual labor expected of scholars to preserve, reproduce, and add onto to the written records of existing knowledge.<sup>202</sup> For different reasons, Stallman suggests that copyright restrictions make as little sense today as they once did in the ancient world. The bargain implicit in the justification of copyright restrictions made sense during an age of industrial production of printed material—when the freedoms used to purchase greater progress in the arts and sciences were, at best, tangential and impractical freedoms, unlikely to ever be relevant to most people. Copyright was an advantageous “bargain” largely because the public was trading away freedoms it could not exercise:

But the context is changing, and that has to change our ethical evaluation of copyright. Now, the basic principles of ethics are not changed by advances in technology; they’re too fundamental to be touched by such contingencies. But our decision about any specific question is a matter of the consequences of the

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author’s copyright lasting in perpetuity was dismissed after some debate. The alternative tradition, associated especially with French and German thought of the 1800s, makes a claim about the moral basis for an author’s control over the use and reproduction of their creative expression, or original idea; Jane C. Ginsburg, “Tale of Two Copyrights: Literary Property in Revolutionary France and America,” *Tulane Law Review* 64, no. 5 (1990 1989): 991–1032.

<sup>201</sup> It also sprung from efforts in London to censor the publication of tabloid-style news about the daily affairs of Parliament; James Van Horn Melton, *The Rise of the Public in Enlightenment Europe* (Cambridge, England: Cambridge University Press, 2001); Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd ed. (Cambridge, England: Cambridge University Press, 1983).

<sup>202</sup> Michel Foucault, “Authorship: What Is an Author?,” *Screen* 20, no. 1 (March 1, 1979): 13–34; Eisenstein, *The Printing Revolution in Early Modern Europe*.

alternatives available, and the consequences of a given choice may change when the context changes.<sup>203</sup>

The advent of computer technology, and advancements that put computers into the hands of the public and connected them to each other, changes the context in which we should evaluate the justification of restrictions on personal freedoms like those imposed by copyright. In the same way that Stallman asks us to reevaluate the public interest in protecting the freedom to use and access software in creative and educational ways, we might also reconsider the public interest in the process of cultural production more generally.

### ***4.3 Cultural Freedom and Liberal Democracy***

For a hacker like Stallman, programming computer software is more than a profession. It is a cultural activity, an outlet to exercise and express creativity. It was a way to produce something that would not only be useful to many people but could even be beautiful to other hackers, who marvel at elegant solutions to technical problems. There are many, but not that many, people who appreciate the activity of computer programming like Stallman does.<sup>204</sup> But one does not need to be a hacker to understand what their particular sub-culture offers to those who fit right in. Excellence,

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<sup>203</sup> Richard Stallman, "Copyright and Globalization in the Age of Computer Networks" (MIT Communications Forum, Boston, MA, April 19, 2001); Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman*, 136.

<sup>204</sup> E. Gabriella Coleman and Alex Golub, "Hacker Practice: Moral Genres and the Cultural Articulation of Liberalism," *Anthropological Theory* 8, no. 3 (September 1, 2008): 255–77.

and a feeling of “flow” and belonging, is appreciated in and outside of any profession.<sup>205</sup> Ordinary professionals of many stripes will, in their best of moments, aspire to approach their work less as a craft and more as a calling. Musicians, actors, novelists, of course—but also journalists, teachers, and scientists, among many others, can just as easily be imagined finding a similar fulfillment through their involvement in some cultural niche: understanding what matters most in their work, discussing the qualities that mark their collective identity, and having a common set of stories to reference shared values. The same could be said about the wider world of hobbies: an array of idiosyncratic skills and obsessions that have drawn people together to share and discuss their fascination with history, movies, games, or any number of things. Hobbyists often similarly find more than mere distraction or leisure in their creative yield, but also a newfound community and self-esteem.

What is true about the fulfillment and meaning people can find in sub-cultures like these is also true of the culture we more generally inhabit. Shared values and common reference points help to construct our views across a wide range of domains, from the personal to the political. No one exists outside of the culture they inhabit, and its influence bears upon how we pursue and understand both our own choices and those we make in concert with others. How we understand and evaluate political issues, and act on our convictions, is often negotiated through appeals to shared reference points. Culture shapes what actions we consider to be appropriate, or what claims to authority are treated as legitimate. The weight of ideas, symbols, and values

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<sup>205</sup> Mihaly Csikszentmihalyi, *Flow: The Psychology of Optimal Experience* (HarperCollins, 2009); Coleman, *Coding Freedom*.

that gain widespread acceptance bear upon what we see as the limits and possibilities of political action.

Culture, and our participation in the production of it, is an important part of how we should understand and pursue the realization of liberal and democratic values like personal autonomy and political freedom. Yet political theorists interested in outlining the requirements of justice in liberal democratic societies have traditionally not said much about the role of culture. Liberal political theorists who have focused on respect for personal autonomy have tended to either make certain assumptions about the nature of individual decision-making that neglect the role of culture, or have opted to implicitly treat culture as if it were a black-box out of which various outlooks may emerge. In the first sense, individuals appear as rational actors who know what is good for themselves. Their behavior expresses their considered preferences, which are generally treated as if they had formed independently from any prior engagement with other people. Alternatively, pluralist conceptions of liberal democracy tend to describe a political society that respects various competing systems of value. Some views of life may be more or less comprehensive than others in shaping individual preferences, but on this view, a liberal state should refrain from picking any winners among them. The “fact” of reasonable pluralism leaves individuals to choose their own good independently of politics, and forges the liberal state from the basic principles of justice over which any reasonable comprehensive view of the good would overlap.<sup>206</sup>

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<sup>206</sup> John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005).

The concept of culture confuses this picture of a pluralist society insofar as individuals cannot be understood to choose their own good completely independent from social influence. The objection arises from a basic intuition that our choices are always already rooted to some degree in our interactions with, and observations of, other people. Although culture does not have a determinate influence in this regard, our values and preferences are unavoidably learned and adopted from others to some extent.

A range of critics across a variety of fields have spoken to the politics of culture insofar as it shapes the preconceptions that people bring with them into politics and public discourse. Some cast their criticism in a harsher or softer light. Cultural influences may appear so powerful that they can suppress popular support for otherwise desirable alternatives to the political status-quo. Industrial systems of cultural production, like mass media and commercial advertising, can thus serve as a “hegemonic” tool of ideological control by the ruling class.<sup>207</sup> On this view, to give expression to political beliefs or otherwise participate in the democratic process would seem to fall far short of meaningful political freedom when cultural forces beyond our own control lead us to discount alternatives we might otherwise prefer.

However, the politics of culture need not be framed as such a fundamental critique of theories of liberal democracy. Many other scholars have considered the role of culture as more of a requisite background for political discourse. Culture provides people with a set of shared assumptions that makes (or at least can make) moral and

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<sup>207</sup> Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971).

political argument both meaningful and productive.<sup>208</sup> Theories of deliberative democracy, in particular, have understood the role of culture to be a basis for some level of mutual intelligibility between people. It provides the background knowledge necessary to vindicate the validity of moral and political claims in the eyes of others.<sup>209</sup> Such mutual intelligibility is also understood as an important step for children to take towards becoming a citizen of a liberal democracy, gaining a “cultural coherence” that enables them to productively engage in public life.<sup>210</sup> With respect to sub-cultures, too, like minority cultures existing within a larger society, liberal theories of justice need to account for the fact that personal autonomy is often intimately related to cultural membership. Membership and participation in a culture provides the “contexts of choice” in which people craft their own lives and choose meaningful pursuits.<sup>211</sup> What all these accounts of the politics of culture suggest is that who we understand ourselves to be, what beliefs we hold, and what actions we undertake are in part constituted by the culture we inhabit. To be committed to the realization of liberal and democratic ideals will often entail accounting for the role of culture in politics.

Liberal democracy can make sense of cultural influences that have the potential to undermine the integrity of personal autonomy and political freedom insofar as it is able to speak to how culture is produced. Assessing the system of cultural production is

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<sup>208</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, revised edition (New York: Basic Books, 2006).

<sup>209</sup> Jürgen Habermas, *The Theory of Communicative Action*, trans. Thomas McCarthy (Boston: Beacon Press, 1984); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 22–23.

<sup>210</sup> Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), 333–35, 141–46.

<sup>211</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 2003), 89.

essential to reconciling potentially adverse cultural influences with liberal and political freedoms. In other words, we need to be able to say something about the attractiveness of any particular system of cultural production in terms of its compatibility with basic liberal and democratic values. One way to think about the qualities that would make a system of cultural production more or less compatible with a liberal democratic society is in terms of its transparency and openness.<sup>212</sup> A transparent culture offers people greater clarity about what ideas and traditions are being built upon by the contributions of others. Transparency thereby offers individuals more agency in recognizing and understanding the influence that culture may have on them. It also provides a more thorough catalog of the resources that people can use to offer their own creative contributions. An open culture encourages diffuse participation by making cultural material widely available. The stories, art, and knowledge that gain significance from wide acceptance into a set of a common references are the material from which culture takes shape, and which in turn shapes those who inhabit it. Who can explore, create, and share cultural material, and what resources are available to build upon, distinguishes an open and transparent culture from one that is opaque and closed.

Scholars of law, economics, and political theory have more recently recognized the significance of computer and network technologies in pushing society towards one or the other extreme. There are many reasons to be optimistic about the opportunities afforded by recent advances. The technical characteristics of digital information technology have significantly undermined the industrial model of cultural production

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<sup>212</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006).



that came to dominance during the twentieth century. The information economy enabled by the internet offers new ways to interact with culture, challenging our expectations about who generally creates new cultural material, and how they do so.<sup>213</sup> The capacity of ordinary people, especially non-commercial actors, to use and manipulate cultural material has rapidly closed the gap that previously existed between them and corporations with much greater financial resources.<sup>214</sup> The ability of audiences to readily select from among a wider range of options, and the opportunity to easily publish and market their own creative contributions, challenges the traditional gatekeeper role of large corporations in a variety of industries, like the newspaper, film, and music industries.<sup>215</sup> This has led a growing contingent of legal scholars to call for rethinking intellectual property protections from the democratic standpoint that there is something normatively attractive about redesigning the system to encourage anyone to “take from the existing cultural universe more or less whatever they want, cut it, paste it, mix it, and make it their own.”<sup>216</sup>

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<sup>213</sup>Niva Elkin-Koren, “Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace,” *Cardozo Arts & Entertainment Law Journal* 14, no. 2 (1996): 215–96; William W. Fisher III, “The Implications for Law of User Innovation,” *Minnesota Law Review* 94, no. 5 (2010 2009): 1417–77.

<sup>214</sup> Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights,” *California Law Review* 81, no. 1 (1993): 125–242.

<sup>215</sup> Benkler, *The Wealth of Networks*; William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford University Press, 2004).

<sup>216</sup> Benkler, *The Wealth of Networks*, 276; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (New York: Penguin Press, 2004); Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society Commentary,” *New York University Law Review* 79, no. 1 (2004): 1–58.

## 4.4 Conclusion

Despite the promise that the computer revolution has offered to those who would otherwise be limited in their capacity to create, share, and participate in the making of culture, there is nothing that necessarily prevents these technologies from being used for antithetical purposes. Nor does the technological capability necessarily translate into the freedom to use computers in the ways that Stallman and others have advocated.

To the contrary, the emergence of greater cultural freedom at a technological level has been met by an equally significant regulatory shift designed to protect the incumbent industrial model of cultural production. Industry representatives have largely persuaded Congress and the courts to prohibit not only the commercial use of their products, but also much of the non-market creativity undertaken by individuals making use of copyrighted material. Their efforts are part of a larger trend—“an enclosure movement”—that legal scholars have steadily documented over the past fifty years. It is a steady shift in the regulation of new technology towards greater private control. Its effects are seen in many places, including how institutions interpret the nature of intellectual property,<sup>217</sup> or understand the extent of the public domain,<sup>218</sup> to legislative

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<sup>217</sup> Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” *New York University Law Review* 74, no. 2 (1999): 354–446; Yochai Benkler, “Siren Songs and Amish Children: Autonomy, Information, and Law,” *New York University Law Review* 76, no. 1 (2001): 23–113. See also Elizabeth Eisenstein’s history of an earlier enclosure movement of printing privileges for publishers and booksellers in England, which similarly restricted access to the literary “commons” with unintended consequences; Eisenstein, *The Printing Revolution in Early Modern Europe*, 83–84.

<sup>218</sup> Jessica Litman, “The Public Domain,” *Emory Law Journal* 39, no. 4 (1990): 965–1024.

extensions on copyright,<sup>219</sup> and the erosion of “fair use,”<sup>220</sup> to the increasing sophistication of technical tools that restrict control over copyrighted material.<sup>221</sup> The risk, suggested by some scholars, is that these efforts will drive a race to the bottom—a so-called “tragedy of the anticommons”—where a default principle of exclusion applied to the products of creative activity can effectively block what would otherwise be the best use of shared resources.<sup>222</sup> The problem, in this sense, is similar to the more familiar “tragedy of the commons”—in which the depletion of a shared resource occurs when too many people have a right to use it, and no one has a right to exclude others. A tragedy of the anticommons is the reverse. It occurs when so many people have an overlapping right to exclude that it tragically prevents the best use of a shared resource.<sup>223</sup> Out of a concern that authors might see too little monetary incentive to produce more creative works, the enclosure of the cultural commons threatens to deplete the shared resources we depend on to fully realize some of our most important liberal and democratic commitments.

The recent technological revolution in personal computers and network communication offers people a newfound capacity to access and contribute to public culture. Qualitative differences have eclipsed the significance of quantitative improvements in the means of communication. Meanwhile, a cohort of legal scholars

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<sup>219</sup> Copyright Term Extension Act (“CTEA”), Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>220</sup> James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *Law and Contemporary Problems*, 2003, 63–104.

<sup>221</sup> Lawrence Lessig, *Code*, version 2.0 (New York: Basic Books, 2006); Lessig, *Free Culture*.

<sup>222</sup> Dan Hunter, “Cyberspace as Place and the Tragedy of the Digital Anticommons,” *California Law Review* 91, no. 2 (2003): 439–519.

<sup>223</sup> Michael A. Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,” *Harvard Law Review* 111, no. 3 (1998): 673–78.

and political theorists have called attention the role of culture in a liberal democracy, and the normative stakes of the ongoing conflict over public access to it. But before these battle lines were drawn, the work and writings of Richard Stallman were put forward in order to challenge us to see the freedoms at stake in our use of computers, and to reconsider the public interest in the process of cultural production more generally. He has met with some success, directly inspiring the work of many of the legal scholars that would follow, and developing the core components of what would become the most popular operating system currently in use. GNU/Linux powers the vast majority of all smartphones, the basic infrastructure of the internet, and the world's fastest supercomputers, and, in addition, can boast of a modest but increasing share of personal computers. By considering the normative and practical influence of Stallman's politically-motivated development of technology, and efforts like his, we can better understand the political significance of information technology more generally.

## 5. Conclusion

Like the reflections of Niccolo Perotti on the advent of the printing press, and those of many other authors interested in the political significance of new technology, the sentiments of both hope and dread have surely left their imprint on the production of this dissertation, if not also on its argument. Motivated by a suspicion that qualitative differences can arise from quantitative improvements in the means of communication, I pursued the study of a few issues where new technology seemed to raise novel political or ethical concerns. Not surprisingly, perhaps, I found that the problems were not all that different than before; but out the contrasts between old and new, we might find our way to new solutions.

By considering how individuals and social groups develop technology for political purposes, we gain insight into the values that are stake in how people use and abuse new technology. The cases I have discussed each reflected a basic disagreement about the appropriate domain of the public sphere: whether to accommodate electronic forms of civil disobedience, to sanction the act of leaking, or to treat digital information as intellectual property. In these debates, new technologies have normative and political implications insofar as they afford opportunities for a more open and responsive political society. They challenge the strength of our commitment to some of the most basic liberal and democratic values, like personal autonomy and political participation.

In order to adapt to the peculiar problems and opportunities that accompanied the advent of the internet, a “hacktivist” collective developed software that would translate the traditional protest tactics of trespass and blockade for a world in which power flowed through information networks. They organized “virtual sit-ins” made possible by a “mass demonstration machine,” which directed a users web browser to send an automated reload request to a target website every few seconds. Their abuse of internet technology for the purpose of political dissent, I argued, should be regarded as a potentially legitimate practice of civil disobedience. Of course, there are good reasons to question the justification of electronic forms of civil disobedience—reasons which might lead us to the opposite conclusion if not for an appreciation of the ways in which states can frustrate or prevent acts of civil disobedience. Absent a consideration of the circumstances of political dissent in the information age, the ways in which new technology have misshaped the usual the relationship between the state and the disobedient would go unnoticed. By thinking about the political significance of new techniques of civil disobedience, we also gain insight into the many ways in which the physical context limits the power of protesters to disobey, or empowers the state to prevent a valuable form of political participation.

The publication of massive disclosures of secret documents has also emerged as new sort of phenomenon in the long history of leaking. Recent revelations like the Panama Papers, the Snowden files, or the Iraq War Logs, can be characterized as “mass leaks” in the sense that they disclosed a mass of documents that does not have a defined focus on a particular case of wrong-doing. It is not the exactly the quantity of

documents disclosed that makes these leaks different. Their massive quality is valuable for the insight it provides into the ordinary inner workings of secretive organizations. In this regard, the political significance mass leaking is consistent with the ethic of leaking that I have associated with Julian Assange. The tools he helped to develop serve two immediate functions: to resist attempts to censor the publication of secrets on the internet, and to provide leakers with a technical assurance of anonymity. These functions have normative implications insofar as they were designed to shape political systems by removing any significant deterrent to leaking—except for the discretionary responsibility of individuals themselves. To invest responsibility in people to make decisions about what the public has the right to know is not to disown ethical responsibility, but rather to justify the publication of leaks based on a democratic ethic. This political approach to the ethics of leaking is not new. At a pivotal moment of the political conflict that led to the American Revolution, Benjamin Franklin justified his leak of the Hutchinson Letters on similar grounds. These controversies reflect the political values that frame how we see ourselves in relation to the state. The advent of new technology thereby prompts us to reconsider who should have the authority to decide what the public has the right to know.

Lastly, the politically-motivated development of free software was designed to provide people with the freedom to control the tools that have become a ubiquitous part of everyday life. Computer and network technologies have offered new ways to interact with culture, changing our expectations about who generally creates and participates in the production of culture, and how they do so. The idea of “free”

software speaks more generally to a freedom of creative production. By developing some of the core components of the GNU/Linux operating system, Richard Stallman aimed to challenge long-standing assumptions about the justification of intellectual property and the public interest bargain at the heart of it. The logic of understanding the freedoms at stake in our use of computers prompts us to reconsider the role of culture in political society more generally. To participate in public life, to contribute to the culture that shapes us all, and to carve out a life of our own making, depends on the freedom to engage with cultural material by studying, modifying, and sharing it.

Each of these issues illustrates the political significance of new technology. Individual actors and social groups have developed new information technology in ways that are intended to be compatible with the political values they want to promote, or incompatible with those they would want to diminish. I have focused on three figures who combined their political activism with their development of computer software. Their work and writings encourage us to reconsider received opinion about what should count as a use or abuse of new technology: what forms of political protest can be justified, who should have the authority to decide what the public has the right to know, and what restrictions on access to creative works are in the public interest. We should not expect that anything will determine our answers to these questions, except the extent of our own commitment to political values at stake.



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## Biography

Chris Kennedy is a PhD candidate in Political Science at Duke University. His research focuses on ethical controversies over the use and abuse of information technology—including civil disobedience, leaking, and intellectual property. More broadly, he is interested in the history of political thought, where previous periods of technological development have raised questions about the appropriate domain of the public sphere and who should be able to participate in it. He has been a Ph.D. Lab Scholar in Digital Knowledge at Duke University, and a recipient of a Bass Connections Fellowship, a Graduate Fellowship from the Kenan Institute for Ethics, and a Humane Studies Fellowship from the Institute for Humane Studies. Before coming to Duke, he received a BA in Politics from New York University in 2009. He enjoys listening to American folk music, going for walks to nowhere in particular, and reading in a hammock on his porch.