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Contextualizing Disclosure's Effects: Wikileaks, Balancing and the First Amendment

Christina E. Wells
University of Missouri School of Law, wellsc@missouri.edu

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CHRISTINA E. WELLS[*]

Introduction

Professor Fenster's article discussing the effects of the WikiLeaks disclosures is a welcome addition to the all-too-often visceral literature describing Wikileaks and Julian Assange.[1] As Professor Fenster notes, with the passage of time since the WikiLeaks disclosures, we can assess more calmly than at the time of the original disclosure whether the promise and peril of the published material has come to pass. Such information may even cast light on the interest balancing courts use to determine whether disclosure of classified or sensitive information violates federal law. Indeed, Professor Fenster concludes that the inability to predict the effects of disclosure demonstrates that "a core theoretical concept and assumption for the laws governing access to government information are incoherent and conceptually bankrupt."[2]

I agree with Professor Fenster that the current balancing approach is problematic. But I am less sanguine about whether others will reach the same conclusion. Recent news reports suggest that the United States government has filed a secret indictment against Julian Assange, presumably for violating the Espionage Act with the 2010 and 2011 WikiLeaks disclosures.[3] If

[*] Enoch H. Crowder Professor of Law, University of Missouri School of Law. Special thanks to Scott Snipkie who provided valuable research for this response essay.

[1] Much of the literature describing Assange likens him either to a hero or a terrorist and describes the effects of his actions in grand or awful terms depending on the speakers' viewpoints. *Compare* Anna Mulrine, *Pentagon Papers vs. WikiLeaks: Is Bradley Manning the New Ellsberg?*, CHRISTIAN SCI. MONITOR (June 13, 2011), http://www.csmonitor.com/USA/Military/2011/0613/Pentagon-Papers-vs.-WikiLeaks-Is-Bradley-Manning-the-new-Ellsberg (quoting Daniel Ellsberg as calling Assange a "hero"), *with* Ewen MacAskill, *Julian Assange like a High-Tech Terrorist, Says Joe Biden*, GUARDIAN (London) (Dec. 19, 2010), http://www.guardian.co.uk/media/2010/dec/19/assange-high-tech-terrorist-biden; Fox News' *Bob Beckel Calls for 'Illegally' Killing Assange: 'A Dead Man Can't Leak Stuff' (VIDEO)*, HUFFINGTON POST (Dec. 7, 2010, 5:46 PM), http://www.huffingtonpost.com/2010/12/07/fox-news-bob-beckel-calls_n_793467.html.

[2] Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753, 806 (2012).

[3] Jennifer Robinson, Opinion, *Time for Government To Stand Ground and Protect Assange*, SYDNEY MORNING

the government pursues this prosecution, the phenomena Professor Fenster identifies will likely work against Assange and WikiLeaks rather than against the current balancing approach, an approach which is highly manipulable and allows the government great latitude in the face of uncertain consequences. This brief response to Professor Fenster's article builds upon his observations about the WikiLeaks disclosures to explore the significant problems with the court's balancing approach and its implications for Assange and others who may publish confidential government information.

I. The Evolution of Balancing As Applied to Disclosure of Information Under the Espionage Act

A prosecution of Assange is likely to proceed under a provision of the Espionage Act,[4] which punishes anyone who has "unauthorized possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" and who "willfully communicates, delivers, [or] transmits . . . the same to any person not entitled to receive it."[5] Prosecutors might also pursue Assange for conspiring with Bradley Manning, the government employee who allegedly accessed the confidential information, to violate 18 U.S.C. § 793(e). As

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HERALD (Mar. 1, 2012), http://www.smh.com.au/opinion/politics/time-for-government-to-stand-ground-and-protect-assange-20120229-1u3cn.html. As Professor Fenster observes, the government contemplated bringing such an indictment soon after the Wikileaks' disclosures. *See* Fenster, *supra* note 2, at 765.

[4] Other statutes may also apply. *See* Fenster, *supra* note 2, at 787 n.161. I focus on the Espionage Act charges because of the potential breadth of the criminal liability, the similarity in balancing to other confidential information disclosure approaches Professor Fenster identifies, and because Professor Fenster singles this statute out as his primary focus.

The other possible charges against Assange could include a violation of 18 U.S.C. § 641 (2006), which criminalizes knowing theft of government property (including information), or conspiracy to violate 18 U.S.C. § 1030(a) (2006), which incorporates portions of the Espionage Act into statutes prohibiting access to government computers. Bradley Manning, the government employee accused of providing the classified information to Assange and WikiLeaks, has been charged with violating these statutes.

[5] 18 U.S.C. § 793(e) (2006). I leave to others the difficult discussion of whether the government can successfully overcome technical obstacles to such prosecutions. *See, e.g.*, Patricia L. Bellia, *Wikileaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1479–83 (2012). This response assumes that the government will successfully overcome such obstacles.

Professor Fenster notes, although this law "appears to sweep broadly to impose criminal sanctions on disclosure" of confidential government information, the First Amendment protections of free speech and press somewhat limits its application.[6]

A. The Pentagon Papers Decision

The most recognized Supreme Court case on this topic involves the *New York Times* and *Washington Post*'s decisions to publish excerpts of a top-secret study about the Vietnam War (the "Pentagon Papers") while the war was ongoing. In *New York Times Co. v. United States*,[7] a majority of the Court refused to sustain injunctions barring further publications of the Pentagon Papers, primarily because such injunctions were unreasonable prior restraints against the press.[8] The Court's per curiam opinion did not establish a standard for injunctions against disclosure, but the concurring opinions noted that the government's burden was very high. Thus, Justices Black and Douglas argued against the injunctions altogether because of the Court's general antipathy to prior restraints.[9] Justice Brennan, on the other hand, posited that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an [injunction]."[10] Justice Stewart also noted that an injunction was inappropriate because the disclosed documents would not "surely result in direct, immediate, and irreparable damage to our Nation or its people."[11]

Although the possibility of enjoining the press clearly troubled the Justices, they were not

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[6] Fenster, *supra* note 2, at 787.
[7] New York Times Co. v. United States, 403 U.S. 713 (1971).
[8] *Id.* at 714 ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).
[9] *Id.* at 714–20 (Black, J., concurring).
[10] *Id.* at 726–27 (Brennan, J., concurring).
[11] *Id.* at 730 (Stewart, J., concurring).

as opposed to potential criminal punishment under the Espionage Act. Justices White and Stewart, concurring in the result, noted the availability of "specific and appropriate criminal laws . . . [that] are of very colorable relevance to the apparent circumstances of these cases."[12] Several other Justices similarly intimated that the Espionage Act allowed criminal punishment of the newspapers' publication of the Pentagon Papers.[13] Unfortunately, these opinions did not discuss the standard under which such criminal sanctions should be judged. Thus, the Court's intimation that criminal punishment might survive constitutional scrutiny, without more, served merely to muddy the constitutional waters. Given that the government did not pursue sanctions against the newspapers in *New York Times*, other courts were left to determine when and how to balance the Espionage Act's arguable punishment of disclosure against the First Amendment's right to free expression.

B. Subsequent Lower Court Decisions

Relatively few of these later decisions involved attempts to punish nongovernment publishers of classified or sensitive information. Rather, they have typically involved application of the Espionage Act to persons who engaged in classic espionage activities.[14] Two exceptions exist. The first decision, *United States v. Morison*, involved prosecution of a government employee who leaked top-secret photographs of a Soviet aircraft carrier to *Jane's Defence Weekly*.[15] Although there was no espionage-related activity, the court found that the defendant's

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[12] *Id.*; *see also id.* at 737 (White, J., concurring) ("I would have no difficulty in sustaining convictions under these sections on facts that would not justify the . . . imposition of a prior restraint.").
[13] *Id.* at 743 (Marshall, J., concurring); *id.* at 753–54 (Harlan, J., dissenting); *id.* at 759 (Blackmun, J., dissenting).
[14] *See* Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 882 & n.5. Such activities involve, for example, an individual delivering national defense information to a foreign government in exchange for financial incentives. United States v. Rosen, 445 F. Supp. 2d 602, 635 nn.48–49 (E.D. Va. 2006) (gathering cases documenting persons subject to prosecution under § 793(d) and § 793(e)).
[15] *See* United States v. Morison, 844 F.2d 1057, 1060–62 (4th Cir. 1988). There have been recent prosecutions of government employees who leaked secret information to the press. For example, the Bush Administration's National Security Administration surveillance scheme and the United States' efforts to impede other governments' weapons

actions fell within section 793(e)'s proscription of providing national-defense information to persons not entitled to receive it.[16] However, even here the extension of section 793(e) is somewhat understandable. The free-speech rights of government employees are limited compared to the rights of citizens, and certainly more so when employees undertake a position of confidence and trust, such as when their job gives them access to confidential information.[17]

The other decision, *United States v. Rosen*,[18] is far more worrisome since it is the only decision to date to find that section 793(e) reaches nonespionage-related disclosures by nongovernment actors. *Rosen* involved two political lobbyists (Rosen and Weissman) for the American Israel Public Affairs Committee ("AIPAC"), an organization that lobbied Congress and the executive branch on behalf of Israel.[19] The government accused Rosen and Weissman, in their positions as lobbyists, of conspiring to violate the Espionage Act by cultivating relationships with federal officials, gaining access to sensitive information, and disseminating that information to others not entitled to receive it, such as the media, foreign policy analysts, and officials of other governments.[20]

In response to defendants' First Amendment challenge, the court framed its task as a balancing inquiry. Thus, whether Congress could penalize Rosen and Weissman involved the

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development; however, neither resulted in a written opinion assessing the First Amendment issues. *See* Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks*, 34 HASTINGS COMM. & ENT. L.J. 27, 69–70 (2011).

[16] *Morison*, 844 F.2d at 1068–70.

[17] *See, e.g.*, GEOFFREY R. STONE, TOP SECRET 6–11 (2007). As Professor Stone points out, even government employees may (or should) be protected when revealing confidential information in some instances. *Id*. at 13–14; *see also* Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After* Garcetti, 57 AM. U. L. REV. 1531, 1533–35 (2008) (discussing the unfortunate lack of whistleblower protection in national-security context). But public employees who disclose information unquestionably have fewer rights under existing doctrine than a member of the general public.

[18] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006). Commentators noted that *Rosen* was "the first reported prosecution by the U.S. government against private citizens for exchanging classified information in the course of concededly nonespionage activities." Kitrosser, *supra* note 14, at 882.

[19] *See Rosen*, 445 F. Supp. 2d at 607–08.

[20] *Id*. at 608.

"'delicate and difficult task' of weighing [the competing societal interests at stake] 'to determine whether the resulting restriction on freedom can be tolerated.'"[21] According to the court, the lobbyists' interest "implicate[d] the core values" of the First Amendment since gathering information about the government and discussing it with others "is indispensable to the healthy functioning of a representative government."[22] This was just as true for information the government preferred to keep secret because even democratic governments tend "to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself."[23] However, defendants had not simply disclosed secrets; rather, they had disclosed "government secrets . . . which *could threaten* the security of the nation."[24] "[T]he right to free speech," the court concluded, "must yield to the government's legitimate efforts to ensure 'the environment of physical security which a functioning democracy requires.'"[25] In light of these principles, the judge construed section 793(e) as punishing only intentional disclosure of "closely held" information that a defendant knows is "'potentially damaging to the United States or . . . useful to an *enemy* of the United States.'"[26] Using this interpretation, the court concluded that the law applied to defendants and that Congress had drawn the appropriate balance in the Espionage Act between national security and free-speech interests.[27]

In a series of subsequent motions, the court allowed defendants to show that they lacked

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[21] *Id.* at 633 (quoting United States v. Robel, 389 U.S. 258, 264 (1967)).
[22] *Id.*
[23] *Id.* (quoting United States v. Morison, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring)).
[24] *Id.* (emphasis added).
[25] *Id.* at 634 (quoting *Morison*, 844 F.2d at 1082) (Wilkinson, J., concurring).
[26] *Id.* at 639 (quoting *Morison*, 844 F.2d at 1084) (Wilkinson, J., concurring)). The court made clear that "closely held" was not synonymous with classified information. The government might treat information as "classified" while nevertheless not securing it in a manner qualifying it as "closely held"—e.g., by leaking it on purpose. Courts or juries determine if information is closely held. *See id.* at 620–21, 639–40.
[27] *Id.*.at 638–39.

the state of mind required by the statute by subpoenaing several top government officials.[28] Defendants argued that they did not know their disclosures could potentially damage the United States or aid its enemies because government officials regularly leaked information to them as a form of "back channel" diplomacy.[29] In 2009, prosecutors dismissed the case against defendants,[30] complaining that the court's "knowledge" requirement established an impossibly "high" evidentiary burden."[31] Yet it is not at all clear that *Rosen*'s test is a hurdle to prosecutors pursuing individuals in circumstances different from Rosen and Weissman (i.e., non-lobbyists) who disclose confidential information.

II. Balancing the Effects of the WikiLeaks' Disclosures

Despite prosecutors' complaints about its high evidentiary burden, *Rosen*'s balancing test is actually quite malleable and can result in substantial deference to government officials' claims of threats to national security. In fact, *Rosen*'s approach hearkens back to earlier, discredited Supreme Court decisions. Experience with those decisions suggests that indeterminate balancing tests like that in *Rosen* are likely to be used most effectively against certain kinds of speakers that the government can cast as radical outsiders, like Assange, regardless of whether they pose an actual threat to national security.

A. Balancing Tests and National Security in the Twentieth Century

Beginning in World War I, the Supreme Court struggled to find the appropriate test to determine when speech was sufficiently dangerous to be punished. In *Schenck v. United States,*

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[28] United States v. Rosen, 520 F. Supp. 2d 802 (E.D. Va. 2007) (allowing subpoenas of Secretary of State Condoleeza Rice and former Deputy Secretary of State Richard Armitage, among others).
[29] *Id.* at 808.
[30] *See* Motion to Dismiss Superseding Indictment, United States v. Rosen, Crim. No. 1:05CR225 (E.D. Va. May 1, 2009), *available at* http://www.fas.org/sgp/jud/aipac/dismiss.pdf.
[31] *See* Eli Lake, *Case Against AIPAC Lobbyists Dropped*, WASH. TIMES, May 2, 2009, http://www.washingtontimes.com/news/2009/may/02/fed-drop-charges-against-aipac-staffers/ (discussing the prosecution's allegations of an "additional burden" being placed on it by the Fourth Circuit Court of Appeals).

the Court held that the government could prosecute speech when it was made in circumstances that "create[d] a clear and present danger that . . . [would] bring about the substantive evils Congress ha[d] a right to prevent."[32] Although the test sounded reasonably protective, it provided few concrete parameters to guide judges regarding when harm resulting from speech was "clear" or "present." Combined with a presumption that speakers intended to cause harm based upon the sheer fact of their speech,[33] the test actually allowed punishment of speech simply because it criticized government actions.[34] Furthermore, historical evidence shows that armed with such a malleable test, government officials primarily pursued socialist and radical groups rather than mainstream groups who criticized government actions. Such groups were unfamiliar and different, and thus were more easily cast as dangerous even though their speech was identical to other groups.[35]

The Court eventually responded to the problems arising from *Schenck*'s amorphous balancing by evolving a test that required government officials to make a showing of immediate harm resulting from speech. In *Bridges v. California*, for example, the Court held "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[36] Similarly, in *Brandenburg v. Ohio*, the Court found that officials could punish incitement of unlawful action only if it was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action."[37] This stringent

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[32] Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).
[33] *See Schenck*, 249 U.S. at 51 (noting that the circular at issue "would not have been sent unless it had been intended to have some effect").
[34] *See* Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 149–50, 152 (2012).
[35] *See* Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1584 (2003).
[36] Bridges v. California, 314 U.S. 252, 263 (1941). *See also* Schneiderman v. United States, 320 U.S. 118, 125 (1943); Taylor v. Mississippi, 319 U.S. 583, 589–90 (1943); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).
[37] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

formulation of the clear and present danger test tightened the nexus required between speech and harm, which was necessary to distinguish between punishing unpopular speech and punishing speech that caused immediate and irreparable harm.[38]

Yet the Court has sent mixed signals about the clear and present danger test with speech implicating national security. Even when the Court backed away from such overt deference, it used a balancing test favoring the government. In *Dennis v. United States*, the Court upheld the Smith Act, a federal law punishing advocacy of overthrow of the government, as applied to the leaders of the Communist Party USA ("CPUSA").[39] According to the Court, although there was no evidence of imminent harm from defendants' advocacy of communist doctrine, the enormity of the harm—potential overthrow of the government—justified weighing the magnitude of the harm against the likelihood of its occurrence.[40] The alleged conspiratorial nature of the CPUSA coupled with the presumption that it would someday try to overthrow the United States authorized the government to punish the defendants' speech although they did little more than teach communist literature.[41] Post-Cold War cases attempted to limit *Dennis* by imposing heavy evidentiary and causation requirements and allowing punishment only of "incitement to action."[42] But the Court did not overrule *Dennis* as much as it reinterpreted the decision. Even *Brandenburg* did not actually overrule *Dennis* or *Schenck*. Thus, those decisions exist as

[38] *See* Wells, *supra* note 34, at 152–53; Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362 (2000).
[39] Dennis v. United States, 341 U.S. 494 (1951). Many scholars and jurists view *Dennis* as the nadir of the "clear and present danger" test. *See* Christina E. Wells, *Fear and Loathing in Constitutional Decision-making*, 2005 WIS. L. REV. 115, 119 n.16. Prior to *Dennis*, the Court was even more deferential toward seditious advocacy statutes, upholding them as long as the legislature reasonably determined that the speech was dangerous. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925). *Dennis* explicitly refused to apply such deference, but its version of the clear and present danger test was far more deferential than anything previously applied.
[40] *See Dennis*, 341 U.S. at 510 ("'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" (quoting United States v. Dennis,183 F.2d 201, 212 (2d Cir. 1950))).
[41] *Id.* at 508–11. For further discussion of *Dennis*, see Wells, *supra* note 39, at 148–58.
[42] *See* Yates v. United States, 354 U.S. 298, 303 (1957).

potential precedents. Courts can rely on them as the *Rosen* court did.[43]

According to *Rosen*, section 793(e) legitimately punished intentional disclosures of "closely held" information that a person knew to be "potentially damaging to the United States or . . . useful to an *enemy* of the United States."'[44] *Rosen*, thus, requires only that the government have tried to keep the information secret (as opposed to selectively leaking it) and that the information be potentially harmful to the United States. The test does not require imminence or even substantial likelihood of harm. Instead, it requires only that a person know the information they disclose could "potentially" damage the U.S. or help an enemy. By removing the imminence requirement, *Rosen* allows significant government manipulation, especially given that most people accept the executive branch's special expertise regarding national security matters.

Furthermore, although the district judge in *Rosen* characterized the test as imposing a "bad faith purpose to either harm the United States or to aid a foreign government,"[45] that requirement does not generally help defendants. As the *Rosen* judge specifically noted, the government need only "demonstrate the likelihood of defendant's bad faith purpose," which it can show by demonstrating that "the possessor has reason to believe [the information relating to the national defense] could be used to the injury of the United States."[46] In the Internet era, officials can essentially meet this requirement by claiming that a defendant knew enemies (i.e., terrorists) could access the website on which they posted the disclosed information.[47] By

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[43] *Rosen* referred to quotes in *Schenck* and *Dennis*, and the opinion cited to numerous decisions thought to be superseded by later decisions in order to justify the balancing approach. United States v. Rosen, 445 F. Supp. 2d 602, 631–32, 632 n.42 (E.D. Va. 2006).
[44] *Id.* at 639–40 (quoting United States v. Morison, 844 F.2d 1057, 1084 (4th Cir. 1988) (Wilkinson, J., concurring)).
[45] *Id.* at 626.
[46] *Id.* (internal quotation marks omitted); *see also* United States v. Rosen, 240 F.R.D. 204, 209 n.10 (E.D. Va. 2007) (discussing requirements to prove conspiracy for violating section 793).
[47] *See infra* note 54.

allowing the government to base proof of bad faith on a showing that defendant had "reason to believe" disclosure would harm the United States, the court's test is perilously close to the doctrine of constructive (or presumed) intent found in earlier decisions like *Schenck* and *Dennis*.[48]

B. Balancing and the WikiLeaks Disclosures

The very phenomena that Professor Fenster identifies regarding the WikiLeaks disclosures highlight why the *Rosen* balancing test is so dangerous. In the immediate aftermath of those disclosures, government and NGO officials claimed that they would harm national security and diplomacy, including possibly putting individuals at risk.[49] It is unclear if any of those harms have come to fruition; in some cases, officials admit that they have not.[50] But this latter fact may not matter. As interpreted by *Rosen*, the Espionage Act seems to require only that one intentionally disclose "closely held" information that he knows at the time of disclosure is *potentially* damaging to the United States or useful to an enemy.[51] It does not require that the material have caused actual harm.[52] That officials immediately decried WikiLeak's disclosures and sought to contain potential harm may be sufficient evidence that Assange knew the

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[48] *See supra* note 33 and accompanying text.
[49] Fenster, *supra* note 2, at 788–95.
[50] *Id.* The government has apparently established task forces within various agencies to determine the extent of any damage although it is loathe to reveal that information. *See infra* note 52.
[51] As Professor Fenster points out, some of the WikiLeaks releases may not amount to "closely held" as defined by *Rosen* although some of it undoubtedly would. For example, the information on the Iraqi war was classified as "secret" as were many of the diplomatic cables that were posted on WikiLeaks. It also appears that much of that material had not previously been disclosed. Fenster, *supra* note 2, at 763 & nn.42–43.
[52] In various motions related to Bradley Manning's court martial, which is based on charges substantially similar to those that Assange could face, his lawyers have argued that the government must show actual harm resulting from the disclosures. The military judge has ordered the government to provide damage assessments regarding the disclosures, but it is unclear whether they will be used at the guilt or penalty stage. Raf Sanchez, *Bradley Manning Trial: US Government Ordered to Release WikiLeaks Damage Assessments*, TELEGRAPH (London) (Apr. 24, 2012), http://www.telegraph.co.uk/news/worldnews/wikileaks/9224495/Bradley-Manning-trial-US-government-ordered-to-release-WikiLeaks-damage-assessments.html.

disclosures were potentially damaging to the United States.[53] This is especially true given Assange's willingness to proceed in the face of warning letters from federal officials prior to disclosure.[54] Assange's well-publicized statements that he views disclosure, at least in part, as a method of radical resistance (i.e., a method of destabilizing institutional authority),[55] may also lend credence to the claim that he "knew" the disclosures *could* hurt the United States or aid its enemies.

Even if actual harm is required under the Espionage Act, whether the disclosures caused harm will be "contentious" at the very least.[56] The *Rosen* balancing test allows the government to combine that contestable harm with inferences about knowledge and intent that are likely to be based on manipulable feelings and prejudices about the individual disclosing the information. The *Rosen* defendants avoided prosecution because, as lobbyists with close political ties to powerful people, they could plausibly claim that they did not believe their actions harmed the United States. Assange has no such status. The government need only portray him as a cyberpunk hacker with a grudge against the United States who basks in the celebrity status brought by continuing disclosures[57] to create an inference that Assange intentionally disclosed classified information he knew could harm the country. Many people have worked hard to create

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[53] Military prosecutors appear to use a similar theory in their charge that Bradley Manning "aid[ed] the enemy." According to the prosecution, Manning's willingness to leak the documents to WikiLeaks, when he knew they would be posted and accessed by members of Al Quaeda, shows the "knowledge" required for the charge. *See WikiLeaks: Court Presses Ahead With Aiding the Enemy Charge Against Bradley Manning*, TELEGRAPH (London) (Apr. 26, 2012), http://www.telegraph.co.uk/news/worldnews/wikileaks/9230397/WikiLeaks-court-presses-ahead-with-aiding-the-enemy-charge-against-Bradley-Manning.html. The judge characterized the requisite mental state in the statute as requiring "that Manning knew intelligence given to WikiLeaks would reach enemy hands." *Id.* It is unclear what the judge will require as an evidentiary showing for this proposition.

[54] Fenster, *supra* note 2, at 791–92 (discussing letter from Harold Koh at the Department of State warning Assange of potential problems prior to WikiLeaks' release of the diplomatic cables).

[55] *Id.* at 774–78.

[56] *Id.* at 789–90.

[57] *See, e.g.*, John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES (Oct. 23, 2010), http://www.nytimes.com/2010/10/24/world/24assange.html?_r=1&pagewanted=all.

just such a portrait.[58] This is a common problem with indeterminate balancing tests as was true during World War I and in *Dennis*. Once a speaker (Assange/radicals/domestic communists) is portrayed as sufficiently monstrous, such tests easily allow judges or juries to overlook the improbability of the alleged harm (damage to national security/interference with the war/overthrow of the government) resulting from the speech (WikiLeaks disclosures/criticism of the war/advocacy of communist doctrine).[59]

C. Balancing and Journalists

Successful prosecution of Assange also arguably affects news organizations generally since they also publish "closely held" national security information.[60] Observers debate whether WikiLeaks qualifies as actual journalism due to the Supreme Court's decisions providing something akin to prosecutorial immunity for the press.[61] However, nothing in the *Pentagon Papers* decision suggested *de facto* immunity; the concurring justices actually intimated that government officials could use the Espionage Act against such august institutions as the *New York Times* and the *Washington Post*. We derive any argument regarding the traditional press's protection from assumptions about the way courts *should* interpret the Espionage Act given (1) the Court's free speech jurisprudence in other areas,[62] and (2) our basic understanding about the need for a free press.

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[58] Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 331–33 (2011) (discussing effort to create a picture of Assange as a terrorist). As Professor Fenster notes, many observers disagree with such portrayals, but they nevertheless exist and can be manipulated. *See* Fenster, *supra* note 2, at 768 n.69.

[59] *See* Wells, *supra* note 39, at 159–68 (discussing psychological influences on threat and risk perception).

[60] *See, e.g.*, Benkler, *supra* note 58, at 365.

[61] *See, e.g.*, *id.* at 356–61; Jonathan Peters, *WikiLeaks, the First Amendment, and the Press*, HARV. L. & POL'Y REV. (Apr. 18, 2011), http://hlpronline.com/2011/04/wikileaks-the-first-amendment-and-the-press/.

[62] *See, e.g.*, Benkler, *supra* note 58, at 353–54; Peters, *supra* note 61. As these scholars note, the Court has developed stringent standards of scrutiny for criminal punishment of speech both in cases involving dangerous speech and disclosure of information. *See, e.g.*, Benkler, *supra* note 58, at 353–54 (discussing Brandenburg v. Ohio, 395 U.S. 444 (1969) and Bartnicki v. Vopper, 532 U.S. 514 (2001)). However, these cases do not involve national security.

However, *Rosen* should cause us to rethink these assumptions. *Rosen*'s interpretation of the Espionage Act—which explicitly relied on the *Pentagon Papers* case and the older Supreme Court decisions discussed above—applies to any nongovernment publisher of classified information. *Rosen*'s interpretation was plausible given the state of the Court's free-speech jurisprudence involving national security, although we may have grave doubts about whether it is consistent with the letter and spirit of that jurisprudence. Thus, nothing prevents a prosecutor from pursuing a traditional news organization or its journalists under section 793(e). Furthermore, as with Assange, one can easily level an allegation of conspiracy against investigative journalists whose bread and butter involve inducing leaks of information from confidential sources.[63] Accordingly, a successful prosecution of Assange has significant negative implications for traditional news organizations.

That said, traditional news organizations (especially well-established ones) are unlikely to see their journalists thrown in jail as a result of disclosures of confidential information.[64] The balancing test that works against Assange works in favor of traditional journalists in most circumstances. Prosecutors are unlikely to prosecute traditional journalists as such pursuit would cause howls of protest.[65] Criminal punishment of journalists contradicts our long-held notions of free press and informed citizenry, and arguably portrays the government as weak and ineffectual.[66] Assuming the government was inclined to prosecute, courts would likely want very strong evidence of actual "bad purpose," as opposed to inferring it from the defendant's

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[63] *See* Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 VAND. L. REV. 125, 172–73 (2012).
[64] I leave out here the government's attempts to force disclosure of journalists' confidential sources and focus only on prosecution of journalists under the Espionage Act for actually disclosing closely held information.
[65] *See* Benkler, *supra* note 58, at 357 (discussing how we "lionize" traditional newspapers, especially local newspapers).
[66] Zick, *supra* note 63, at 173.

character. Even if judges did not, it would be difficult to portray a traditional journalist as a radical outsider with a vendetta against the United States. In contrast, it is far easier to prosecute Assange, who the public holds in relatively low esteem after others have portrayed him as a radical and from whom traditional news sources have kept their distance.[67]

In the end, an indeterminate balancing test like *Rosen*'s is likely to result in prosecution of journalists at the government's whim. Thus, whether the WikiLeaks disclosures amount to journalism is irrelevant after *Rosen*. Instead, the press should be concerned about the extent to which nontraditional journalists—especially online journalists unassociated with established news organizations—are at greater risk of prosecution simply because they are more easily portrayed as outsiders. History suggests that *Rosen*'s manipulable balancing test hurts nonconformists and those who can be portrayed as violating traditional social norms.[68] Attempts to enforce conformity hurt not only the journalists who are prosecuted but also those who are not because they must make more cautious decisions in order to preserve their position as trustworthy stalwarts of the press. Either way, the press as an independent check on government suffers.

Conclusion

As Professor Fenster notes, balancing tests in this area of the law are both ubiquitous and necessary.[69] But indeterminate balancing when speech interests are at stake is pernicious. We know this. The phenomena about which Professor Fenster writes appear to reinforce what history has already shown. He and others are right to call for a judicial test or statutory guidance in the

[67] Benkler, *supra* note 58, at 356, 358 (discussing traditional press' efforts to distance itself from Assange); Fenster, *supra* note 2, at 799 (discussing the unpopularity of WikiLeaks).
[68] Wells, *supra* note 35, at 1584 (noting that World War I prosecutions of speakers "were used less to punish disloyalty than to enforce national conformity — either by frightening into silence those without sufficient social position to fight back or by systematically harassing disfavored groups").
[69] *See* Fenster, *supra* note 2, at 782–84.

area of national security that more carefully balances free speech and national security concerns.[70] Such a test must require strong evidentiary showings, clear intent requirements, and other protections to ensure that balancing does not routinely work to the detriment of those who disclose information for nonespionage purposes. Such an approach focuses courts on actual harms stemming from disclosure, as opposed to the character of the people who disclose information, and preserves our access to important information necessary for public deliberation.

[70] *See id.* at 791; Kitrosser, *supra* note 14, at 927–28; Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 127–30 (2011).