

Innocent Bystanders Caught Between Freedom of the Press and an Implied Right to Privacy

It is relatively easy to have a debate when it comes to the United States Constitution. Article 1 § 2 discusses representation, stating "adding the whole number of free Persons" and "three fifths of all other Persons."¹ This was a lightning rod for the Civil Rights Movement.

Article 1 § 8 discusses the government's ability to collect taxes "to pay the Debts and provide for the common Defense and general Welfare of the United States." It continues by listing specifics, such as regulating commerce, building roads, defining and prosecuting piracy on the open seas and declaring war. It also uses the word "militia," which often starts a debate on the Second Amendment, or the right for American citizens to bare arms. Few dispute that "militia," when the Constitution was first written, meant men and boys from the colonies taking up arms against invaders such as the British. However, in the 21st Century, "militia" can mean "a body of citizens organized in a paramilitary group and typically regarding themselves as defenders of individual rights against the presumed interference of the federal government,"² which leaves the door open for just about anyone to consider themselves militia, including gangs or other organized crime, neighbors and family. However, when it comes to the First Amendment, the debate grows dim among Americans, but still resonates between Americans the rest of the world.

¹ GPO Access website. <http://frwebgate.access.gpo.gov/cgi->

American people embrace it, holding it up as the cornerstone to the American

Dream:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Though the bigger idea behind the First Amendment is to ensure the free expression of ideas, there are three specific freedoms that are disputed most often: freedom of religion, freedom of speech and freedom of the press. The right to freedom of religion becomes embroiled in the separation of church and state debate. The right to freedom of speech provides the backdrop for anti-war protests.

The right to freedom of the press, however, is what gives a public voice to the American people. The freedom of the press protects mechanisms of how information is distributed to the American people on subjects as important as the War in Iraq to more mundane topics like Paris Hilton's latest drunken escapade.

The right to freedom of the press has withstood attacks from all sides, most notably and famously in the Pentagon Papers³ case of 1971. The Pentagon Papers case involved a government official who leaked classified information to the *New York Times*. These documents were related to how the United States government entered the Vietnam War while allegedly misleading the American public.

The New York Times ran a series of articles based on the leaked information and was subsequently served with a Temporary Restraining Order (TRO). The United States Supreme Court held that "any prior restraint on expression comes with a "heavy presumption" against its constitutional validity." The Court held that

bin/getdoc.cgi?dbname=105_cong_documents&docid=f:sd011.105.pdf, United States Constitution, last accessed 03/21/2008

² Online Dictionary, <http://dictionary.reference.com/browse/militia>, last accessed 03/21/2008

³ *New York Times Co. v. United States*, 403 U.S. 713 (1971). <http://supreme.iustia.com/us/403/713/case.html>, accessed

the government had failed to meet its heavy burden of showing a justification for the restraint. In other words, simply because the Pentagon Papers cast the government in poor light was not sufficient justification to stop the *New York Times* from printing or writing about them.

The Pentagon Papers case reinforced the right to freedom of the press in general, and more specifically in terms of print media. The same standard, however, holds true today, in the "digital age," where freedom of the press as well as freedom of speech mix and meld due to new technologies. Most major newspapers have one or more websites that are digital versions of the printed copy found at newsstands, and continue digital supplemental materials such as blogs and video clips of newscasts and speeches by police officers, government officials and individual persons. Due to websites such as YouTube.com, putting speech online for anyone, anywhere, is as easy as the click of a mouse. Blogging technology makes it possible for anyone to post opinions and other information for all to read. Such new technologies have made it possible for information, and misinformation, to spread quickly around the United States, and the globe. This new technology has also brought the issue of privacy to the forefront since anyone with a blog can claim a right to freedom of the press

As the cost of digital storage gets cheaper, and new technologies such as blogging and "wiki" technology make it easier to publish, edit and comment on information, the line between the right of freedom of the press and the implied right of privacy collide. The issue was brought to light recently in *Bank Julius Baer & Co. v. Wikileaks.org*. What started as an investigation into stolen bank records resulted in the Wikileaks.org website being temporarily shut down, causing a clash between

privacy and the right to freedom of the press.

Though international banking laws played a role in the court filings and are cited because of their privacy rules, those laws will not be directly addressed in this paper. Rather, this paper will address the wider issue of the conflict between privacy and the right to freedom of the press in the wake of “wiki” technology.

Before the conflict between privacy and the right to freedom of the press can be adequately addressed, it is necessary to understand the power reach of the Internet in general, and the role of “wiki” technology in particular. The power and reach of the Internet makes it possible for information to travel in real time, and for that information to remain available for a lifetime. A student at the Virginia Polytechnic Institute and State University, commonly known as Virginia Tech, was able to use his cell phone to capture video and the sounds of gunfire as a shooting was in progress, and then upload them to the CNN website. Perform a search on YouTube for “virginia tech school shooting” and “Virginia Tech School Shooting Caught on Camera Phone” appears as the first result, even though it was uploaded 11 months ago.⁴ The comment thread is also still active, which means people continue to come back to the video, continuing a discourse on school violence across the globe that cannot be achieved through conventional media.

It is exactly this kind of discussion that has spawned the popularity of “wiki” technology, a technology that makes it possible for anyone to submit and comment on information online. The most well-known website using “wiki” technology is Wikipedia, the free encyclopedia. Anyone can create an entry, add an entry or comment on an entry, creating online collaboration on a global scale. The website wikileaks.org builds on this idea of global online collaboration, but with a different

⁴ YouTube website. http://youtube.com/results?search_query=virginia+tech+shooting&search_type= accessed 04/05/2008.

The goal of wikileaks.org is to create "an uncensorable Wikipedia for untraceable mass document leaking and analysis."⁵ In other words, wikileaks.org provides a platform for would-be corporate and government whistleblowers to freely and anonymously expose wrong-doing, injustice and other unethical behaviors. It "provides a forum for the entire global community to relentlessly examine any document for its credibility, plausibility, veracity and validity"⁶ by making documents available to anyone with an Internet connection for viewing, editing and commenting.

Its main interests are in "Asia, the former Soviet bloc, Latin America, Sub-Saharan Africa and the Middle East,"⁷ and it provides elaborate instructions on how to send or post documents anonymously, such as using a "computer you are not associated with," or a computer "that cannot be physically traced to you."⁸ It also suggests creating an email account not associated with your name, and warns that some government agencies, such as the United States National Security Agency and the Chinese Ministry of State Security, "may intercept the communication if it flows past one of their listening posts (see Connection Anonymity)."⁹ It was under this veil of anonymity that a former Bank Julius Baer employee, Rudolf Elmer, posted stolen confidential bank records. The initial complaint, filed by Bank Julius Baer, alleges that Mr. Elmer "unlawfully took possession of the client banking records and data at issue, in violation of Swiss and Cayman Islands banking and privacy protection laws, and thereafter violated his written confidentiality agreement with

⁵ Wikileaks: About, <http://wikileaks.org/wiki/Wikileaks:About>, accessed 03/31/2008

⁶ Wikileaks: About, <http://wikileaks.org/wiki/Wikileaks:About>, accessed 04/05/2008

⁷ Wikileaks: Home page, <http://www.wikileaks.org>, accessed 04/05/2008

⁸ Wikileaks: Submissions page, <http://wikileaks.org/wiki/Wikileaks:Submissions>, accessed 04/07/2008

⁹ Wikileaks: Submissions page, <http://wikileaks.org/wiki/Wikileaks:Submissions>, accessed 04/07/2008.

respect to disclosure of said records.”¹⁰ The records that Mr. Elmer allegedly stole and posted on wikileaks.org show alleged instances of tax evasion by using offshore accounts. The documents also include names, addresses, telephone numbers, fax numbers and other identifying information.

Take, for example, the documents related to a Mr. Winston Layne.¹¹ The summary provided in the description provides a general location for Mr. Layne, as well as an email address for a Bank of Julius Baer employee. However, the documents located in the downloadable .zip file contain bank numbers, fund transfer records, the complete names and addresses of next of kin along with Mr. Layne’s complete contact information. Such information readily available to the public raises privacy concerns, and Bank Julius Baer attempted to protect what privacy remained of its clients when it filed for an *ex parte* application for a TRO against wikileaks.org and Dynadot, LLC., a California hosting company with whom the wikileaks.org domain name is registered.

Given the confidential nature of the information, and the fact that not only are bank clients exposed, but also family members, business associates and others not involved in alleged tax evasion, it is not difficult to understand why the judge granted the TRO. The problem, however, was that by granting the TRO, the judge temporarily shut down the entire wikileaks.org website. By having Dynadot “lock the wikileaks.org domain name to prevent transfer of the domain name to a different registrar” and forcing Dynadot to “disable the wikileaks.org domain name and account to prevent access to and any changes from being made to the domain name and account information,”¹² it was impossible for any other aspect of

¹⁰ Electronic Frontier Foundation website, http://www.eff.org/files/filenode/baer_v_wikileaks/wikileaks1.pdf, pg. 4

¹¹ Wikileaks website, https://secure.wikileaks.org/wiki/BJB_-_Winston_Layne%2C_New_York_-_USD_10_mil_tax_fraud, accessed 04/07/2008.

¹²

wikileaks.org to function. This point was argued by the Public Citizen and Califo Document hosted at JDSUPRA™
<http://www.jdsupra.com/post/documentViewer.aspx?fid=6ffcdb6f-6f0c-430a-bff6-12d1c16b0f1c>
First Amendment Coalition in its "Opposition to Injunctive Relief and in Support of Dismissal" filing. Raising the issue of prior restraint, they said "the permanent injunction prevents speech (the posting of documents unrelated to plaintiffs) about which plaintiffs do not even claim any impropriety."¹³ Credence is given to this fact by Daniel Mathews, a Stanford mathematics graduate student.

Mathews is another bystander in this case, much like the relatives of Layne. Mathews is involved in human rights activism, and according to his Declaration, he has a law degree from his native country of Australia. Wikileaks offered him a way to volunteer his "time and energy as a scholar, activist and writer to [analyze] the authenticity and significance of purportedly "leaked" documents with potential human rights implications."¹⁴ The Declaration goes on to list some examples of his contributions, such as a document proclaiming an Islamic Republic in Somalia, and the corruption of the former Kenyan President Daniel Arap Moi. And it should be noted that Mathews was drawn into the Wikileaks case because of a Facebook group he created, which listed him as an officer. However, he was an officer and administrator of the Facebook group, not of Wikileaks, as he outlines further in his Declaration.

With the entrance of Mathews in the case, and his explanation of his ability to write, edit and comment on documents related to human rights, a clear conflict between a right to privacy, implied or as mandated by international banking laws, and the right to freedom of the press is defined. No one wants their personal information to be available to the public, yet the public has a right to know about

04/08/2008.

¹³ Opposition to Injunctive Relief and in Support of Dismissal, Electronic Frontier Foundation website, http://www.eff.org/files/filenode/baer_v_wikileaks/wikileaks70.pdf, accessed 04/08/2008.

¹⁴ Declaration of Daniel Mathews in Support of Memorandum in Opposition to TPO, Preliminary Injunction, and Permanent

government wrong-doing and corporate malfeasance, as demonstrated in the
Pentagon Papers case. The question becomes how to balance the two in this age of
instant information, where technologies, such as "wiki" technology, make it possible
for anyone to post, edit, comment, and/or remove information.

Granting the TRO and injunctions were not the optimal solution, especially
since the TRO sought to shut down the entire website because of one group of
documents. That was akin to putting locks on all the printing presses for a
publication, such as the *New York Times*, because of one article.

Neither the TRO nor injunctions accomplished the desired goal. Though the
wikileaks.org domain name was shut down in the United States, it was still
accessible via mirror sites, or websites that are digital replicas of other websites and
hosted in a different geographic location.¹⁵ This demonstrates a lack of technical
understanding of the Internet on the part of the Bank of Julius Baer lawyers and the
judge, as does their oversight in using "wiki" technology to speak out against the
leaked documents, and correct aspects it believed to have been falsified. There is no
guarantee that such efforts would have proven to be worthwhile, but there would at
least have been a digital footprint to demonstrate that Bank Julius Baer had taken
steps to correct the problem at the only source it was able to locate: wikileaks.org.

The injunctions were eventually dissolved, citing First Amendment and
jurisdictional issues, but the balance of privacy and freedom of the press is still in
play. Exposing injustices, crimes and other wrong-doing by governments, private
banks and corporations helps keep such institutions in check. Wikileaks believes
that "authoritarian governments, oppressive institutions and corrupt corporations
should be subject to the pressure...of something far stronger – the consciences of

the people within them."¹⁶ It is a compelling argument, and one that has brought light insider trading scandals that brought down the Enron Corporation. However, the "consciences of the people within them" must also consider what innocent by standards may be injured after damaging information is brought to light.

For Bank Julius Baer, the innocent by standards are the family members, business associates and others connected but not directly involved in a particular client's alleged tax evasion. As the documents have been made the public, their reputations may be damaged because of guilt by association. Ramifications of such an assumption are unknown, but may not be good. It is difficult to tell if job less will result, or if lawsuits will be filed on behalf of the innocent by standards. Bank Julius Baer itself is facing inquiries from various tax authorities who are investigating the documents found on Wikileaks.

It remains to be seen what public good may result from the bank documents beyond shedding light onto possible tax evasion, though it is clear public good has already come from Wikileaks. Transparency that Wikileaks fosters is important in helping people better equip themselves to have a better life. However, some restraint should be considered and thought given to those other than the corporation, bank or government that may be exposed. Removing enough information so that the privacy of others not involved is protected yet having enough information to remain to illustrate wrong-doing is a fine line to walk, but choosing not to tread somewhere near that line presents a compelling argument for websites such as wikileaks.org to be shut down indefinitely. Bank Julius Baer may well be able to demonstrate irreparable harm, but so will those named but who did

¹⁵ www.netdictionary.com/m.html, accessed 04/08/2008.

¹⁶ Wikileaks: About, <http://wikileaks.org/wiki/Wikileaks:About>, accessed 04/05/2008

not participate.

In the United States, the courts would be wise to grasp the concept of the Internet and “wiki” technology, and suggest a plaintiff such as Bank of Julius Baer try to remedy the situation using the technology before pursuing legal again. Records of changes to articles and documents can be subpoenaed, and though persons who changed articles and documents may be exposed, the greater good is served because the corporation must demonstrate why information is wrong, and present the correct information. Doing say may further expose wrong-doing.