The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State

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ABSTRACT

The administrative norm of transparency, which promises a solution to the problem of government secrecy, requires political advocacy organized from outside the state. The traditional approach, typically the result of organized campaigns to make the state visible to the public, has been to enact freedom of information laws (FOI) that require government disclosure and grant enforceable rights to the public. The legal solution has not proven wholly satisfactory, however. In the past two decades, numerous advocacy movements have offered different fixes to the information asymmetry problem that the administrative state creates. These alternatives now augment and sometimes compete with legal transparency regimes.

This Article is the first effort to survey and analyze transparency advocacy campaigns and the “fix” that each proposes to the problems created by the state’s asymmetrical information advantage over the public. It sketches the history of four campaigns: the FOI movement in the U.S., the global anti-corruption movement (spearheaded by Transparency International), the digital transparency movement, and WikiLeaks. The Article offers two insights. First, although these movements share a basic set of assumptions and tell a similar policy story—secrecy is a pressing administrative problem that can be fixed with the right policies and institutional arrangements—they diverge significantly in how they understand not only the problem’s causes but the state itself. Second, and as a result, the Article unveils transparency as a contested political issue which masquerades as an administrative tool. Rooted in contested claims about the state’s legitimacy and performance, the transparency fix leads to tendentious prescriptions about law, policy, and the state.

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INTRODUCTION:
THE INFORMATION ASYMMETRY PROBLEM

Government transparency does not spring naturally from the modern democratic state. As Max Weber maintained, “[b]ureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can.”¹ The prerogative to create and maintain information asymmetries is one that government entities and officials do not easily surrender.² Open government laws, which create legally enforceable rules requiring government entities to make information available, are thus largely the consequence of concentrated political activism and advocacy. For more than five decades, a broad transparency advocacy movement, composed of a diverse array of organizations operating from the transnational to local level, has attempted to address and mitigate the fundamental democratic and administrative problems that information asymmetry creates for legitimate and effective governance.³

At its inception, the movement understood and defined excessive state secrecy as a problem caused by a scarcity of laws—one that could be solved by a powerful, wide-ranging, and publicly enforceable legal right to government information. The quintessential campaign, which had historical antecedents and contemporaries in the U.S. and elsewhere,⁴ was

¹ 2 MAX WEBER, ECONOMY AND SOCIETY 992 (Guenther Roth & Claus Wittich eds., 1968).
² See id. at 992-93 (identifying the bureaucracy’s “pure power interest” in protecting its secrets from the legislature, something it will defend “fanatically”).
³ For a summary of the claims made about secrecy’s costs to legitimate and effective governance, see Mark Fenster, THE OPAQUE OF TRANSPARENCY, 91 Iowa L. Rev. 885, 895–902 (2006).
⁴ I discuss the most important domestic predecessor in Part I-A, infra. If one views transparency advocacy as a subset of more general campaigns for good government, then it dates back at least to the Progressive Era, when a social and political movement led the charge for reforms to eradicate bureaucratic corruption, especially at the municipal level. See ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 at 164–85 (1967). Indeed, Louis Brandeis’ famous claim that sunlight is “the best of disinfectants,” made as part of his campaign as a Progressive trustbuster, dates from this period. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (Augustus M. Kelley 1986) (1914). With respect to international precedents, Anders Chydenius, a priest and legislator, led Sweden to adopt the first freedom of information law in 1766. See Juha Manninen, ANDERS CHYDENIUS AND THE ORIGINS OF WORLD’S FIRST FREEDOM OF INFORMATION
the mid-twentieth century effort in the United States that resulted in enactment of the federal Freedom of Information Act in 1966. That campaign has never ended. Numerous contemporary domestic and international NGOs endeavor to preserve, strengthen, and extend open government mandates.

But the results of the freedom of information (“FOI”) campaign’s labors, while considerable, have not fully solved the problem that it sought to address, at least for the many advocates in the U.S. and around the world who regularly complain about the laws’ limited scope and their inadequate enforcement. In recent decades, several new networks and groups have responded to these frustrations by advocating alternative means to open the state to public view. Law, their efforts imply, is not the

Act, in The World’s First Freedom of Information Act: Anders Chydenius’ Legacy Today 18 (Juha Manninen ed., 2006). But the Swedish law was limited to the press and did not establish a public right to information; nor did it augur a significantly more open domestic state or inspire imitation in the manner of the U.S. FOIA. See Leena Luhtanen, Transparency at the Core of Democracy, in The World’s First Freedom of Information Act, supra, at 56; Manninen, supra, at 52-53.


Organizations that campaign on behalf of legislative Freedom of Information laws include OpenTheGovernment.org, a coalition of organizations devoted to “stimulating legislative and executive branch action and garnering media attention to the benefits of government openness,” We Do, OPENTHEGOVERNMENT.ORG, http://www.openthegovernment.org/we_do, the National Freedom of Information Coalition, which “protects the public's right to oversee its government,” especially at the state level, About NFOIC, NATIONAL FREEDOM OF INFORMATION COALITION, http://www.nfoic.org/about, and OMB Watch, which “exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy.” About Us, OMB WATCH, http://www.ombwatch.org/about_us. Internationally, the human rights organization Article 19 defends and promotes freedom of expression and freedom of information all over the world and especially promotes “international human rights standards and . . . legislation that protects the right to speak and right to know in countries emerging from conflict, war and genocide or repression.” Who We Are, ARTICLE 19, http://www.article19.org/pages/en/who-we-are.html. The website freedominfo.org, which is funded by several foundations and working with the National Security Archive in the U.S., serves as a “virtual network” for the many national FOI movements that have emerged in the last few decades, and provides “crucial information on freedom of information laws and how they were drafted and implemented, including how various provisions have worked in practice.” About Us, FREEDOMINFO.ORG, http://www.freedominfo.org/about-us/. For general descriptions of the international FOI advocacy movement, see ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 107–11 (2006), and John M. Ackerman & Irma E. Sandoval-Ballesteros, The Global Explosion of Freedom of Information Laws, 58 ADMIN. L. REV. 85, 121–23 (2006).

See infra notes 83-85 and accompanying text.
answer to secrecy, or at least not the only solution. I discuss three such campaigns in this Article. The anti-corruption movement, exemplified by the non-governmental organization (NGO) Transparency International, views transnational and domestic activism—which includes both lobbying for freedom of information laws and gathering and distributing information about governmental performance—as essential weapons in the larger battle to identify and stigmatize venal states and unscrupulous officials. It insists that transnational NGOs can use the information they obtain from and about the state to lobby, pressure, and shame government into operating more accountably.\(^8\) Second, the “digital transparency” movement champions the use of information technology and networked communication as the solution to government secrecy, as well as a medium that can create a more participatory, collaborative state. For its advocates, technology will open the state by freeing its data.\(^9\) Third, WikiLeaks claims that its technological ability to distribute liberated government documents over the Internet will usher in a newly transparent state. It views itself as enforcing the public’s natural and internationally recognized human right to government information through extralegal means, assisted by arguably illegal acts—and often ones that are clearly illegal.\(^10\)

These four campaigns—FOI, anti-corruption, digital transparency, and WikiLeaks—share a commitment to the nearly religious, normative concept of transparency around which they are organized.\(^11\) They all agree, at a high level of abstraction, that excessive secrecy endangers the democratic system and effective, ethical public administration. But in defining the problem, they focus on different issues and offer distinct policy prescriptions. Put simply, they all agree that transparency can counteract secrecy and the abuse of power that is its consequence, but each diverges in identifying its preferred fix. They may look within the state for an institution (like judicially-enforced legal rights) to check the bureaucracy; they may look outside the state for an institution (like transnational NGOs) or technology (like networked communication) that can hold the state accountable; or they may actively oppose the state in a struggle to pry the government open against its wishes and outside of the

\(^8\) See Part II, infra.
\(^9\) See Part III, infra.
\(^10\) See Part IV, infra.
prevailing law. “Transparency” is a goal, a happy ending, that inspires very different policy stories.

This Article probes the continuities and discontinuities among these movements and in the stories they tell in order to fill a crucial gap in the burgeoning academic literature on transparency. My purpose is two-fold. First, I explain that each of these movements operates privately—that is, as activists advocating from outside of the state—in search of a means to

There can be no doubt about transparency’s ascendance as a concept among academic advocates, especially in the economic and legal academic literature. See Emiliano Grossman et al., Economies Through Transparency, in Transparency in a New Global Order 97, 100–01 (Christina Garsten & Monica Lindh de Montoya eds., 2008) (displaying a chart that shows an extraordinary rise in use of the term in journals within the EconLit database between 1986 and 2004, and especially between 1997–2004); Guy I. Seidman, Lawyers are from Mars, Political Scientists are from Venus: Who Gets Transparency Right? (March 21, 2011) (unpublished manuscript) (on file with author) (finding in search of law review publications between 1990 and 2010 a nearly forty-fold increase in the use of the term “transparency,” and a nearly three-fold increase in the use of the term “freedom of information”).

They are all led by NGOs and funded by a mix of civic-minded interest groups, charitable foundations, and like-minded individuals. Among the leading foundations that support work on transparency are the Open Society Foundations, which sponsor a “Transparency and Integrity Fund” to increase access to information at the U.S. state and federal levels and provide support for individual projects throughout the world. See About the Transparency and Integrity Fund, OPEN SOC’Y FOUND., http://www.soros.org/initiatives/usprograms/focus/transparency/about (announcing availability of funding “for a wide range of policy advocacy strategies” relating to transparency); Fiscal Decentralization Initiative, LOCAL GOVERNMENT AND PUBLIC SERVICE REFORM INITIATIVE, http://lgi.osi.hu/documents.php?id=3259 (subsidiary of Open Society Institute); Rising Voices Launches Technology for Transparency Network, OPEN SOC’Y FOUND. (Jan. 19, 2010), http://www.soros.org/initiatives/information/focus/communication/news/transparency-tools-20100119 (announcing a program co-created by Open Society Foundations grantee to promote the “use of technology for transparency and accountability” throughout Latin America, Asia, and Africa, among other places). Other foundations that have funded or established transparency-related projects include the Carnegie Corporation of New York and the Ford Foundation. See, e.g., CARNEGIE CORP. OF N.Y., CARNEGIE RESULTS, (2010), available at http://carnegie.org/fileadmin/Media/Publications/carnegie_results_spring_10_final_02.pdf (highlighting Carnegie’s support for the Project on Government Oversight, a “nonprofit organization that works with whistle-blowers to add transparency to government operations”); Democratic and Accountable Government: Promoting Transparent, Effective and Accountable Government, FORD FOUND., http://www.fordfoundation.org/issues/democratic-and-accountable-government/promoting-transparent-effective-and-accountable-government (announcing support for “community-driven efforts to improve the transparency and integrity of government institutions and processes”). Indeed, the problems that WikiLeaks has faced in receiving private donations—beginning in late 2010, major credit card companies,
fix what it views as a fundamental and pervasive problem endemic to government. They share assumptions about the needs and rights of democratic citizens to have access to government information in order to mitigate—or, better, eradicate—the asymmetric informational advantage the state enjoys over its public. But they diverge significantly in how they understand not only the problem’s causes but the state itself. In extolling the virtues of its particular fix, each campaign offers a broader vision of transparency’s mission, one tied to its particular understanding of the current state and of the better state that it hopes will emerge under the administrative conditions that its work will surely help create. The transparency fix—an idea that occupies a pivotal position in contemporary debates about governance, administration, and regulation—thus reveals our political and social anxieties about administration and about how we understand and attempt to correct the shortcomings of administrative law.

Second, the Article unveils transparency as a contested political issue that masquerades as an administrative tool. The existing literature advocating and developing transparency as a concept has failed to date to map out transparency as a diverse and contested political field; instead, it has assumed transparency’s status as a universal norm and debated the technical and legal issues of optimal administration and application. But as I demonstrate, each transparency campaign’s competing fix and vision of a more perfect, visible state rests on contested claims about the state’s legitimacy and performance and theories of law, policy, and the state. That is, each movement and its fix implicate “transparency” in a much broader

In earlier work, I have reviewed the normative and consequential literature on transparency, which focuses on its democratic and administrative benefits and costs; this large body of work considers what transparency does, not the political conditions under which transparency is adopted. See Fenster, supra note 3, at 894-910. Works that offer normative arguments in transparency’s favor provide brief accounts of the FOI movement and of more recent efforts to advocate transparency, but they generally provide little historical, political, and social context. See, e.g., ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 24-29 (2007) (describing “the struggle toward openness” and “a slow march toward right-to-know” before shifting to the history of disclosure-based regulation); SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 21-24 (2007) (providing an “overview and history of the federal FOIA” in a study of the relationship between open government and the new governance or new public management movement).
To understand transparency, we must understand the political and social world within which it is defined by the networks, groups, and individuals who attempt to pressure the state to adopt their vision of a visible state. Viewed in context rather than simply as a transcendent normative goal or neutral technical tool, transparency emerges as a political concept that is deployed in diverse campaigns as parts of broader political and economic projects.

I begin in Part I by introducing the legal- and rights-based understanding of transparency that developed in the mid-twentieth century U.S. Part I describes that campaign’s two distinct stages. As World War II was winding down, newspaper editors’ trade groups sought to export free speech ideals and the model of an objective and independent press abroad to the new world that the post-war period seemed to herald. Later, those trade groups shifted their attention inwards, to address what they saw as the growing problem of domestic state secrecy. This second period adapted the legalistic concepts of press freedom and rights that had been developed in the earlier period as a “right to know” and the “freedom of information” for the somewhat different project of advocating laws to require the U.S. government to disclose information to the public. Parts II through IV describes three contemporary movements that attempt to extend the transparency ideals in the US and internationally: the transnational campaign to fight corruption (Part II); the effort to remake the state and its relationship to the public in a digital, networked world (Part III); and, in the WikiLeaks organization, the vigilante struggle to impose an ethic of transparency on a recalcitrant state (Part IV). A conclusion in each Part provides a comparative perspective on the different campaigns, noting their continuities and discontinuities, and the Conclusion summarizes what this study reveals about transparency and the longing for a fix to the information asymmetry problem the state creates.¹⁵

¹⁵ My focus here is largely on efforts to address executive branch and administrative secrecy, but it can apply to campaigns focused on congressional secrecy. See, e.g. Jane S. Schacter, *Digitally Democraticizing Congress? Technology and Political Accountability*, 89 B.U. L. Rev. 641, 648-62 (2009) (describing efforts to use the Internet to impose transparency on Congress).
I. THE LEGAL RIGHTS FIX: 
FOIA AND THE ORIGINS OF THE “RIGHT TO KNOW” 
AND “FREEDOM OF INFORMATION”

The initial American transparency movement grew out of a campaign to promote a broader vision of press freedom. In the decades following World War I and especially in the latter years of World War II, leading newspaper editors and press associations actively worked to export abroad the American model of a private, for-profit press insulated from government oversight and censorship. Frequently referred to as a plan to promote the “freedom of information” and the public’s “right to know,” the campaign rehearsed the ideas that would culminate decades later with the Freedom of Information Act. In addition to advocating in favor of public access to government information as one among many issues, the campaign helped sharpen the arguments in favor of limiting state secrecy and established the press’ ability to collaborate with government entities to achieve that goal.

A. Exporting Rights and Freedoms

The campaign began as a response to two related issues: concerns about the availability of foreign markets for American news gathering and distribution, and a desire to export American free press and liberal democratic ideals. The American press and especially the American wire services—which supplied national and international news to many local newspapers and thus at the time were the country’s most global and national media firms—faced journalistic and economic constraints in attempting both to collect news in other countries and to export their products around the world. In the mid-nineteenth century, a cartel of major European news agencies, which included Reuters (Great Britain), Agence Havas (France), and Wolff (Germany) as its original members, had divided the world among themselves for purposes of newsgathering. They agreed both to geographic constraints limiting themselves to their demarcated territories and to publish international news only from the cartel’s members. The American Associated Press (AP) was invited to join the cartel in 1887 and enjoyed the competitive advantages it provided for several decades. AP did not find its participation entirely satisfactory,

however. As the U.S. newspaper industry and the domestic market for news grew, the cartel’s constraints on the AP’s newsgathering operations abroad bridled the expanding company. The AP faced tougher domestic competition from the United Press agency (UP) (founded in 1907), which was unconstrained by the cartel agreement.\(^\text{18}\) At the same time, the AP had started its own newsgathering information in far-flung territories, first in South America and then around the world.\(^\text{19}\)

The AP was also concerned about the cartel’s effects on news content. The European agencies had formal and informal ties to national governments that sought to shape news for propagandistic ends. As a result, the AP complained, foreign media frequently under-reported news from the United States and described the country in an uncomplimentary fashion.\(^\text{20}\) For the American press, this potent and dangerous mix—with individual wire services that had close relationships with their own governments, a cartel with oligopolistic control over international news distribution, and the lack of the objective news values that American news editors increasingly prized—all endangered the press and nation’s political and economic interests.\(^\text{21}\)

These conditions prompted news organizations—as both interested parties and upholders of emergent ideals for a free press—both to model and help develop entrepreneurial, independent news media around the world. In the narrative that Cold War advocates constructed to tell the story about the necessity for informational freedom and rights,\(^\text{22}\) the AP’s commercial triumph, in which the agency and its powerful general manager Kent Cooper broke free from and helped smash the global news cartel in 1934, was not merely a self-serving effort to expand the company’s commercial reach but part of a full-fledged campaign to promote democracy.\(^\text{23}\) The cartel’s demise, coupled with the havoc

\(^{18}\) Margaret Blanchard, Exporting the First Amendment 7 (1986)

\(^{19}\) Rantanen, Foreign Dependence, supra note 17, at 28–30. Indeed, the UP also directly competed with the cartel itself, leading the cartel finally to grant AP full membership in order to compete more effectively with UP’s challenge. TERRY RANTANEN, MR. HOWARD GOES TO SOUTH AMERICA: THE UNITED PRESS ASSOCIATIONS AND FOREIGN EXPANSION Roy W. Howard Monographs in Journalism and Mass Communication Research, No. 2, May 15, 1992, 22–24 (1992).

\(^{20}\) BLANCHARD, supra note 18; KENT COOPER, BARRIERS DOWN 43 (1942).


\(^{22}\) On the relationship between ideals of the “free flow of information” and the Cold War, see Hanno Hardt, Comparative Media Research: The World According to America, 5 CRITICAL STUD. IN MASS COMM. 129, 132–33 (1988).

\(^{23}\) GRAHAM STOREY, REUTERS’ CENTURY, 1851–1951, at 184–93 (1951); HERBERT BRUCKER, FREEDOM OF INFORMATION 214–15 (1949). Significantly, Cooper gave his
wreaked on German and French news production by the Nazi party’s ascent and then Germany’s occupation of France in World War II, enabled American corporate entities to play a preeminent role in the export of news, propaganda, and journalistic practices from the U.S. to western Europe and developing countries in the post-war period. Once the cartel was broken, Cooper proclaimed, no more would such a “perfect instrument that could covertly, effectively and without the suspicion of the uninitiated carry on the great game of international government propaganda.” Indeed, as the AP and UP began to coordinate as well as compete, the U.S. emerged in the post-war period as the only nation with multiple news services, helping it to take a leading position in the global competition over news and media content. The American press’s triumphant effort to advance what it viewed as the free markets it needed to thrive was ideological as well as profitable, a fact occasionally remarked upon by European skeptics.

memoir of AP’s fight against the cartel, published in the midst of World War II, the martial title Barriers Down. Cooper’s story was self-serving and not entirely true: AP in fact had a more complex, often friendly relationship with the government-controlled members of the international press cartel, and AP’s efforts were as much in response to competition from the United Press as for a broader ideological or nationalistic purpose. See Terhi Rantanen, After Five O’Clock Friends: Kent Cooper and Roy W. Howard (Roy W. Howard Monographs, No. 4, February 27, 1998) 25–27 (1998).

One can view this critically, as a form of cultural imperialism, see, e.g., Herbert Schiller, Mass Communications and American Empire 24–45 (1969); Altaf Gauhar, Free Flow of Information: Myths and Shibboleths, 1 Third World Q. 53, 53–54 (1979), or as a means to lower barriers that stopped content and commerce from flowing freely among nations for ideological and commercial reasons, see, e.g., Erwin D. Canham, International Freedom of Information, 14 L. & Contemp. Probs. 584, 584–85 (1949).

Kent Cooper, The Right to Know 154 (1956).


See, e.g., Kent Cooper, Newspaper Statesmanship for Peace, in Journalism in Wartime 214, 215–16 (Frank Luther Mott ed., 1943) (noting, in a short article exhorting the press to exert itself in peace negotiations because of the importance of a free press and informed public to ending wars, the relationship between wars and the prosperity of the international news industry).

In the most public such episode, the British magazine, the Economist, viewed Cooper’s aggressive efforts to expand AP as an independent source of news throughout the world quite skeptically, complaining that he “experiences a peculiar moral glow in finding that his idea of freedom coincides with financial advantage. In his ode to liberty there is no suggestion that when all barriers are down the huge financial resources of the American agencies might enable them to dominate the world. . . . [D]emocracy does not necessarily mean making the world safe for the AP.” The Press: Storm Warning, Time, Dec. 11, 1944, http://www.time.com/time/magazine/article/0,9171,883902,00.html (quoting the
Having defeated its competitors abroad, the American press turned evangelical. In its 1944 convention, the American Society of Newspaper Editors (ASNE), the most active trade group representing news editors and journalists, announced a campaign to protect “the right of the people” against censorship and to advocate for “freedom of information” around the world.\(^{29}\) The campaign formally began with a world tour undertaken by three editors during the waning days of the war, led by Ralph McGill, an editor for the *Atlanta Journal-Constitution* and chairman of the ASNE’s Freedom of Information Committee.\(^{30}\) ASNE also lobbied on behalf of international rights for a free press in the new United Nations.\(^{31}\) Working with the Truman administration, ASNE and its members viewed the state as the best means to achieve long-lasting peace and to help in the development of an international press industry that would adopt the American model of the profession.\(^{32}\) Press representatives played key roles in the Subcommission on Freedom of Information created by the UN’s Human Rights Commission in 1947, and, alongside prominent Harvard constitutional law professor Zechariah Chafee, served as delegates to the Conference on Freedom of Information held in Geneva in 1948.\(^{33}\)

In a 1949 article, Erwin Canham, editor of the *Christian Science Monitor*, officer of the American Society of News Editors, and member of

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\(^{31}\) Blanchard, *supra* note 18, at 52–89; Pitts, *supra* note 30, at 182–85.

\(^{32}\) Blanchard, *supra* note 18, at 2.

\(^{33}\) *Id.* at 154–63, 174–97.
the American delegation in Geneva,\textsuperscript{34} offered a survey of journalistic practices around the world, ranking them against the preeminent work of the American media in supporting the preeminent American democratic model. None quite matched up, although Canada and Britain came close. Therefore, Canham argued, the U.S. must spearhead the effort to free the flow of information throughout the world and thereby expand political freedom and fight the growing threat of authoritarianism:

Of course, despotisms of various degrees will finally end when the people really know what is happening to them—when they learn the facts of international and national life—and thus throw off their chains. Freer information, in the broadest sense, will ultimately bring tyranny down. And so the efforts to lower barriers will ultimately produce conditions that will bring about a truly free press everywhere.\textsuperscript{35}

The specter of “tyranny” he identified meant the Soviet Union, of course, the principal Cold War threat. Alongside many of his fellow prominent newspaper editors, Canham played a semi-official role in the United States’ effort to spread its vision of a liberal democracy abroad. For Canham and his colleagues, the ideal press was private, independent, and capable of objectively reporting on events, and enjoyed and helped enforce liberal democratic rights. The press under an authoritarian government served as the state’s mouthpiece, a propaganda organ rather than a true Fourth Estate. A truly free press, therefore, required not only a private, independent set of media institutions but also a limited, non-intrusive state. It was up to the United States and its press institutions to spread the word.\textsuperscript{36}

Ironically, this project—intended to promote the ideals of a free press—required underwriting by the very government whose clutches journalism’s leaders and spokespersons feared. Midcentury journalists viewed state intervention in the marketplace of ideas and news as a significant, authoritarian-like threat to the press and to American

\textsuperscript{34} \textit{Id.} at 174–75.
\textsuperscript{35} Canham, \textit{supra} note 24, at 584, 589, 598.
\textsuperscript{36} During the Cold War, scholars and journalists noted that different approaches to press freedoms existed, that nation states adopted one of them, and that the underlying theories for these approaches were connected to the political theory underlying each nation’s regime. The American model was decidedly “libertarian” or classically liberal, and contrasted with authoritarian, Soviet communist (which scholars differentiated from the authoritarian model), and the social democratic “social responsibility” models. \textit{See} FRED S. SIEBERT, THEODORE PETERSON \& WILBUR SCHRAMM, \textit{FOUR THEORIES OF THE PRESS} (1956); \textit{see also} LAST RIGHTS: 
\textit{REVISING FOUR THEORIES OF THE PRESS} 7-16 (John C. Nerone, ed. 1995) (historicizing and updating the “Four Theories” model).
democracy. During World War I and its aftermath, the federal government had not only acted as an official censor, a traditional role for the state during wartime, but also as a major producer of informational content akin to propaganda. The government’s informational activities now included pushing material to the public in order to grab the attention and shape the attitudes of its citizens, like the growing consumer goods industries that utilized press agents and advertisers to push their interests and hawk their wares. For the editors who sought its support in their international campaign, the state thus represented both a means to project press freedom ideals and a grave threat to the press’s crucial role in reporting news objectively and thoroughly.

In this sense, the movement to export First Amendment and journalistic values also reflected a strong professional identity among the press leaders who viewed the journalistic enterprise as free, independent, and objective, and staffed by full-time, well-trained, professional

37 Cooper, supra note 25, at 64, 95–96, 147–48; Brucker, supra note 23, at 221, 241–42, 250–51. This conflict arose not only from the importance the press placed on its independence from the state. Newspaper publishers tended to be quite conservative and disliked President Roosevelt, the Democratic Party, and the New Deal. See Blanchard, supra note 18, at 2.

38 Cooper, supra note 25, at 163–65.

39 See id. at 308 (warning that a passive “American layman,” allowing the state to “do[] his thinking for him,” will allow the government to infringe his “Right to Know”). Cooper’s concern about propaganda spread by government press agents was widely shared in the 1930s. See E. Pendleton Herring, Public Administration and the Public Interest 362–67, 373–75 (1936) (describing the Roosevelt administration’s increasing use of “public relations” professionals in its attempt to manage publicity and the press); Michael Schudson, Discovering the News 134–44 (1978) (discussing generally of the press’ distaste for the public relations industry); see, e.g., John Dewey, Individualism Old and New 61 (1930) (characterizing the “press agent” as “the most significant symbol of our present social life”).

40 State influence on the press and the public was not the press’s only concern about government interference. During the New Deal, the Roosevelt administration had fought to impose against news organizations federal laws and regulations that applied to employers, including the Social Security Act, the National Industrial Recovery Act, federal labor laws and the Wagner Labor Relations Act, as well as federal laws and regulations intended to regulate advertising. Claiming that these laws would infringe constitutional free speech rights if applied to the press—an argument that the press lost—newspapers and their owners, whose relative conservatism made them skeptical if not hostile to the New Deal anyway, resisted the state’s intrusion into their business. Margaret A. Blanchard, The Hutchins Commission, the Press, and the Responsibility Concept, Journalism Monographs No. 49, at 4–8 (1977). For an example of how the press lost these arguments, see Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937) (“The publisher of a newspaper has no special immunity from the application of general laws.”)
journalists. Journalistic objectivity in this context served as an American professional ideal and norm, and stood in opposition to political and ideological partisanship and to subjective or biased reporting. In Michael Schudson’s authoritative account, objectivity defines and disciplines journalism as a vocation: it binds publishers, reporters, and editors together through a series of rituals that define what journalism is and how it is produced; it allows constituents of the journalistic community to recognize and exclude those who fail to practice it correctly; and it organizes the bureaucratic practice of journalism and the training of those who wish to enter the profession. The objectivity ideal helps justify the press’s explicit right to be free from government constraint, and it constitutes the pillar of the press’s role as an independent institution of civil society—one just as important to the protection of individual rights and democratic institutions as an independent judiciary.

All of this—the political economy of the international news industry and AP’s struggles with the European news cartel, the emergent ideal of press freedom during the gathering Cold War, and the press’ self-conception of journalism as a professional vocation organized around the objective reporting of news—contributed to the historical context in which the phrases “freedom of information” and the “right to know” began to circulate. Kent Cooper used the phrase “right to know” as early as 1945 and as the title of his 1956 book on the general topic of press freedom.

41 On the history of journalism’s understanding of itself as a profession with a distinct and crucial social and political position and a self-developed and –enforced code of conduct, see Howard Tumber & Marina Prentoulis, *Journalism and the Making of a Profession*, in *MAKING JOURNALISTS* 58, 60–68, (Hugo de Burgh ed. 2005). The Commission on Freedom of the Free Press, a private, widely heralded group of leading academics and government officials brought together under the leadership of Robert Hutchins, president of the University of Chicago at the time, had declared in its 1947 final report that the press had the social and professional responsibility to provide “full access to the day’s intelligence” and a “truthful, comprehensive, and intelligent account of the day’s events in a context which gives them meaning.” *COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* 28 (1947). On the Hutchins Commission generally, see Blanchard, supra note 40.


44 Cooper, supra note 25; *The Right to Know*, N.Y. TIMES, Jan. 23, 1945, at 18.
He defined it both affirmatively, as the right of individuals to have access to full and accurate news reporting, and negatively, as prohibiting the government from interfering with the relationship between the press and its public. “It means,” he wrote, “that the government may not, and the newspapers and broadcasters should not, by any method whatever, curb delivery of any information essential to the public welfare and enlightenment.” He also offered a modern revision of the Constitution’s First Amendment: “Congress shall make no law . . . abridging the Right to Know through the oral or printed word or any other means of communicating ideas or intelligence.” In Cooper’s understanding, the right to information belongs to the public; the state has the legal duty to disclose and is prohibited from restraining the press; and the independent commercial press serves as the essential go-between with an ethical, as opposed to legal, duty to ferret out and present information. The press would transform data into knowledge, which the reading public, in turn, would respond to rationally, as democratic citizens.

The term “freedom of information” had a similar meaning. President Roosevelt used it in a press conference in 1940 to refer to the flow of uncensored news, identifying it as one of the key principles of democratic government and the un-enumerated freedoms that the Constitution set in motion, while President Truman used it similarly in a message to Congress in 1947 reporting on U.S. participation in the United Nations. At the same time, news editors viewed and deployed the phrase as part of the broad ideal of press freedom. The ASNE established a “Freedom of Information Committee” to press for international speech liberalization, and Herbert Brucker, one of chairs of the committee during the post-war period, appropriated the term as the title for his 1949 book on the need for

45 Cooper, supra note 25, at 16.
46 Id.
press freedom. The nascent international human rights movement appropriated it as well. In its first meeting in 1946, the United Nations General Assembly issued a declaration calling for recognizing and protecting the freedom of information as a fundamental, “touchstone” human right while defining it quite broadly: “Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters.”

As concepts, the right to know and freedom of information overlap in a number of important ways and have endured as key phrases in the movement for open government. First, although they concern much more than simply government information, the concepts identified and sought to protect an international and national right that would limit the state’s control of information flows. Second, they conceptualized the state as something distinct from the public, as an entity that at once represents its citizens but is distant from them. The public must be protected from the state, while the state must be checked from violating private individuals’ rights—in this context, the right to receive information and to “know.” Third, the terms assume that information, in its raw and cooked forms as data, news stories, and opinion, constitutes a truth to which the public must have access in order to gain knowledge and act as citizens.

49 Teel, supra note 42, at 17–18; Brucker, supra note 23; Kiyul Uhm, The Cold War Communication Crisis: The Right to Know Movement, 82 JOURNALISM & MASS COMM. Q. 131, 139 (2005). Brucker added a further meaning defining the term in terms of the relationship between the press and its public: “freedom of information for newspapers and related media will have not only the historic sense of freedom from government but also include freedom from any attachment, direct or indirect, to any class, political party, economic group, or other fraction of society.” Brucker, supra note 23, at 276. His definition suggested in its breadth (which went beyond the Bill of Rights’ much simpler check on state power) the concern that the press must report news free from biases that would arise from “attachment” to anything besides the professional norms of objective reportage. Freedom of information was an institutional freedom for the press from external interference of any kind, including the state and private interests.

50 UN General Assembly, Resolution 59(I) (Dec. 14, 1946), available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf. Two years later, a draft convention on Freedom of Information that failed to garner sufficient support defined the term as “the free interchange of information and opinions, both in the national and in the international sphere.” Blanchard, supra note 18, at 410. Although Article 19 of the Universal Declaration of Human Rights adopted the general language of free expression and the right to receive and impart information, the more specific provisions considered in the 1948 Convention on Freedom of Information, which both protected individuals from the state and allowed states to support and protect their domestic press (for example, “in the interest of national safety” and to “develop its national news enterprises”), faced significant opposition, not least from the U.S. delegation. On the influence of the press on the U.S. delegation, see id. at 174-75.
And finally, at least in its American version as defined by Cooper and Brucker, the terms contemplate a free and independent press as the public’s agent in protecting the right to know and in delivering the information that should flow freely. Rights (to know) and freedoms (of information) simultaneously enable the press to report objectively, without the constraints of excessive state or private interest, and allow that independent pillar of society to play its crucial role in a functional democracy. As the institution capable of mediating between the public and a distant, increasingly complex state, the press had come by midcentury to view itself as the community’s representative and enforcer of public rights, capable of unveiling and criticizing the state.51 “The right of the individual to know,” Cooper asserted, is “coordinated with the right of his newspaper to tell him all the news, except what the government was guilty of withholding and suppressing.”52 The original FOI campaign’s goals were to transform that inchoate notion of “guilt” into a legal wrong, and to transform the abstract ideal of a “right” into an enforceable cause of action for the individuals to whom it belonged.

B. The Political Enactment of Legal Informational Rights

By the late 1940s, ASNE’s Freedom of Information Committee, having been frustrated in its efforts to formalize press freedoms in international law,53 turned its attention to press freedom in the U.S. and to one particular issue: government secrecy.54 Louisville Courier-Journal editor James Pope’s term as Committee chair, which started in 1950, proved integral to the organization’s turn to fighting federal, state, and local government secrecy and in making the fight against it explicitly political. Pope’s committee began by organizing state-level committees to help organize legal advocacy and defense for local newspapers, and to serve as the basis for an effort to change federal policy.55 Pope recruited Harold Cross, a retired media lawyer and journalism professor at Columbia, to

52 COOPER, supra note 25, at 69.
53 See supra note 50.
54 David R. Davies, The Postwar Decline of American Newspapers, 1945-1965, at 31–38 (2006); Herbert N. Foerstel, Freedom of Information and the Right to Know 14–18 (1999); Kennedy, supra note 29, at 24–28; Pitts, supra note 30, at 172–73. While some press advocates complained about government censorship during the war, see, e.g., Erwin D. Canham, The Battle for News, in Journalism in Wartime, supra note 27, at 44 (complaining about censorship, though conceding that U.S. censorship during World War was less onerous than other countries), the press grew more publicly exorcised about post-war secrecy.
serve as the Committee’s legal advisor. In this capacity, Cross produced *The People’s Right to Know* (1953), a book that both summarized the patchwork of existing constitutional and administrative laws regulating government secrecy and advocated for reforms to strengthen the public’s access to information.

As Pope noted in his foreword to Cross’ book, ASNE stood alongside Cross as “an agent of the people” to enforce the people’s right of access to information on the public’s behalf. In that role, the press would strike down “the barriers to access to public records and proceedings” in order to help citizens understand an “increasingly complex government.” The title Cross chose at once echoed the rights concept from the press’ earlier advocacy of press freedoms abroad and framed the problem of secrecy as one of insufficiently enforced legal rights. The book opened with the most prominent terms from the earlier free press campaign:

> Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings. “Rights” against the state, along with the ideal of “freedom” from state barriers to access, served as the logical way for a legal advocate like Cross to champion transparency.

But the prevailing law of access to government information, Cross complained, was a mess: it existed only “where you find it,” in a “welter of varying statutes, conflicting court opinions and wordy departmental regulations present the problem as a veritable Chinese puzzle.” As such, it was incapable of confronting and controlling the expansion of Cold War secrecy. Quoting a recent student-authored law review publication, Cross lamented the fact that access to information was “a neglected constitutional right,” and argued that it ought to be encompassed within

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56 Id. at 134–38.
58 James S. Pope, *Foreword to CROSS, supra* note 57, at vii, ix.
59 Id. at xiv.
60 CROSS, supra note 57, at xiii. Other books from the mid-1950s by prominent editors and activists in the older international free press movement employed the term “right to know” as including, as a prominent element, the right of access to information. COOPER, supra note 25, at 283–88; JAMES RUSSELL WIGGINS, *FREEDOM OR SECRECY* 3–4 (1956). Following Cross, Wiggins—himself a former ASNE FOI Committee chair—advocated establishing an enforceable right to know. Id. at 71. On Wiggins, see Uhm, supra note 49, at 138–39.
61 CROSS, supra note 57, at 4, 6, 10.
First Amendment protections. To that end, he cited a range of historical and contemporary figures for support.\(^{63}\) His efforts to find a constitutional basis for the “right to know” proved unavailing, although they have often been repeated in the decades since then, most prominently by First Amendment scholar Thomas Emerson.\(^{64}\)

As an alternative, Cross offered federal legislation as a second-best path to legal rights. The Administrative Procedure Act, enacted in 1946, had provided both a model of statutory control over administrative agency operations and a potential home for a freedom of information act. But it would require amendment, as its existing information access provisions were too vague and riddled with exceptions; it also failed to create an enforceable public right to information that would allow an aggrieved citizen (whether or not a member of the press) to seek judicial review of a government entity’s refusal to disclose information.\(^{65}\) To bridge this substantive and procedural gap, Cross urged, Congress must “begin exercising effectually its function to legislate freedom of information for

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\(^{63}\) CROSS, supra note 57, at 128–32. Zechariah Chafee’s 1947 treatise Government and Mass Communications noted the problem of expanded secrecy in the post-war era, but did not develop the First Amendment argument that Cross would later pursue. ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 12–13 (1947). Alexander Meikeljohn’s Free Speech and Its Relation to Self-Government (1948) includes in his general discussion of the democratic values inherent in the First Amendment the idea that free speech allows the public access to information, but he never specifically considers the relevance and problem of state information. ALEXANDER MEIKELJOHN, JR., FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT 26, 66, 89 (1948).


\(^{65}\) CROSS, supra note 57, at 223–25. The APA’s original government information provision included exceptions for information involved in “any function of the United States requiring secrecy in the public interest,” and allowed information not otherwise barred from disclosure by statute to be made available by published rule “to persons properly and directly concerned except information held confidential for good cause found.” Id. at p. 226 (quoting 5 U.S.C.A. § 1002(1), 1002(c) (1946)). In addition to analyzing the APA’s weaknesses, Cross’s book also listed all of the existing statutory exceptions from disclosure. Id. at 231-234.
itself, the public, and the press.” Recognize the need in a democratic system for a legal right to know, Cross urged Congress, and create that right. His argument certainly convinced his ASNE sponsors; “[e]nlisted as an adviser,” James Pope wrote, “he became our leader.”

Soon after the publication of Cross’s book in 1953, the ASNE Committee finally found a potentially effective political government actor and partner for establishing the legal rights that Cross described. In November 1954, a new Democratic majority wrestled control of the U.S. House of Representatives back from a small Republican majority that had ridden Dwight Eisenhower’s coattails in his 1952 election to a first presidential term. Although Eisenhower’s moderate conservatism held at arm’s length both Senator Joseph McCarthy (whose prominence was fast receding by 1954) and his vice president Richard Nixon, politics was politics, and the executive branch’s expansion during the New Deal and the presidency’s administrative prerogative over executive branch secrets following the end of World War II constituted a source of political conflict. Democrats had controlled the presidency since Franklin Roosevelt’s election in 1932; now, even with a moderate war hero in the White House and a common enemy in the Soviet Union, the Congress viewed its role vis-à-vis an electoral foe as both a principled, institutional opposition to the Executive and a political opposition to a Republican. The House of Representatives’ Government Operations Committee, chaired by Democratic Representative William Dawson of Illinois, established a Special Subcommittee on Government Information, chaired by California Representative John Moss, as a means to investigate Executive Branch secrecy.

ASNE leaders and prominent newspaper editors played key roles in spurring the Subcommittee that Moss chaired (referred to popularly as

66 Cross, supra note 57, at 246.
67 Pope, supra note 58, at xi.
“the Moss Committee” into action. The press provided personnel, with former journalists dominating the Committee’s staff, while prominent editors helped devise its aggressive strategy of investigating federal agencies that kept information secret from the press and public. ASNE provided legal advice by introducing Cross to Moss and his Committee, and the author of The Right to Know would play a key role as the Committee’s legal advisor until his death in 1959. The press also provided publicity, as newspapers throughout the country promoted the Committee’s work and especially its hearings and investigations. And, through its lobbying and Cross’s advice, the press helped frame the issue for the Subcommittee as one of insufficiently recognized and enforced legal rights. In James Pope’s words when he testified at the Moss Committee’s first hearing, “freedom of information is not a political issue. . . The right to know is the right of the people.” Tellingly, Harold Cross’ argument in favor of imposing legal obligations through the creation of private statutory rights proved ultimately to be the only satisfactory legislative solution to secrecy. After an amendment to existing law failed to change bureaucratic norms, the Freedom of Information Act—a statute whose very title was apparently appropriated from the title of ASNE member Herbert Brucker’s 1949 book—finally gained sufficient legislative support in 1966, cleared Congress’s procedural hurdles, and was enacted despite President Johnson’s ambivalence (if not resigned hostility).

69 Archibald, supra note 68, at 727.
70 Blanchard, Federal Public Records Law, supra note 68, at 108–25; Kennedy, supra note 29, at 64–73; Archibald, supra note 68, at 727.
71 Kennedy, supra note 29, at 68-70, 94-96.
73 Kennedy, supra note 29, at 96; Uhm, supra note 49, at 140.
75 Kennedy, supra note 29, at 69–70; Archibald, supra note 68, at 728; Blanchard, Present at the Creation, supra note 72, at 276. After Cross’s death, Jacob Scher, another media lawyer and journalism professor, took his place as the Moss Committee’s legal advisor and continued to follow Cross’s approach. Blanchard, Federal Public Records Law, supra note 68, at 89–91, 138–39.
The FOIA enacted a version of a “right to know” and pledged to protect the informational “freedom” that had been first conceptualized and developed in the early post-war and Cold War effort to instill Western democratic values abroad through the ideal of a free, independent press. In its original enactment and in subsequent amendments, Congress has continually recognized and proclaimed the crucial role that the right to know and informational freedom play in a democracy—legislative declarations that courts have consistently restated when reviewing claims filed under the FOIA. The statute recognized an individual right to information and granted broad private rights to any person to seek judicial enforcement of those rights—rights that were themselves balanced against the state’s need to keep some information from the public eye. Congress had thus established a right to know within the existing legal framework established under the APA, placing certain procedural burdens on agencies and creating a private right of action for aggrieved individuals, and delegating to the federal judiciary the task of protecting the right and enforcing the burden. Working together, Congress and the press had placed the right to know firmly within the institutional framework of the rule of law: agencies would henceforth have to follow legislatively prescribed rules enforced by the judiciary; while the press would serve as a private enforcement mechanism, harnessing this newly established right to hold the government accountable and inform the public.

C. Conclusion: The Limits of Law

Traditional legal concepts—rights and judicial review, above all—had animated and grounded an American open government movement that viewed the state as a threat to democracy and press freedom, and provided a foundation for the movement’s successful efforts to establish enforceable rights both to limit and force state action. In its actions against

78 See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (noting that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”); EPA v. Mink, 410 U.S. 73, 80 (1973) (explaining that FOIA was “broadly conceived” “to permit access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands”.
79 Freedom of Information Act of 1966, Pub. L. No. 89-487, §§ (c), (e), 80 Stat. 250 (1966) (requiring agencies to make records available to “any person” and providing private right of action to challenge an agency’s refusal to disclose, while also enumerating exemptions to disclosure).
the state, the press worked with state actors—an ironic element in any reformist civil libertarian movement, and one that has remained consistent from the World War II period through FOIA’s enactment, given its legislative rather than constitutional basis. These efforts assumed and helped constitute an institutional structure for these rights: the press, acting as the public’s agent, would advance and take advantage of the right to know, with Congress and the courts playing key roles in helping to enforce them, and information would thereby be freed for the public to consume and act upon it in its members’ role as democratic citizens. The rhetoric was broad and the terms powerful because the stakes were so high: a democratic system demanded no less, especially in the midst of a Cold War that produced an enormous quantity state secrets but that required a free and independent press to remain legitimate and accountable.

The American federal FOIA is now merely one legislative enactment in a much broader universe of legal rights and duties created by constitutional and legislative mandates. FOI provisions regulate government activity around the world as well as in American states and localities. The proliferation of legal rights has not created fully or, to many in the transparency advocacy community, even satisfactorily open governments, as political, practical, and bureaucratic obstacles have obstructed the state’s visibility to the public. In the U.S., the annual Sunshine Week and Freedom of Information Day events, established in 2005 to bring attention to freedom of information laws, include an annual declaration that more must be done to open government to the public’s

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80 See Davies, supra note 54, at 32.

81 This campaign also represents the first instance in which the U.S. sought to export its ideals of press freedoms abroad, an idea that would largely end with the shift towards fighting government secrecy; it would later be resurrected in the 1990s, after the collapse of the Soviet Union. See Craig L. LaMay, Exporting Press Freedom: Economic and Editorial Dilemmas in International Media Assistance 76–84 (2007).


83 These frustrations began soon after FOIA’s enactment. See James Brian McPherson, Journalism at the End of the American Century, 1965-Present 50–51 (2006). On the difficulties of achieving a fully transparent state, see Mark Fenster, Seeing the State: Transparency as Metaphor, 62 ADMIN. L. REV. 617 (2010) [hereinafter Fenster, Seeing the State].
gaze.\textsuperscript{84} International FOI advocates express the same frustration with other nations’ compliance with their own laws.\textsuperscript{85} Even when enacted, formal legal commands by themselves have not been able to overcome all forms and instances of governmental resistance to disclosure, whether that resistance is intended to hide corruption or incompetence, or as sincere efforts to protect internal deliberative processes, or simply because officials find it easier and less costly not to disclose information.

Despite these frustrations—or perhaps because of them—numerous FOI NGOs still actively advocate for a classically liberal, rights-focused approach to transparency, and continue to view the press as the essential mediating institution capable of enforcing legal rights and informing the public.\textsuperscript{86} But in part as a response to the frustrations that this resistance causes, and in part due to other factors—including developments in information technology, changing conceptions of the state, and the political economy of global commerce and international financial institutions (IFIs)—some contemporary advocacy groups have broadened their approach to understanding the asymmetric information problem and champion new approaches to transparency that look beyond formal law and its enforcement. The remainder of this Article outlines these alternative fixes to the problem of government secrecy—fixes that either view legal reform as part of a broader program, or that abandon law altogether.

\textsuperscript{84} See \textit{About Sunshine Week}, SUNSHINE WEEK: YOUR RIGHT TO KNOW, http://www.sunshineweek.org/About.aspx.

\textsuperscript{85} See, \textit{e.g.}, Lalanath de Silva, “Freedom of Information Laws Spreading Around the World,” World Resources Institute, Sept. 26, 2010 http://www.wri.org/stories/2010/09/freedom-information-laws-spreading-around-world (describing and celebrating new freedom of information laws but noting that, “[T]here is still a lot that needs to be done to improve implementation of these laws. Our research has shown that practice lags behind.”).

\textsuperscript{86} See supra note 6. Some such organizations, such as the Reporters Committee for Freedom of the Press (established in 1970) and the National Freedom of Information Coalition (established in 1989), have had longstanding and institutional commitments to supporting the press and are led by executives and board members from the institutional press and their legal representatives. See \textit{About The Reporters Committee for Freedom of the Press: A Short History}, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/about.html; \textit{About NFOIC}, NAT’L FREEDOM OF INFO. COALITION, http://www.nfoic.org/about-nfoic; \textit{Board of Directors}, NAT’L FREEDOM OF INFO. COALITION, http://www.nfoic.org/board-directors.
II. THE ADMINISTRATIVE AND INSTITUTIONAL FIX:
ANTI-CORRUPTION AS TRANSPARENCY

Although it prominently incorporates transparency in its name and holds the transparency.org URL for its website, Transparency International (TI) is part of a movement that views transparency as one among a diverse set of tools that can achieve its larger goal of fighting corruption. TI puts transparency to work for a more specific, substantive goal than the FOI movement, which focuses more broadly on legal rights and a well-informed public. As I explain in this Part, TI advocates traditional legal rights to information, but concentrates its efforts on building a transnational network of independent institutions that can fight corruption and distribute information on government performance, and emphasizes economic development over democratic norms (without, to be sure, ignoring democratic norms entirely).

Before discussing transparency’s role as a concept and policy goal in this movement, the movement and its more general project requires some introduction. The transnational anti-corruption movement that TI helped spark advocates on behalf of administrative practices and institutional arrangements that can improve the integrity of states and their economies. It has both responded to and helped spread the widely-held view that corruption, which it defines as “the abuse of entrusted power for private gain,” constitutes a problem endemic to developing nations and a leading cause of underdevelopment and poverty. For the anti-corruption community, corruption’s prevalence in the developing world helps explain the failure of the post-Cold War era to meet the potential offered by the global spread of democracy, the expansion of international trade, the privatization of inefficient state-owned enterprises, and the wealth created by extractive industries in resource-rich countries and regions.

87 On the then-nascent role of NGOs in the anti-corruption field, see Susan Rose-Ackerman’s influential book, Corruption and Government. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 168–71 (1999). Transparency International’s history as the core NGO in this movement has been very well documented, both by TI members and by its critics. See Frederik Galtung & Jeremy Pope, The Global Coalition Against Corruption: Evaluating Transparency International, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 257 (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999) (account by TI’s first managing director and original staff member); Luis de Sousa & Peter Lamour, Transparency International: Global Franchising and the War of Information Against Corruption, in RESEARCH COMPANION TO CORRUPTION IN ORGANIZATIONS 264 (Ronald J. Burke & Cary L. Coopers eds., 2009) (critical account of TI’s history).


89 De Sousa & Larmour, supra note 87, at 270.
International financial institutions (IFIs) have recently adopted measures that not only reflect the movement’s influence but also suggest that IFIs themselves now act as part of the movement in forcing transparency on foreign development and financing projects.\footnote{Beginning in 1998, the International Monetary Fund began its own efforts at imposing and evangelizing in favor of “fiscal transparency” in governments receiving IMF support. \textit{Manual on Fiscal Transparency: Introduction, INT’L MONETARY FUND}, http://www.imf.org/external/np/fad/trans/manual/intro.htm. In 2010, the World Bank implemented a new Public Access to Information policy, representing what the Bank characterized as “a sea change” in its approach to information access that would broaden disclosure and “allow for greater monitoring of Bank-supported projects, thereby enabling better development results.” \textit{World Bank Broadens Public Access to Information, WORLD BANK} (July 1, 2010), http://go.worldbank.org/L3HF51WOX0; see also Rebecca Harris, \textit{Knowledge Is Power: Transparency and Participation Will Be the Drivers of Effective Development}, \textsc{Huffington Post} (April 19, 2011), http://www.huffingtonpost.com/rebecca-harris/knowledge-is-power-transp_b_851020.html; Stephanie Strom, \textit{Cracking Open the World Bank}, \textsc{N.Y. Times}, July 3, 2011, at BU-1.} Together, TI and similar NGOs, along with the IFIs and intergovernmental organizations that have come to emphasize anti-corruption as an integral reform to political and economic development, form what Steven Sampson has characterized as an “anti-corruption industry”—a combined political movement and social network composed of international and national elites that sponsors conferences, policy reports, and journals, all in the name of promoting good governance in general and a particular understanding of “transparency” in particular.\footnote{Steven Sampson, \textit{The Anti-Corruption Industry: From Movement to Institution}, 11 \textsc{Global Crime} 261, 276–77 (2010). Prominent human rights NGOs with agendas that look beyond anti-corruption, such as Amnesty International, have also begun to promote transparency campaigns. TI and AI occasionally work together in broader campaigns to end human rights abuses and corruption. See, for example, \textit{Middle East and North Africa Can End Legacy of Human Rights Abuse and Corruption}, \textsc{Transparency Int’l}, (Mar. 11, 2011), http://www.transparency.org/news_room/latest_news/press_releases/2011/2011_03_11_mena_end_rights_abuse_corruption (joint announcement by AI and TI calling for new governments coalescing after the so-called Arab Spring to establish, among other things, “processes for consultation and access to information that allow human rights activists and all other civil society actors to participate fully and without fear in the building of systems and institutions of government”).} In its international operations, the shared values and common discourse of its members, and its exchange of information and services among members and with state officials, this “industry” constitutes a “transnational advocacy network” akin to those developed by human rights, labor, and feminist activists.\footnote{Margaret E. Keck & Kathrun Sikkink, \textit{Activists Beyond Borders} 2 (1998).} Significantly, however, it departs from this broader trend by eschewing the...
“counterhegemonic” left project that those other networks attempt to further; instead, the anti-corruption community works with established IFIs to further the financial integration of developing nations within global capitalism.93

A. “Transparency” in Transparency International

TI was founded in 1993 under the leadership of former World Bank executive Peter Eigen. and thus one of the first and most prominent non-governmental member of this “industry.”94 It has expanded to include nearly one hundred accredited national chapters that lobby and pressure public decision makers in the many countries in which it operates to adopt corruption control instruments.95 Lacking the power or leverage that international and regional governing bodies like the UN or the Organization of American States and international financial institutions like the World Bank and IMF enjoy, TI works by trying to use its

93 See Peter Evans, Counterhegemonic Globalization: Transnational Social Movements in the Contemporary Global Political Economy, in THE HANDBOOK OF POLITICAL SOCIOLOGY: STATES, CIVIL SOCIETIES, AND GLOBALIZATION 655, 656-58 (Thomas Janoski et al. eds., 2005); Philip McMichael, Globalization, in HANDBOOK OF POLITICAL SOCIOLOGY, supra, at 587, 588-90. In this regard, the anti-corruption movement is decidedly not a “social movement” that would fall within the sociological subfield that studies such movements—it is far more top-down than bottom-up, as its institutional relationship with the World Bank, see text accompanying infra note 96, demonstrates. See Amy Kapczynski, The Access to Knowledge Mobilization and the New Politics of Intellectual Property, 117 YALE L.J. 804, 806-07 n.2 (2008) (parsing definitions and noting that the term transnational advocacy network is generally identified predominantly with “professionalized NGO advocacy”); Michael McCann, Law and Social Movements: Contemporary Perspectives, 2 ANN. REV. L. & SOC. SCI. 17, 23-24 (2006) (providing literature review of social movement theory and identifying among its many themes a focus on movements led by and representing “nonelites whose social position reflects relatively low degrees of wealth, prestige, or political clout” and a use of disruptive protests and other tactics “that halt or upset ongoing social practices”).

94 Galtung & Pope, supra note 87, at 258. TI’s founding coincided with, and helped spur, the development in the mid- to late-1990s of an international consensus among IFIs and other state and non-state entities to view corruption as a preeminent obstruction to economic development. See James Thuo Gathi, Defining the Relationship Between Human Rights and Corruption, 31 U. PA. J. INT’L L. 125, 144-45 (2009). It also coincided with the beginning of a period in the history of NGOs in which NGOs were increasingly active and influential in international policymaking. See Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 MICH. J. INT’L L. 183, 265-68 (1997).

professional networks and moral authority to build coalitions among government, private sector, and civil society institutions.\(^96\) In its overarching policy platform, TI prescribes a portfolio of legal and structural measures that extend well beyond forcing the state to disclose information to the public.\(^97\) These include using its institutional structures, which produce research and model reforms and which build networks among states, IFIs, and other NGOs, to lobby and pressure for various reforms. TI and the broader community encourage states to enact and enforce ethical standards among officials and corporations contracting with governments, to offer higher salaries to government employees, to privatize state owned enterprises and services, and to enact laws and develop norms that promote transparency and thereby bring corrupt practices to light.\(^98\)

With the prominent position that it plays in the name of one of the most widely-recognized anti-corruption NGOs, transparency enjoys special status among the package of good government reforms that the movement promotes.\(^99\) TI advocates on transparency’s behalf both by lobbying for rights-based legal reforms (whether at the national level or via the enforcement of international conventions) and by collecting and distributing information about government performance. As it states on its website,

> Transparency International supports the international efforts to have the right of access to information recognised and respected.

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\(^{97}\) The anti-corruption movement of which TI is a part intersects with broader international movements promoting good governance, democracy promotion, economic development, and state-building. Steven Sampson, The Anti-Corruption Landscape in Southeast Europe: Landscapes and Sites, in GOVERNMENTS, NGOs AND ANTI-CORRUPTION, supra note 95, at 170.  


\(^{99}\) See Margaret Hanson, The Global Promotion of Transparency in Emerging Markets, 9 GLOBAL GOVERNANCE 63, 66–68 (2003). To its great credit, TI also has also attempted aggressively to disclose the sources of their own funding—a practice that other transparency-focused NGOs have adopted. See Frequently Asked Questions About Transparency International, TRANSPARENCY INT’L, http://www.transparency.org/news_room/faq (explaining how TI is funded and how its national chapters are financed independently); see also How We Are Funded, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org/about/funding.
The exercise of this right enables citizens to keep their governments and public bodies accountable. This can hinder corrupt practices that benefit from opaque or obscure regimes.\textsuperscript{100} TI also collects and publicizes information about corrupt practices, most famously in its Corruption Perception Index (CPI).\textsuperscript{101} The CPI is an “aggregate indicator” that uses assessments and business opinion surveys to gauge the extent of a nation’s corruption and the extent of its anti-corruption efforts in the public sector. It then scores each nation on a ten-point scale that allows comparisons across countries.\textsuperscript{102} TI’s approach has served as a model for new entrants in the anti-corruption field, which use similar approaches to protect developing nations from corrupt practices in the extractive industries (where corruption is often endemic),\textsuperscript{103} or to offer an index of laws and government practices that competes with and complements TI’s CPI.\textsuperscript{104}

If the anti-corruption industry adapts, at least in part, a traditional rights-based strategy for opening government, its focus on the economic and political effects of corruption distinguishes its understanding and use of transparency as an issue. It views NGO-produced measures that force disclosure on state actors—like the other good governance measures that it

\begin{enumerate}
\item For a list and description of TI’s full range of reports, see Publications, TRANSPARENCY INT’L, http://transparency.org/publications/publications.
\item The most prominent extractive industry NGOs are the Extractive Industries Transparency Initiative, founded in 2002 and funded by the private sector, supporting countries, civil society organizations, and its host government, Norway, and Publish What You Pay, also founded in 2002 and formed and initially funded by NGOs and foundation. See EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/ (last visited Aug. 5 2011), and PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org (last visited Aug. 5, 2011). Their campaigns attempt to force companies to, as the name states, “publish what [they] pay” for the right to extract, in order to make such transactions more transparent.
\item A recent entrant in the field is Global Integrity, begun in 1999 within the Center for Public Integrity (a U.S. domestic investigative journalism NGO) and then spinning off independently in 2005, with a mission to “play a catalytic role in promoting accountability and transparency reforms by developing tools that address the needs of the public, private, and civil sectors equally.” \textit{Global Integrity’s Mission}, GLOBAL INTEGRITY, http://www.globalintegrity.org/about/mission. Rather than studying perceptions of corruption like TI, GI assesses anti-corruption mechanisms, openness, and government accountability, to understand not what it describes as the “disease of corruption” but “the medication applied against it: the public policies, institutions, and practices that deter, prevent, or punish corruption.” \textit{Our Story}, GLOBAL INTEGRITY, http://www.globalintegrity.org/about/story.
\end{enumerate}
advocates—as a means to make a nation’s government more ethical, its markets more efficient, and its economy more robust. It thereby reverses the assumptions about transparency’s primacy in democratic theory and practice that we have thus far seen: rather than understanding law or technology as an administrative means to make the state transparent and therefore more democratic (with the help of the private press), the anti-corruption movement views transparency and the international NGOs that define and enforce it as the means to an economic and administrative end that will ultimately reform a nation’s political system. Ironically, an organization whose name has played a key role in the emergence of “transparency” as the term that signifies open government neither seeks transparency for its own democratic sake nor privileges it as the most important tool on the role to a legitimate state—instead, it promotes the consequential value of openness as a means to fight corruption.

B. The Limits of the Anti-Corruption Fix

TI’s fight against corruption and on transparency’s behalf has not gone unchallenged. Critics argue that despite its seemingly precise, quantitative, and unambiguous calculation of corruption, TI’s CPI relies on imprecise perceptions and flawed sampling and survey methodologies. They also claim that the anticorruption movement furthers Western, technocratic conceptions of governance and a neoliberal vision of a minimal state; as applied in the nations that the CPI identifies as suffering from corruption, anti-corruption programs shrink the size of government and limit its functions while expanding institutional and legal accountability regimes. In the process, seemingly universal ideals of a good government, developed and promoted by Western NGOs funded by


106 For a broader critique of NGOs role in promoting a neo-liberal globalization, see JEAN-FRANÇOIS BAYART, GLOBAL SUBJECTS: A POLITICAL CRITIQUE OF GLOBALIZATION 58–67 (2007).

107 TI’s rise has run concurrently with the rise of New Public Management (also known as “New Governance”), whose emphasis on accountability have proven especially attractive to the diverse political interests in favor of public fiscal restraint, particularly in the provision of public services. See MICHAEL POWER, THE AUDIT SOCIETY 43–44 (1997).
Western governments and foundations, are imposed on distinct political, economic, and social systems of individual nations; these prescriptions prioritize “good government” over popular democracy and effective, legitimate policy for the entire nation, while the pursuit of these ideals limits the range of political issues that voters and their elected representatives can decide. The CPI thus acts as a disciplining technology, one whose seeming but imperfect neutrality and basis in the administrative norm of transparency constitutes a form of unelected “organized governance” on states and their agencies while it hides its more normative, programmatic functions. Representing ideas developed elsewhere, and wielding powerful, seemingly objective indices to advocate for government reform, TI and international anti-corruption advocates appear unaccountable to local citizens and publics—even as they would claim to be furthering the crucial political and public goal of fighting official corruption.

108 See Frequently Asked Questions About TI, Transparency International, http://transparency.org/news_room/faq/faq_ti (“The bulk of TI’s income comes from government development agency budgets and foundations. Other sources of income include project funds from international organisations, donations from private sector companies and income from honoraria and publications.”).
110 See Anderson & Haywood, supra note 105; Brown & Cloke, supra note 98; see also Jon Beasley-Murray, Posthegemony: Political Theory and Latin America 107–08 (2011) (critiquing transparency’s transformative power on the state and society, and its relationship to neoliberalism); Power, supra note 107, at 6–8 (noting the distinction in financial accounting between technological, or operational, elements of auditing practices and programmatic, or normative, elements, while both problematizing the idea that technology is neutral and noting how its seeming neutrality obfuscates the programmatic nature of the practice). For a critique of how seemingly neutral standards serve as normative efforts to control behavior and organize governance, see Nils Brunsson & Bengt Jacobsson, Introduction, in, A World of Standards 1, 10 (Nils Brunsson & Bengt Jacobsson eds., 2000); Haridimos Tsoukas, The Tyranny of Light, 29 Futures 827, 831 (1997).
111 For criticism of NGOs as unrepresentative of local populations and unaccountable to national political systems, see Kenneth Anderson & David Rieff, “Global Civil Society”: A Sceptical View, in Global Civil Society 2004/05, at 26, 29-30 (Helmut Anheier et al. eds., 2004); Ruth M. Grant & Robert O. Keohane, Accountability and Abuses of Power in
TI responds to this critique first by distinguishing the easy cases of clear corruption (the official with the Swiss bank account) from more nuanced instances, and then by arguing that it allows its locally-situated national chapters to define corruption in difficult cases. Eradicating clear cases of corruption is not political, in other words, and the organization leaves open to nation states a broad array of political and regulatory options that they can use. But if corruption is defined narrowly as rent-seeking behavior by public officials, then privatization and deregulation, as strategies that can apply everywhere, simultaneously reduce the potential for corruption and make the state ostensibly more transparent by making it smaller.

To the extent that TI and the anti-corruption movement market these contestable reforms as administrative, technocratic improvements provided by independent, non-state institutions, their reforms seem like neutral, commonsensical tools that can transform states into leaner, more efficient institutions, ones that can both be held accountable to a Western model that is cognizable to NGOs and IFIs and be more attractive to direct foreign investment. But these seemingly neutral principles are the very problem that TI represents for its critics, as it positions the NGO as either a witting or unwitting agent of a global neoliberal regime that undercuts state sovereignty and local control.

"Transparency," in other words, is a normative political apparatus rather than a transcendent and neutral administrative norm.


Hanson, supra note 99, at 63; Hindess, Normalization, supra note 99, at 23; Mark Philip, Modelling Political Corruption in Transition, in DIMENSIONEN POLITISCHER KORRUPTION. BEITRÄGE ZUM STAND DER INTERNATIONALEN FORSCHUNG 91, 96 (2005).

On transparency’s relationship to global neoliberalism, see ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONDITION 29–33 (1998) (characterizing the expert imposition of transparency as a means to ease administration over differentiated, local cultures); Christina Garsten & Monica Lindh de Montoya, The Naked Corporation: Visualization, Veiling and the Ethico-Politics of Organizational Transparency, in TRANSPARENCY IN A NEW GLOBAL ORDER, supra note 12, at 79, 90–91 (describing transparency as a seemingly moral, apolitical means to “mak[e] the globalizing world hospitable for trans-organizational, transnational and sometimes super-national interventions and administrative procedures”).
C. Conclusion

Representative of the “new transnational activism” of global NGOs, TI and the anti-corruption movement mobilize resources against state structures and officials by working simultaneously at two distinct levels: rooting their efforts in specific national contexts (through, for example, TI’s chapters and other national and local NGOs) while acting within transnational networks and furthering seemingly neutral, international norms of transparency.\textsuperscript{116} Their support for FOI laws overlaps with earlier and contemporary transparency campaigns. But an open, visible state is one aspect, albeit a key one, in a broader critique of current state practices and a normative vision for the leaner, more accountable and efficient state of the future, brought about by TI’s neutral, transnational activism. The problem TI and the broader movement principally addresses is corruption, not a perceived democratic deficit. It pursues reform in order to extend the larger structural, historical change of which TI is itself a part: the expansion and movement of global capital and finance to fund economic development as it is understood and championed by Western states. Informational rights and a transparent state are a means to improve administration and therefore development, rather than a normative commitment to democratic self-rule in the first instance. TI holds a primarily consequentialist vision of transparency, one in which transparency’s democratic effects flow from better, non-corruption governance rather than from the access to information itself.

It is also a vision whose suspicion about the state and law are more pronounced than in the earlier FOI movement. If the state is corrupt, it will not enact laws to force the state to disclose information; and if the state has such laws, it will under-enforce them. Like other transnational NGOs, TI thus attempts to work around the state by helping to construct an institutional network of organizations that can force the information to disclose information.\textsuperscript{117} This network begins with its own international organization and local chapters, which produce and distribute seemingly authoritative research and indices, and the relationships it has developed with influential IFIs, developed nations, and private firms. The structure that TI has built and upon which it relies for reform is far more institutionally complex than that which FOI establishes—with its internal


\textsuperscript{117} This process is referred to as the “boomerange” effect in the literature on transnational activism. See Keck & Sikkink, supra note 92, at 12-13; Tarrow, supra note 116, at 145-46.
administrative procedures and external review by an independent judiciary—and operates largely outside of the state whose degree of transparency is being challenged.

These differences reflect the quite different historical context from which the anti-corruption movement emerged. The Cold War had ended when TI began, removing world communism as the specter that threatened the developing world. But corruption serves an analogous role to TI in post-Communist, failed, and developing states as the Soviet threat did to ASNE and free press advocates focused on the immediate post-war world. Economic development has replaced democratic development as the preeminent concern, while administration and governance that can attract foreign capital and IFI loans and investment serve the role that legal informational rights and a free press played and continue to play for the FOI movement.

III. THE TECHNOLOGICAL FIX:
DIGITAL TRANSPARENCY

Rather than viewing government information asymmetry and hoarding primarily as a political problem with a legal solution (as the FOI advocates see it) or an administrative problem with an institutional solution (as TI and the anti-corruption advocates see it), digital transparency advocates view it primarily as a data access problem that can be solved through information technology. In their telling, code and networked communication can substitute for or augment the legal rights and duties that officials routinely ignore and courts insufficiently enforce. Law is not the only solution to solve the problem of moving information from hard drives and other storage media across computers and space, nor is it a sufficient one. Reframing the problem that transparency must solve leads digital advocates to prescribe a smaller role for the state (as well as for the institutional press) than the earlier advocacy movement, and a much larger role for an active, participatory citizenry and an entrepreneurial class of visionaries and software designers. Although some digital transparency NGOs attempt to further the more traditional aims of the FOI movement,\(^{118}\) the movement’s innovation lies in its distinct efforts to free government data.

\(^{118}\) The Sunlight Foundation, for example, has established a wide range of on-line programs that overlap with traditional freedom of information and campaign finance disclosure laws, and is focused especially on making congressional operations more visible via the Internet. See Issues by Topic, SUNLIGHT FOUNDATION, http://sunlightfoundation.com/about/issues/ (listing the projects it is pursuing, which
A. Digital Transparency and the Technological Transformation of State and Public

The rhetoric that digital technology advocates deploy is remarkably powerful, continuing a tradition established in the writings that heralded the emergence of cyberspace.\(^{119}\) The foremost collection advocating this position, entitled *Open Government: Collaboration, Transparency, and Participation in Practice* (2010) and issued by the technology book publisher O’Reilly,\(^ {120}\) includes essays proclaiming that the revolutionary changes wrought by information technology can tame and make usable the data collected and produced by sprawling government bureaucracies. The Internet, the book’s foreword states, allows both leaner, more efficient government and a diminished bureaucracy by generating a state apparatus that

opens its doors to the world; co-innovates with everyone, especially citizens; shares resources that were previously closely guarded; harnesses the power of mass collaboration; drives transparency throughout its operations; and behaves not as an isolated department or jurisdiction, but as something new—a truly integrated and networked organization.\(^ {121}\)

includes disclosing congressional earmarks, participating in the FOI campaign’s Sunshine Week and Freedom of Information Day, and attempting to increase the transparency of lobbyists’ influence; see also Schacter, supra note 15, at 651 (discussing Sunlight Foundation programs). Micah Sifry, co-founder the Personal Democracy Forum, similarly views at least part of the NGO’s purpose as using digital information and networking technology to take advantage of and further the spirit of FOI laws. See MICAH L. SIFRY, WIKILEAKS AND THE AGE OF TRANSPARENCY 105-34 (2011).


\(^ {120}\) Open Government: Collaboration, Transparency, and Participation in Practice (Daniel Lathrop & Laurel Ruma eds., 2010) [hereinafter Open Government].

\(^ {121}\) Don Tapscott, Foreword to OPEN GOVERNMENT, supra note 120, at xv, xvi (Daniel Lathrop & Laurel Ruma eds., 2010).
The book’s contributors provide a representative sampling of the movement’s composition and leadership: NGO executives and staff, entrepreneurial software programmers as well as executives and in-house intellectuals at Microsoft and IBM, academics (both faculty and enterprising students), consultants, and several government officials from federal agencies and congressional staff as well as from state and local government.

As an example of the excitement that this movement has created, consider TransparencyCamp, an annual event held outside Washington, D.C., where “government officials, technologists, journalists and advocates [come together] to share their knowledge about how best to use new technologies and policies to make our government really work for the people.”\footnote{122 About Transparency Camp, Transparency Camp, \url{http://transparencycamp.org/}; Sponsors, Transparency Camp, \url{http://transparencycamp.org/sponsors/}.} A project of the Sunlight Foundation, a leading digital transparency NGO, the Camp’s 2011 “unconference” was sponsored by Microsoft (on whose Maryland campus the 2011 Camp was held), Google, O’Reilly Publishing, Governing magazine, Adobe, and Forum One Communications (a “digital communications firm” that develops internet strategies for, among others, NGOs and government agencies).\footnote{123 Sponsors, supra note 122.} Scheduled sessions in 2011 included varied topics like “Building an Open Financial Datamart,” “Breaking the Information Cartel in Congress,” and “Open Data in Municipal Government for Fun and Profit.”\footnote{124 Schedule, Transparency Camp, \url{http://transparencycamp.org/sessions/}.} TransparencyCampers imagine a millennial future without informational gatekeepers in which the promised land of data freedom will surely come through the processing power provided by large-scale IT hardware companies, the platforms provided by massive software companies, the boundless entrepreneurial energy of new tech startups, and the savvy of government information managers.

Such rhetorical verve and organizational energy posit that the state and public can themselves be transformed by the flow of data through networked communication—a much bolder claim than the FOI movement’s more restrained vision that the public’s right to know will increase government accountability and improve bureaucratic performance. Before, “information” needed to be “freed” to the public via the press; now, as usable data, it can, must, and will flow freely and cheaply in all directions. Technology also allows two-way access to the state. Data running freely can move from the state as well as to it; the public can both pull information from the state and push data and opinions
to it. A digital world thus should enable unmediated, interactive communication between state and citizens, an ideal that digital technology NGOs like the Sunlight Foundation and the Personal Democracy Forum embrace.\footnote{125} It is a vision captured in Beth Noveck’s book *Wiki Government*, which characterizes the ideal of “open government” as extending to data access and collaboration,\footnote{126} and which has been carried forth, albeit imperfectly, in the Obama Administration, in part with Noveck’s participation.\footnote{127} In Noveck’s definition of “open government,” announced on her personal website soon after her departure from the Obama White House:

> Open government is an innovative strategy for changing how government works. By using network technology to connect the public to government and to one another informed by open data, an open government asks for help with solving problems. The end result is more effective institutions and more robust democracy.\footnote{128}

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\footnote{125}{See, e.g., SIFRY, supra note 118, at 14 (editor and curator of the Personal Democracy Forum, praising the “Age of Transparency” in an era of networked communication, in which social media and so-called “crowd–sourced” information are viewed as inexorably changing the shape of the government and its relationship to its citizens): Sunlight Agenda 2011, SUNLIGHT FOUND., http://sunlightfoundation.com/policy/documents/agenda/ (touting “the potential of Internet-enabled government transparency” and “cutting-edge technology and ideas to make government transparent and accountable...[by] focus[ing] on the digitization of government data and the creation of tools and Web sites to make that data easily accessible for all citizens”).}


Advocates view technology as the basis for a transparent state that uses open technology, and especially open source code, to make its data more open. When government makes its source code available to users and the general public to adopt and adapt, it employs an inherently democratic model and tool for transparent and participatory government. In his key chapter in the aforementioned digital transparency book (published by the company he founded), Tim O’Reilly offers a series of “lessons” from the open source community and technology industry that he argues apply directly to government: use open, simple programming standards, design information technology to foster participation, and enable end users to mine and aggregate data the state collects. “Just as open source software allows users to change and contribute to the source code of their software,” the book’s editors note in its preface, “open government now means government where citizens not only have access to information, documents, and proceedings, but can also become participants in a meaningful way.”

Open data and technology will thus change the state, proponents argue—indeed, at their most exuberant, digital transparency advocates forecast a more collaborative version of the state, with citizen-participants working together with officials to solve pressing problems, or, in some instances, a welcome waning of the state, if not its wholesale withering away. Tim O’Reilly makes this latter point explicitly: the state, he...
argues, should no longer be viewed as the “first mover of civic action” but instead as a “platform” and “the manager of a marketplace” for private and government interaction. The state can provide key public services and gather and release data about its performance, as well as capital intensive infrastructure like vehicular and information highways that are unlikely to be provided in sufficient quantities by the market. But a functional, transparent state must make the data it gathers about its efforts available to individual entrepreneurs who can gather government data and make it available and useful via the web, to blogs and websites that can “crowdsourcing” government data to make sense out of it, and for programs that “mash-up” government information in order to make it user-friendly for mobile computing devices like smart phones.

Let me illustrate digital transparency’s promise and its application as they are evolving in American municipalities. A number of larger cities with strong software development industries have encouraged the use of their data for development by private firms—indeed, the City of New York and its Metropolitan Transit Authority have even sponsored contests with cash prizes for software developers to create apps using government data sets. New York has created the position of Chief Digital Officer whose job is to “improv[e] communication with residents and businesses by enhancing government transparency and working closely with digital media.” Such new positions, as well as more senior positions of municipal information or technology officer, have been given new responsibilities to encourage communication and collaboration with the

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134 O’Reilly, supra note 130, at 12–15.
136 See SIFRY, supra note 118, at 75–80.
public through web portals and social media. In the first months of her tenure as New York’s Chief Digital Officer, Rachel Sterne discussed with technology companies “ways to use their platforms to showcase the work of city agencies,” and unveiled The Daily Pothole, a blog that reports on street repairs. Filling potholes is not the only local government service that information technology can assist. Drivers in some cities can use applications on their smart phones to learn of available parking spots, for example, while the cities, in turn, can use the data collected about the demand for parking on certain streets and in certain neighborhoods to set variable pricing. Perhaps unsurprisingly, San Francisco appears to be in the lead in municipal digital transparency as a matter of practice and law: not only does it boast DataSF, a web portal that serves as a clearinghouse for its data sets, but it is the first city to enact an open data law requiring city departments to make their data sets available to the public.

For advocates, the applications that develop from these data sets, and the economic growth and convenience they create, will create wealth and improve individuals’ lives. The state’s role and the extent of its usefulness will be its performance as an adjunct to market activity, by helping to distribute information as a public good that serves as the foundational resource for economic and civic development. The resulting state, rendered digitally transparent, will be smaller and more accountable as a result. Significant by its absence in this conception is government’s more

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142 Javier C. Hernadez, A Digital Matchmaker for the City and Its Public, N.Y. TIMES, July 31, 2011, at M-1.


144 DataSF—Liberating City Data, DATASF, http://datasf.org/.


146 On the notion of information as a public good, see CASS SUNSTEIN, REPUBLIC.COM 2.0, at 107–09 (2007).
traditional, broader police power authority to enforce laws and promulgate and enforce regulations, as well as its role in redistributing wealth. The digital state provides services and information; it eschews coercion in favor of collaboration and negotiation. The digital ideal also prophesies the ultimate irrelevance of traditional media. Private websites of all sorts can sort, organize, and make data useful for the public, first in the shadow of and perhaps ultimately in the absence of any authoritative press that collects information and educates the public. Indeed, a more competitive market of entrepreneurial data managers, programmers, website authors, and crowdsourcing masses can mash up and process information that the public finds more useful to its needs and preferences.

Transparency thus appears in this movement less as a means to inform the public about secret government doings and more as part of a broader re-conception of government’s operations and purpose. As an ideal, the networked state imposes less coercion and paternalism while, in its leaner form, it can prove more directly and immediately accountable to its citizens who themselves engage the state in profoundly different ways. Put more schematically, whereas traditional ideals of transparency in the FOI approach promises to open a window onto state activity, allowing the public to peer in, digital transparency offers to plug the state into existing data flows, connecting government, as a data repository, into part of a seamless web of information. When reimagined as a networked data repository, an “open civic system” carried over and through public and private networks, the state allows everyone, from app designers to the wisest of crowds, to solve the problems that bureaucrats formerly struggled with behind the government’s closed doors. Digital transparency is not a remedy; it is a state transformed.

Alongside information technology’s transformative promise is the related assumption that technology will transform the public by expanding citizens’ ability to receive data, enabling them to become informed users.

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149 See SIFRY, supra note 118, at 100 (“In this understanding, the relationship between governments and their constituents is a two-way street, and data is the road that connects them.”).

of government services and active participants in democratic politics. The blogger and journalist Jeff Jarvis imagines a world in which everyone creates “personal political pages” where they discuss their own beliefs and commitments, “manage” their “relationship” with politicians and government officials, and have their pages aggregated by Google (“the polling place that never closes”). All this in turn would allow activist networks to form and to participate more effectively in politics and government.\footnote{Jeff Jarvis, The Ethics of Openness, in REBOOTING AMERICA: IDEAS FOR REDESIGNING AMERICAN DEMOCRACY FOR THE INTERNET AGE 215, 218-20 (Allison Fine et al. eds., 2008).} For Yochai Benkler, the networked information environment has produced “a cultural shift in self-perception, from passive couch potato to active participant in collaborative practices for making one’s own information universe, [which] opens the opportunity for a more robust, sustainable level of involvement by citizens in the governance of their society.”\footnote{Yochai Benkler, Participation as Sustainable Cooperation in Pursuit of Public Goals, in REBOOTING AMERICA, supra note 151, at 58, 52-53.} Such assumptions about digital transparency’s effects on the public closely parallel assumptions extant both in the rights-based and anti-corruption movements about information’s effects: once information (or data) is made “free” (or flows through a network) it will necessarily have transformative, positive effects on politics and society.\footnote{Fenster, supra note 3, at 895-902.} But the informational stakes are higher in a code- and data-based world than in a legal one, because of the state’s concurrent transformation in a networked age—if the division between state and civil society is withering, then the public (along with the civil society that the public helps create and joins) must be capable of effective self-rule. Lacking the intermediaries of the institutional press, independent judiciary, and transnational NGOs (themselves networked with state actors and IFIs), and faced with a smaller state that is less capable of providing them a social and regulatory safety net, digital transparency assumes the emergence of a public that will act as wired “netizens” rather than as mere couch potatoes.

\textbf{B. The Limits of the Technological Fix}

Digital transparency builds on a number of long contested assumptions about information’s direct effects.\footnote{Id. at 927–33; for a vivid, articulate description of the conflicts over information theory, see JAMES GLEICK, THE INFORMATION 413–26 (2011).} As Philip Agre has explained, information technology’s advocates fetishize a technological sublime that is a longstanding feature in American culture: “Every important new technology,” he writes, “creates an imaginative vacuum, and time and
again this is the sort of thing that flows into it: tropes of transcendental escape, utopian perfection, discontinuous change, communitarian intimacy, everlasting peace, and boundless prosperity.\footnote{155} Notwithstanding noteworthy successes, however, it is unclear precisely how the state and public have been or will soon be transformed. Information’s fast and cheap distribution in digital form does not necessarily translate to its use; nor is its use necessarily civic-minded or wealth-creating; nor does access to information necessarily translate into knowledge or understanding.\footnote{156} No doubt many technologically savvy users of government services are willing and able to take advantage of new data flows to enhance their lives and gain knowledge that informs their voting and political participation, but studies to date have tended to show that use patterns of online government resources reflect age, class, and educational differences, and that the heaviest users are the youngest, wealthiest, and those who have gained the highest educational degrees.\footnote{157} Furthermore, while it is unclear whether the public is incrementally more


\footnote{156} See Fung, Graham & Weil, supra note 14, at 33-34; Mary Graham, *Democracy By Disclosure* 140–42 (2002). As David Sholle has noted, advocacy surrounding information technology frequently views information as a content-less, decontextualized thing, neglecting content and the complex, context-contingent communicative process in which meaning is produced. See David Sholle, *What Is Information? The Flow of Bits and the Control of Chaos*, in *Democracy and New Media* 343 (Henry Jenkins & David Thorburn eds., 2003). As Roland Barthes explained, the notion that language is merely instrumental, neutral, and above all *transparent* is itself a product of the emergence of modern science and religious argument, and empiricist and rationalist ideals. See Roland Barthes, *The Rustle of Language* 4 (Richard Howard trans., 1986).

informed about government and its performance than in the pre-digital era, dissatisfaction with the state appears to run at least as high as in analog times. The wired general public has not (yet, at least) been transformed into the satisfied, enlightened, collaborative polis that digital transparency promises.

Nor is it clear that information technology can tame the institutional complexity and bureaucratic resistance that complicate efforts to reveal the state to the public. The modern state, for good and bad reasons, is composed of multiple, overlapping organizational layers that extend within and across jurisdictions and space; smoothing out its striated institutions will require more than imagining it as a data repository and offering a technological fix through open access and open source code.\(^{158}\) Again, there is no doubt that government entities, NGOs, and commercial entities have made great inroads into making government information available and useful, but one would be hard-pressed at present to conclude that these effects have created a new age—or form—of government. The Obama administration’s much-vaunted Open Government Initiative (“OGI”) illustrates this well: the very digital advocates who cheered its announcement have complained that its changes have been incremental rather than revolutionary, and that its implementation has occasionally been ineffective.\(^{159}\) At the same time, OGI’s existence is fragile—in the present it relies on the current administration’s willingness to invest human and capital resources on its development, and in the future it may be abandoned by future presidents.\(^{160}\) Put simply, the digital transparency

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\(^{158}\) On how the state’s organizational and geographical complexity makes transparency difficult to accomplish, see Fenster, supra note 83, at 617. For an illustration of how the bureaucratic empire fights back, see What Transparency Means to Feds, NEXTGOV, (Apr. 1, 2009), http://www.nextgov.com/nextgov/ng_20090401_5914.php, (polling government managers and finding a mixed response to the Obama administration’s Open Government Initiative).

\(^{159}\) Jaeger & Bertot, supra note 127, at 373–75; Open Government Directive: Year One, Success and Setbacks on the Way to a More Open Government, SUNLIGHT FOUND., (Dec. 7, 2010), http://sunlightfoundation.com/press/releases/2010/12/07/open-government-directive-year-one/ (“The [Obama] administration has to give stronger direction and urge the agencies to move forward if the promise of an open government is to be realized.”). More traditional transparency advocates, such as the National Security Archive, have expressed similar disappointment in the administration’s more traditional disclosure practices under the FOIA. See NAT’L SEC. ARCHIVE, GLASS HALF FULL: 2011 KNIGHT OPEN GOVERNMENT SURVEY FINDS FREEDOM OF INFORMATION CHANGE (2011), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf (reporting on the mixed results of an audit of federal agencies’ compliance with FOIA).

\(^{160}\) A Congressional Research Service report on the OGI provides a mixed review of the administration’s performance and identifies, without any recommendation, the issue of
revolution, should it occur, will be both a consequence of policy and politics and will continue to be subject to these very human, imperfect processes, rather than from some ahistorical, sublime technological force.

C. Conclusion

Digital transparency advocates claim that the revolution in information technology has already freed and will only further free the state’s data to the public, for whom it will be packaged by public entities, private entrepreneurs, and wise, wired crowds so that it can be available for everyday use, political action, and commercial advantage for citizens. The basic logic underlying this process parallels that described in the rights-based FOI movement and the contemporary digital movement: the state is a repository of information (recast now as data) that must be freed from its clutches and made available to the public, although by means of codes and bits rather than law. In this regard, they both share what Michael Schudson identified as an idea of citizenship that dates to the Progressive Era, where to be a good citizenship required one to be well-informed. The happy ending that digital transparency’s policy story offers also parallels Transparency International’s prescription: the transparent administrative state that results from the fixes they advocate will operate more efficiently and inspire the development of new markets for investment and widespread economic development.

Nevertheless, digital transparency relies on a quite different set of tools to secure a transparent state: information technology, and the software and hardware developers that innovatively apply it to the state, rather than legal rights enforced by state institutions and the press, and the transnational institutional watchdogs that pressure state institutions to conform to administrative and legal norms. Digital proponents predict that the decentralized regime of information distribution will at minimum augment, if not render irrelevant, the commercial press’ institutional gatekeeping role and the judiciary’s position in enforcing legal rights. More significantly, the classic legal approach latter views the legal rights and obligations that open government laws create as acting neutrally upon the state, whose functions and operations would not necessarily change—though they would improve—due to the greater exposure and accountability that an enforceable right to know allows. The digital

whether Congress should codify any of the OGI’s policies. See Ginsberg, supra note 127, at 27–28.

Michael Schudson, Click Here for Democracy: A History and Critique of an Information-Based Model of Citizenship, in Democracy and New Media, supra note 156, at 49, 57.
transparency movement envisions a quite different state emerging as a result of its actions, one that is defined by its data and the flow of information to and from it rather than by its actions, that is more immediately responsive to the public and allows extensive citizen participation, and that provides a “platform” for government services and for the provision of public informational goods. The staunchest of the digital advocates appear ready to abandon the standard post-war model of the regulatory welfare state, with its overly paternalistic and invasive bureaucracy, in favor of one that collects and enables the aggregation of data for public use and benefit, or that breaks down the wall between state and the public and market in further of a fully collaborative government.

At the same time, technology and the technologists the deploy it can augment if not replace anti-corruption watchdogs—after all, once the state’s information is made to flow freely, citizens can hold the state accountable on their own. Like TI, digital transparency proponents view themselves as external agents that explicitly attempt to transform the state by making it more efficient, accountable, and leaner. They favor different transformations, however, and emphasize distinct goals: the digitally transparent state will be more collaborative and participatory, while the non-corrupt one will be focused more on adopting models of good governance developed by international NGOs, IFIs, and public and private aid organizations.

IV. THE VIGILANTE FIX: WIKILEAKS AND TRANSPARENCY

Along with its offshoots and followers,162 WikiLeaks offers a distinct transparency agent: an organization and media outlet with the means to anonymously receive important digital files that shed light on government actions, and then distribute the files widely in electronic form.163 After

162 See infra note 171.
launching in 2006 and enjoying some success in releasing documents which proved embarrassing to some governments, the site became most famous in the U.S. in 2010, when it began to release the products from a cache of massive classified files caches that had been stolen from the Departments of Defense and State, allegedly by a serviceman whose security clearance and computer skills enabled him to download the materials from a military file server. Although none was classified above “secret,” the documents were unavailable to the public prior to

WIKIPEDIA, http://en.wikipedia.org/wiki/WikiLeaks. In addition to government documents, WikiLeaks also receives and distributes documents purloined from private corporations, but I will focus here only on the government documents it has released.

WikiLeaks’s early releases of documents included evidence of corruption in the Kenyan government; operation manuals of the Guantanamo Bay detention camp; secret manuals from the Church of Scientology; and documents that revealed self-dealing by the owners of Kaupthing Bank, the bank whose collapse hastened Iceland’s financial downfall. See LEIGH & HARDING, supra note 163, at 57-64; Manfred Goetzke, WikiLeaks Website Offers Promising Outlet for Fighting Corruption, DEUTSCHE WELLE (Nov. 26, 2009), http://www.dw-world.de/dw/article/0,,4930880,00.html.

Benkler, supra note 13, at 321-30. Most of the documents that composed the Afghanistan and Iraq “War Logs” were classified “secret.” Piecing Together the Reports, and Deciding What to Publish, N.Y. TIMES, July 25, 2010, http://www.nytimes.com/2010/07/26/world/26editors-note.htm; Scott Stewart, WikiLeaks and the Culture of Classification, STRATFOR GLOBAL INTEL. (Oct. 28, 2010), http://www.stratfor.com/weekly/20101027_wikileaks_and_culture_classification. Of the more than 250,000 diplomatic cables WikiLeaks obtained, approximately 11,000 were classified “secret,” 4,000 were classified “secret” and “noforn” (that is, not to be shared with a foreign government), and 9,000 were classified “noforn.” Scott Shane & Andrew Lehren, Leaked Cables Offer Raw Look at U.S. Diplomacy, N.Y. TIMES, Nov. 28, 2010, http://www.nytimes.com/2010/11/29/world/29cables.html. See also What Do the Diplomatic Cables Really Tell Us?, DER SPIEGEL (Nov. 28, 2010), http://www.spiegel.de/international/world/0,1518,731441,00.html (giving slightly different figures from the New York Times).


Most of the documents that composed the Afghanistan and Iraq “War Logs” were classified “secret.” Piecing Together the Reports, and Deciding What to Publish, N.Y. TIMES, July 25, 2010, http://www.nytimes.com/2010/07/26/world/26editors-note.htm; Scott Stewart, WikiLeaks and the Culture of Classification, STRATFOR GLOBAL INTEL. (Oct. 28, 2010), http://www.stratfor.com/weekly/20101027_wikileaks_and_culture_classification. Of the more than 250,000 diplomatic cables WikiLeaks obtained, approximately 11,000 were classified “secret,” 4,000 were classified “secret” and “noforn” (that is, not to be shared with a foreign government), and 9,000 were classified “noforn.” Scott Shane & Andrew Lehren, Leaked Cables Offer Raw Look at U.S. Diplomacy, N.Y. TIMES, Nov. 28, 2010, http://www.nytimes.com/2010/11/29/world/29cables.html. See also What Do the
their release by WikiLeaks.\textsuperscript{168} Commentators have debated the extent of the documents’ significance and how much they have revealed, but there can be no question that they have at least marginally increased public knowledge about recent American military campaigns and the nation’s diplomatic relations with other countries.\textsuperscript{169}

The organization itself is small and somewhat anonymous (besides the celebrity status of its founder Julian Assange), but it presents itself as a transnational NGO campaigning to change the political order and society. As its website declares,

WikiLeaks is an independent global group of people with a long standing dedication to the idea of a free press and the improved transparency in society that comes from this. […]

The broader principles on which our work is based are the defence of freedom of speech and media publishing, the improvement of our common historical record and the support of the rights of all people to create new history. We derive these principles from the Universal Declaration of Human Rights.\textsuperscript{170}

Embracing the conception of government information as a human right while exploiting information technology both to obtain and distribute classified documents, WikiLeaks combines elements of both the rights-based and digital transparency advocacy movements.

\textbf{A. Vigilante Transparency as Rights Protector and Enforcer}

WikiLeaks has played two significant roles as an advocate for transparency. First, by establishing its own powerful brand identity as a technologically sophisticated service capable of distributing purloined data anonymously and publicizing its release, it has proven the viability of an

\textit{Diplomatic Cables Really Tell Us?}, DER SPIEGEL (Nov. 28, 2010), http://www.spiegel.de/international/world/0,1518,731441,00.html (giving slightly different figures from the \textit{New York Times}).


\textsuperscript{169} See Fenster, \textit{supra} note 163, at 38-55 (summarizing arguments made by WikiLeaks critics and proponents on the relative significance of the site’s disclosures, and attempting to discern their wider impact on the general public).

anonymous, on-line leaking site as a model for others to follow. Numerous sites, both independent, non-profit ones and some proposed by established newspapers, have announced plans to do so.\textsuperscript{171} Second, its extralegal (and possibly illegal) disclosure of illegally obtained government documents implicitly challenge the nation’s disclosure practices under the laws of the nation whose documents are disclosed, while the site’s leader, Julian Assange, has made this challenge explicit in his writings and interviews.\textsuperscript{172} Like digital and anti-corruption transparency advocates, Assange has identified an information asymmetry and hoarding problem, a transparency fix, and a political objective: state secrecy can be defeated through whistleblowing and hacking insecure government databases, which will result in a smaller, chastened, fully visible state.

The problem WikiLeaks has identified is that same addressed by the original FOI movement: that the public’s need and basic human right to view the state’s information has been underenforced by state actors who


\textsuperscript{172} See, e.g., About: What Is WikiLeaks, supra note 170 (defining and defending “principled leaking” as a means to resist and challenge “secrecy laws [that] are being used to keep the public ignorant of gross dishonesty practised by their own government”); Bivol, 2011-05-01 Julian Assange: “I believe in the right to communicate and the inviolability of history,” WL CENTRAL, May 1, 2011, http://wlcentral.org/node/1727 (Assange interview with Bulgarian investigative journalism website in which he states, “Cablegate was not born from the citizen's rights to access information: if this was the case Cablegate would have come from FOIA requests. Rather it was born from people who presumably worked for the US government feeling the information they saw showed wrongdoing that the public should know about.”)
either refuse to recognize or ignore it. The site describes its project in broad, world-historical terms:

The broader principles on which our work is based are the defence of freedom of speech and media publishing, the improvement of our common historical record and the support of the rights of all people to create new history. . . . Article 19 [of the Universal Declaration of Human Rights] inspires the work of our journalists and other volunteers. It states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. We agree, and we seek to uphold this and the other Articles of the Declaration.

WikiLeaks enforces this right, it claims, by disclosing facts—the raw documents that the state attempts to suppress. It does so through the “scientific journalism” it claims to practice, which proves the truth of an objective news story by allowing readers “to click online to see the original document it is based on. That way you can judge for yourself: Is the story true? Did the journalist report it accurately?”

Although it shares with the legal rights approach the claim that the release of government information is an inherently and primarily political act, the site has little faith in the state’s willingness to disclose its secrets and even to obey its own laws. Instead, WikiLeaks presents itself as advancing popular democracy directly against despotic central authorities by obtaining and distributing the sovereign’s information:

Today, with authoritarian governments in power in much of the world, increasing authoritarian tendencies in democratic governments, and increasing amounts of power vested in unaccountable corporations, the need for openness and transparency is greater than ever. WikiLeaks interest is the revelation of the truth [sic]. Unlike the covert activities of state intelligence agencies, as a media publisher WikiLeaks relies upon

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the power of overt fact to enable and empower citizens to bring feared and corrupt governments and corporations to justice.\textsuperscript{176}

The press interest groups and activists in the post-war period criticized state secrecy because they feared its use as a means to hide corrupt and potentially abusive government. They assumed that the state could serve as the institutional basis for reform. More than fifty years after the FOI movement began, WikiLeaks explicitly does not.

Law might be unable to trump the power and privilege of authoritarian governments and the authoritarian “tendencies” of putatively democratic states, but technology can. “As a result of technical advances,” WikiLeaks declares, “particularly the internet and cryptography,” it can receive and distribute state secrets while it lowers if not eliminates risk to itself, its readers, and most importantly its sources.\textsuperscript{177} Although this looks like a merely technological fix, WikiLeaks departs from digital transparency’s prediction about technology’s transformative capacity in a number of important ways. First, it explicitly focuses on a radical political program to liberate state secrets rather than market-driven reforms to access and aggregate data for private use and private collaboration with the state.\textsuperscript{178} Assange shares some technologists’ libertarian, even utopian sentiments, but he appears as distrustful of the market and of corporate entities as he is of the state.\textsuperscript{179} Second, Assange has also made plain his disdain for the very collaborative technological mechanisms that the digital transparency advocates embrace—blogs, crowdsourcing, and the like—in the distribution of information.\textsuperscript{180} WikiLeaks had failed in its attempt by relying on the blogosphere and online communities and the institutional mainstream press to publicize the releases and provide further

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\item \textsuperscript{176} About: What Is WikiLeaks?, supra note 170.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} On Assange’s radical proclamations about WikiLeaks’ project to destroy conspiratorial regimes, which include states, see infra text accompanying notes 187-189.
\item \textsuperscript{179} Fenster, supra note 163, at 27.
\item \textsuperscript{180} See Julian Assange, The Hidden Curse of Thomas Paine, GUERNICA: A MAGAZINE OF ART & POLITICS, Apr. 29, 2008, http://www.guernicamag.com/blog/571/the_hidden_curse_of_thomas_paine/; Aaron Bady, Julian Assange in Berkeley, ZUNGUZUNGU (Dec. 12, 2010, 5:53 PM), http://zunguzungu.wordpress.com/2010/12/12/julian-assange-in-berkeley/ (transcript of Assange’s participation in academic in which he complained that bloggers and the like “don’t give a fuck about the material” and write in order to speak to and gain status with peers, not because of their inherent interest in the material or willingness to investigate it further).
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investigation into their significance and context. As a result, the site began to collaborate with major international newspapers for its Afghanistan, State Department, and Guantanamo releases, embracing precisely the old media whose predecessors sponsored the first wave of transparency advocacy and whose dinosaur, gatekeeper status the digital world was supposed to render obsolete.

In combining but also rejecting elements of the rights-based and digital approaches to transparency, while collaborating with mainstream newspapers and declaring its radical distrust of the state and other concentrated sources of power, WikiLeaks articulates and advocates a complex, conflicting conception of transparency. On the one hand, it seems to pursue the traditional goal of revealing the state to the public—not only to the citizens who can hold the state directly accountable, but to everyone who is able to “see evidence of the truth.”

“[O]ur sort of modus operandi behind our whole organization,” Assange has said, “is to get out suppressed information into the public, where the press and the public and our nation’s politics can work on it to produce better outcomes.” All of the movements discussed above share this general assumption and ideal: more information leads to a more visible, more functional and authentically democratic state. WikiLeaks can claim at least some success. Its recent military and diplomatic disclosures from the U.S. might have had little discernible impact on American politics and government policy, the documents it has released have been distributed

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182 See generally LEIGH & HARDING, supra note 163, at 110-14 (describing the negotiated agreements between WikiLeaks and its newspaper partners to redact documents); Benkler, supra note 13, at 323-24 (summarizing the WikiLeaks releases and describing the site’s relationship with the established print news media).
183 Id.
184 Julian Assange on WikiLeaks, War and Resisting Government Crackdown, DEMOCRACY NOW! THE WAR AND PEACE REPORT, http://www.democracynow.org/2010/12/31/julian_assange_on_wikileaks_war_and_peace_report_interview_in_which_Assange_explains__our_sort_of_modus_operandi_behind_our_whole_organization_is_to_get_out_suppressed_information_into_the_public_where_the_press_and_the_public_and_our_nation__s_politics_can_work_on_it_to_produce_better_outcomes____; see also Time’s Julian Assange Interview: Full Transcript/Audio (Dec. 1, 2010), available at http://www.time.com/time/world/article/0,8599,2034040,00.html (claiming that transparency can “achieve a more just society” by allowing a more knowledgeable, engaged public to oppose “abusive plans or behavior”).
185 See Roberts, supra note 163, at 18-21 (noting that WikiLeaks has had minimal effects in the U.S.).
globally and seem to have affected countries discussed in the State Department cables.\textsuperscript{186}

On the other hand, the site’s radical critique of the state’s tendency towards secrecy, as well as Assange’s formative years in the cypherpunk community and his pre-2010 writings, bespeak a political program that views disclosure as a means to discipline the modern state’s authority over its subjects and its dealings with other nations.\textsuperscript{187} One of Assange’s essays, posted online in the period just prior to WikiLeaks’ launch, sets forth his justification for and theory of deploying transparency as a transformative weapon against what he described as the pervasively autocratic, secretive nature of contemporary states.\textsuperscript{188} When faced with the threat that all of its internal correspondence will be leaked, a powerful, secretive regime will find itself unable to communicate with the agents it needs to oversee and instruct in order to operate. It must therefore either reform itself and act ethically—in which case transparency has in fact performed its reformist function—or collapse. Transparency, then, serves not merely to improve the state but to pose a fundamental challenge to its operations.\textsuperscript{189} No such challenge can come from within the state itself. Laws attempting to impose transparency, drafted and enacted by the state and enforced by its institutions, cannot be made to confront a regime by threatening complete exposure. Only a wholly independent institution, one willing to deploy extralegal tactics at the leading edge of technological innovation, can do so.

\textsuperscript{186} See Fenster, \textit{supra} note 163 (summarizing claims about external effects of WikiLeaks’s State Department releases on revolutions in North Africa).


\textsuperscript{189} \textit{ASSANGE, CONSPIRACY, supra} note 188, at 1 (calling for a “course of ennobling and effective action to replace the structures that lead to bad governance with something better”).
B. The Limits of the Vigilante Fix

Criticism of WikiLeaks as a model for transparency activism and as a proponent of a particular vision of transparency enforcement begins, typically, with the argument that it either engages in or solicits criminal activity. There is no question that it must rely on unauthorized, and possibly illegal disclosures made by its sources. But with respect to WikiLeaks itself, the unauthorized, potentially criminal nature of these disclosure provokes one critique, one prediction, and one problem for the organization and those who follow its model: first, that WikiLeaks’ actions constitute or rely upon lawless actions; second, that its disclosures will cause harm to American military, law enforcement, and diplomatic efforts; and, third, its reliance on unauthorized, potentially illegal disclosures make WikiLeaks vulnerable to supply chokeholds. I want to set aside the first issue to the extent that it conjures up the complex legal issue of WikiLeaks’ criminal liability (which is beyond this Article’s scope), and the adverse effects of its disclosures, which are to date arguably minimal and which the site itself claims to mitigate through its “harm minimization” efforts, and focus on the supply problem, which constitutes a significant vulnerability to the site’s efforts to force transparency systematically upon states.

WikiLeaks necessarily relies upon the existence of whistleblowers who are willing to release information against the state’s wishes and in violation of the law, a reliance that is neither particularly new nor a systematic means to make the state open. It thus confronts a problem that Daniel Ellsberg, as a Pentagon employee with security clearance and direct access to the documents he released, did not face when he leaked the Pentagon Papers—but would have faced had he promised to continue making unauthorized disclosures of classified documents from the American military. WikiLeaks’s ongoing business model depends upon

190 See, e.g., Steven Aftergood, WikiLeaks Fails “Due Diligence” Review, SECRECY NEWS (June 28, 2010, 11:19 AM), http://www.fas.org/blog/secrecy/2010/06/wikileaks_review.html (leading transparency advocate declaring that “WikiLeaks must be counted among the enemies of open society because it does not respect the rule of law nor does it honor the rights of individuals”). For a thorough discussion of WikiLeaks’s potential criminal liability, see supra note 13, at 356-65.

191 See Benkler, supra note 13, at 331-33 (summarizing claims made by elected and executive branch officials about the dangers of WikiLeaks’s disclosures), 328-30 (dismissing such concerns).

192 See id. at 356-65 (discussing WikiLeaks’s potential legal liability).

193 See Fenster, supra note 163, at 37-45.
the availability of content, while its political program as an agent of transparency depends upon the credible threat of an endless supply of leaked documents. If it lacks supply from frustrated government employees or those who steal documents, its model fails and the state remains opaque. As a result, even if it can solve its ongoing problems in acquiring financing, and even if its model is successfully adopted by well-funded institutions, WikiLeaks will always face a supply problem, one made more difficult when governments better secure their computer networks and security systems and harshly punish whistleblowers.  

It is possible, of course, that a thousand WikiLeaks will bloom, perhaps as small start-ups in response to new caches of documents, or that established newspapers will be able to copy the WikiLeaks model and use it more regularly. But this scenario suggests something less than a permanent program to force transparency, especially in contrast to those advocated through law, technology, or international NGOs and IFIs which propose permanent fixes to information asymmetry. Instead, it imagines an irregular set of practices that can only be effective when sources make documents available. The state will remain opaque except when a WikiLeaks can crack it open—a dramatic but comparatively underwhelming ideal for making the state permanently and programmatically visible.

Like the FOI and digital transparency movements, WikiLeaks rests its vision of a more function and democratic state on the assumption that more disclosures will positively affect the state and public. Its most significant leaks to date have brought the site and its founder significant celebrity and may have played some supporting role in the political upheaval in Tunisia (which in turn may have had ripple effects in North African and the Middle East during the so-called Arab Spring), but it seems not to have had the kinds of effects that would support its boldest claims about its potential as an agent of transparency or about transparency’s potentially radical effects. As with digital transparency advocates, WikiLeaks’ faith in its technological fix is belied by a post-technological political order that looks quite a bit like the one that preceded it.

C. Conclusion

WikiLeaks shares important commitments with its contemporaries and predecessors. Like FOI advocates, it views transparency as a human and

\[194\] See id. at 11-12 (discussing U.S. government’s aggressive, if thus far unsuccessful, efforts to punish WikiLeaks, and the military’s harsh incarceration of Bradley Manning as a strategy to dissuade others from leaking documents.
political right; like anti-corruption advocates, it views the state as inevitably corrupt without the monitoring that NGOs and other external institutions can provide; and like digital transparency advocates, it views new technological developments as enabling a more open state. But the site’s commitment to vigilante disclosures of government documents and its radical political project and skepticism about the online community’s ability to process and distribute the information that it liberates, distinguish both its project and its vision of a truly transparent state. The state it hopes to call forth is neither the traditional one (as the FOI movement relies upon), nor the one tied to networks of global capital (as the anti-corruption movement advocates on behalf of), nor a libertarian or collaborative one (that digital advocates prefer), but a left-libertarian state that meets its international human rights obligations—obligations that WikiLeaks will enforce, if no one else will.

CONCLUSION: TRANSPARENCY IN SEARCH OF A FIX

Since advocacy on transparency’s behalf began in earnest during the mid-twentieth century, its various movements have proceeded from the same basic assumption about the problem that their efforts hope to solve—that states and state actors seek to protect from public disclosure the information they collect and produce. These movements also share a commitment to the idea that an external authority, whether legal, technological, or institutional, can provide the necessary fix. And as I have argued here, each movement is certain that its solution will in turn transform the state in a manner consistent with the movement’s political commitments and will further its institutional interests.

Nevertheless, they differ in the details of the fix they propose and the state they imagine. The FOI movement advocated new administrative laws and enhanced judicial review of administrative agencies, with the newly disclosed information reported on by an authoritative press—an institutional arrangement that was consistent with the existing state apparatus in the post-war U.S. The anti-corruption movement advocates a transnational effort, led by NGOs and IFIs, to impose administrative and legal reforms that will lead to a non-corrupt state and a functional economy—one that is open to the flow of global investment. The digital transparency movement advocates the expanded use of information technologies to bring about a collaborative, open, smaller, and wired state, watched over by websites, netizens, and the wired public at large.
WikiLeaks envisions unauthorized leaks as a means to protect and enforce human informational rights on a resistant, secretive state.

The movements differ, too, in their relationships with the existing, flawed state. Press advocates for a legal rights approach lobbied and collaborated with state actors, but in an effort to constrain the state in a process that included investigations and critiques of the government bureaucracy. Anti-corruption advocates collaborate with more powerful IFIs and with sympathetic state actors, but in an effort to fight what it views as the state’s inevitable tendency towards corruption. Digital transparency advocates collaborate with tech-savvy state actors regarding technical standards and data releases while critiquing state bureaucracy and especially its tendencies to hoard information and to refuse to collaborate and communicate with the public. And WikiLeaks views the state as an adversary whose foundations can and must be shaken by surreptitious and perhaps criminal efforts to steal its data.

The newer transparency advocacy movements thus express, in different ways, dissatisfaction with the contemporary administrative state and with the laws intended to impose order and control over it. They envision a bounded, tamed state whose relationship to the public (and, for anti-corruption and digital transparency advocates, the market) makes it more functional. The resulting state they envision may be smaller—indeed, perhaps it will no longer exist in its present form—but it will certainly operate more efficiently, more effectively, and, most importantly, in a more publicly accountable, more truly democratic manner. They thus work within and extend prevailing political, economic, and ideological shifts away from the post-war administrative state and towards the globalization of capital and culture, the diffusion of digital technologies and networks, and a smaller, more modest role for the state in private markets and activities. They are thus political actors, deploying transparency for normative, prescriptive ends.

The problem, however, is that the transparency fix does not quite work. Notwithstanding the enactment of laws and recognition of public rights to require disclosure, the state remains hidden; notwithstanding the best efforts of a wide array of NGOs to unveil and stop the state’s tendency towards corruption, the political nature of the state’s operations and local bureaucratic resistance frustrate the dream of a pure, honest state; notwithstanding information technology’s ability to move data from the state to public, government operations remain at a remove, while large swathes of the public appear unmoved by the digital magic; and notwithstanding the liberation of hundreds of thousands of its secret
documents, the American superpower has neither been overthrown by popular revolution nor faces internal collapse.

Of course, the opacity that remains despite advocates’ best efforts only demonstrates the necessity of their continuing advocacy. Their campaigns will continue to promote a variety of fixes, with varying degrees of success—all of them reflective of, and seeking to extend, a particular normative vision of a better, more perfectly visible state.