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## Googling Freedom

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*While GM and GE rushed into China, why did so many Americans cheer the possibility of Google pulling out? The answer to this puzzle lies in Google's special role as new media. Television once moved the free speech paradigm from the local street corner to the national platform of CBS; the Internet has shifted it further to the global stage offered by Google and its peers. Free speech theory—and Western media corporations—must now grapple with the reach of this media into unfree societies. While a growing chorus has denounced Western new media enterprises for betraying their obligations to the people of China and other authoritarian regimes, no one has yet explained what those obligations are or why these companies might have them. Corporate social responsibility theory*

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*has focused largely on the risks of a global supply chain in goods, neglecting the questions raised by the rise of global information services. The notion of corporate obligations to people around the world seems especially perplexing in juxtaposition with the familiar mandate to maximize shareholder wealth at home. Drawing from theories of Foucault and Habermas and the history of the underground press, I argue that information service providers bear a special responsibility to unfree people. What might have been mutually beneficial transactions in a free society can become, in an unfree society, predicate offenses leading to years of hard labor. New media can either help give voice to dissidents or help perfect totalitarianism.*

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#### INTRODUCTION

The murder of Neda Agha-Solten as she protested Iranian repression ricocheted around the world via electronic networks. The video was smuggled out of the country via email to an Iranian expatriate in the Netherlands, who forwarded it to a friend who posted it to Facebook, from which it was reposted to YouTube and across the web.<sup>1</sup> Through the circulation of this tragic video,

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1. Brian Stelter & Brad Stone, *Web Pries Lid of Censorship a Bit*, N.Y. TIMES, June 23,

the world witnessed the brutality of Iranian repression and Neda became “an icon of the Iranian protest movement.”<sup>2</sup>

Across the world, dissidents have used the web to circulate information, relying on offshore servers to avoid local repression. When Buddhist monks marched against the Myanmar dictatorship in 2007, Burmese citizens revealed the government’s savage suppression through Google’s Blogger and YouTube.<sup>3</sup> The dictatorship responded by shutting off the Internet for the entire country.<sup>4</sup> In May 2008, when Ahmed Maher Ibrahim used Facebook to organize a protest against the President, Egyptian police beat him, demanding his account’s password.<sup>5</sup>

Dissidents have long relied on brave foreign printers to publish their work. At the dawn of the Enlightenment, Dutch printers such as Elsevier disseminated a science that Rome abhorred, allowing Galileo’s words to reach the world—and other Italians—even while, in Milton’s words, Galileo himself “gr[ew] old as a prisoner of the Inquisition.”<sup>6</sup> Galileo’s “manuscript had to be smuggled out of Italy to Leiden, in Protestant northern Europe, by Louis Elsevier . . . before it could appear in print.”<sup>7</sup> History’s most famous tract in defense of free speech,

2009, at A1.

2. *Id.*

3. Stephanie Holmes, *Burma Cyber-dissidents Crack Censorship*, BBC NEWS (Sept. 26 2007), [http://news.bbc.co.uk/mobile/bbc\\_news/features/701/70129/story7012984.shtml](http://news.bbc.co.uk/mobile/bbc_news/features/701/70129/story7012984.shtml); A.O. Scott, *Bravery Fills Secret Burmese Dispatches*, N.Y. TIMES, May 20, 2009, at C7 (“The viral videos of the Democratic Voice of Burma [a network of Burmese journalists] are like the hidden printing presses of earlier underground revolutionary movements, except that the portability of the cameras and the ease of Web and satellite-based distribution make them harder to suppress.”).

4. Stephanie Wang, *Pulling the Plug: A Technical Review of the Internet Shutdown in Burma*, OPENNET INITIATIVE BULLETIN, [http://opennet.net/sites/opennet.net/files/ONI\\_Bulletin\\_Burma\\_2007.pdf](http://opennet.net/sites/opennet.net/files/ONI_Bulletin_Burma_2007.pdf) (last visited Dec. 24, 2010) (describing Internet shutdown of September 29, 2007).

5. *Egypt: Investigate Beating of ‘Facebook’ Activist*, HUMAN RIGHTS WATCH (May 10, 2008), <http://www.hrw.org/legacy/english/docs/2008/05/10/egypt18800.htm>. Esraa Abdel Fattah Ahmed Rashid became famous as Egypt’s “Facebook Girl,” and was arrested for organizing a protest via that platform. Samantha M. Shapiro, *Revolution: Facebook-Style*, N.Y. TIMES MAG., Jan. 25, 2009, at 34; Anne Nelson, *Arab Media: The Web 2.0 Revolution*, 5 CARNEGIE REP. 12 (2008). Protestors using Facebook have also been arrested recently in Cyprus and Croatia. Jelena Kovačević, *Police Arrest Anti-Cabinet Facebook Activists*, DALJE.COM (Dec. 2, 2008), <http://dalje.com/en-croatia/police-arrest-anti-cabinet-facebook-activists/210254>; *Two Arrested After Insulting North Cyprus Leader on Facebook*, FAMAGUSTA GAZETTE (Nov. 30, 2008), <http://famagustagazette.com/two-arrested-after-insulting-north-cyprus-leader-on-facebook-p6708-69.htm>.

6. 2 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 682 (1979). Elsevier visited Italy in secret to see Galileo, then a “political prisoner, whose captors had forbidden him to publish or even write anything ever again.” *Id.* at 677.

7. *ON THE SHOULDERS OF GIANTS* 397 (Stephen W. Hawking ed., 2002). Elsevier visited Galileo in 1636, where he arranged to wait in Venice for the first half of the manuscript. The second half was smuggled to Leiden through intermediaries in Venice. Correspondence from Mario Biagioli, *Historian of Science*, Harvard University, to author (Dec. 11, 2009) (on file with author). Holland was not entirely a free speech zone in the seventeenth century. Baruch Spinoza published his works there anonymously, even avoiding naming the publisher, to evade the Dutch censors because his work “violated even Holland’s relatively lenient censorship laws.” Francesca

*Areopagitica*, was written on the heels of Milton's visit to Galileo under house arrest.<sup>8</sup>

Like yesterday's Elseviers, online publishers based in liberal states today challenge the orthodoxies of repressive states. The citizen journalists of the participatory Internet known as Web 2.0 utilize this media to defy the efforts of authorities to quell dissent and rewrite history. The Internet not only spreads news, but it helps individuals to organize together to effect change. Through Facebook, Twitter, and other social networks, an "Army of Davids" can mobilize. Of course, even well-informed groups can be dispersed by batons or bullets.<sup>9</sup> But in this century, internal dissent nurtured by the Internet is likely to prove an important vector for change,<sup>10</sup> perhaps more effective than either economic sanctions or military invasion. The revolution may not be delivered by foreign armies; it may not be televised; but it will be blogged.

Yet while the Internet is history's greatest medium for information dissemination, it is also its greatest tool for surveillance.<sup>11</sup> As the dissident mails—not nails—his or her theses to the world and citizens propagate them virally, sleepless watchers silently track uploads and downloads, cataloging IP addresses and emails.<sup>12</sup> Worse still, foreign media corporations, eager to ingratiate themselves to local governments in order to gain unimpeded access to the local market, might themselves serve as auxiliaries of authoritarian states.<sup>13</sup> Microsoft's Chinese blog service banned the words "democracy" and

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di Poppa, Review of *Theological-Political Treatise*, NOTRE DAME PHIL. REVS. (Dec. 15, 2007), <http://ndpr.nd.edu/review.cfm?id=11983>.

8. In AREOPAGITICA, Milton recounts his visit: "There it was that I found and visited the famous *Galileo*, grown old, a prisoner of the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought." JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND 24 (1644).

9. Scott, *supra* note 3 ("[T]he denouement [of the documentary film *Burma VJ*] shows that old-fashioned police-state repression can still overpower a rebellion fueled by new media.").

10. On internal reform movements and their relationship to the outside world, see Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399 (2003). See also Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891 (2005).

11. *Caught in the Net*, ECONOMIST, Jan. 25, 2003, at 17 ("[T]he internet could become the most effective tool of social control that autocratic rulers have ever wielded."). For an authoritative country-by-country review of Internet censorship for both political and social purposes, see ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (Ronald J. Deibert et al. eds., 2008). See also Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES MAG., Nov. 30, 2008, at 50 (describing YouTube censorship around the world).

12. Derek Bambauer, *Cool Tools for Tyrants*, LEGAL AFFS., Jan.-Feb. 2006, at 55, available at [http://www.legalaffairs.org/issues/January-February-2006/feature\\_bambauer\\_janfeb06.msp](http://www.legalaffairs.org/issues/January-February-2006/feature_bambauer_janfeb06.msp); Steven J. Murdoch & Ross Anderson, *Tools and Technology of Internet Filtering*, in ACCESS DENIED, *supra* note 11, at 57.

13. Reports suggest that Western companies may have provided the Iranian government with equipment that could assist censorship or surveillance, perhaps allowing the authorities to engage in "deep packet inspection," a process that allows authorities to eavesdrop on communication. Christopher Rhoads & Loretta Chao, *Iran's Web Spying Aided by Western Technology*, WALL ST. J., June 22, 2009, at A1; Chip Pitts, *Technology, Business & Democratic Rights in Iran*, CSR L. (June 25, 2009). In a notorious case, Yahoo disclosed information about

“freedom,” hoping thereby “to avoid offending Beijing’s political censors.”<sup>14</sup> Furthermore, the digital network itself could make political dissidents vulnerable, providing a veritable black book of names and addresses for the secret police to round up. In the optimistic scenario, the Internet might help topple dictators; in the pessimistic scenario, the Internet might cement their control.

In January 2010, two American corporations operating in China offered a curious juxtaposition.<sup>15</sup> At the same time that Americans were celebrating GM’s record sales in China, many cheered Google’s declaration that it might leave China.<sup>16</sup> What explains this starkly divergent response? The answer, I argue, lies in the special responsibilities owed by new media in unfree societies.

Google is the world’s biggest media company today, dwarfing Time Warner, Disney, the Associated Press, and publishing house Reed Elsevier—named after Galileo’s publisher.<sup>17</sup> Through its search engine and through its

Yahoo Groups contributor and Beijing dissident Wang Xiaoning, whom the Chinese authorities arrested and ultimately sentenced to a ten-year term for “incitement to subvert state power.” Ariana Eunjung Cha & Sam Diaz, *Advocates Sue Yahoo in Chinese Torture Cases*, WASH. POST, Apr. 19, 2007, at D1; Victoria Kwan, *Prisoner Profile: Wang Xiaoning*, HUMAN RIGHTS IN CHINA, [http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3\\_WangXiaoning.pdf](http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3_WangXiaoning.pdf) (last visited Dec. 24, 2010). The Beijing court described his crime as follows: “Wang had edited, published and contributed articles to 42 issues of two political e-journals, advocating for open elections, a multi-party system and separation of powers in the government.” Luke O’Brien, ‘*Yahoo Betrayed My Husband*’, WIRED, Mar. 15, 2007, available at <http://www.wired.com/politics/onlinerights/news/2007/03/72972>. Allegations of Yahoo’s complicity with mainland repression have received the scrutiny of Hong Kong authorities in another infamous case, involving journalist Shi Tao. RODERICK B. WOO, H.K. OFFICE OF THE PRIVACY COMM’R FOR PERS. DATA, CASE NO. 200603619, THE DISCLOSURE OF EMAIL SUBSCRIBER’S PERSONAL DATA BY EMAIL SERVICE PROVIDER TO PRC LAW ENFORCEMENT AGENCY 16 (2007), available at [http://www.pcpd.org.hk/english/publications/files/Yahoo\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf).

14. Mure Dickie, *Don’t Mention Democracy, Microsoft Tells China Web Users*, FIN. TIMES (London), June 11, 2005, at 8.

15. I deploy the term “China” here to refer to mainland China, which has far fewer press freedoms than the Chinese special administrative region of Hong Kong. Indeed, when Google sought to give Chinese citizens access to uncensored Chinese language search, it redirected its mainland Chinese users to its Hong Kong-based servers. David Drummond, *A New Approach to China: An Update*, THE OFFICIAL GOOGLE BLOG (Mar. 22, 2010, 12:03 PM), <http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html>.

16. See, e.g., *GM’s Sales in China Hit Record in 2009*, DETROIT NEWS, Jan. 5, 2010, at 5B; Barbara Wieland, *GM Exec Looks to Expanding Market in China*, LANSING ST. J., Jan. 15, 2010; David Drummond, *A New Approach to China*, THE OFFICIAL GOOGLE BLOG (Jan. 12, 2010, 3:00 PM), <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html>; Editorial, *Google vs. China*, WASH. POST, Jan. 14, 2010, at A18 (describing Google’s actions in China as “admirable”); Editorial, *Google Fulfills Its Motto, “Do No Evil,”* GRAND FORKS HERALD (ND), Jan. 14, 2010, at A4 (describing Google’s action as “inspiring”).

17. *\$80bn Google Takes Top Media Spot*, BBC NEWS (June 8, 2005), <http://news.bbc.co.uk/2/hi/business/4072772.stm>. The metric here is market capitalization, though measures of readership—or “page views”—are likely to reach similar results. Google’s market capitalization as of February 4, 2011 was \$195 billion, compared to Time Warner’s \$40 billion and Disney’s \$77 billion. See Yahoo! Finance, <http://finance.yahoo.com/q?s=GOOG> (last visited Feb. 4, 2011); Yahoo! Finance, <http://finance.yahoo.com/q?s=TWX&ql=0> (last visited Feb. 4, 2011); Yahoo! Finance, <http://finance.yahoo.com/q?s=DIS&ql=0> (last visited Feb. 4, 2011). The Associated

YouTube, Blogger, and Orkut services, Google has become the world's most important platform for disseminating information, earning more than half its income outside the United States.<sup>18</sup> The rise of Google and its peers heralds a fundamental shift: television moved the free speech paradigm from the local street corner to the national platform of CBS; the Internet has shifted it further yet—to Google's global stage.<sup>19</sup>

Given this global stage, free speech theory—and Western media corporations—must now grapple with the reach of this media into *unfree* societies. Must new media companies refuse to bend to repressive demands in such societies, disengaging entirely if that proves impossible? Or should they remain engaged even on compromised terms because companies with fewer ethical constraints will fill the vacuum created by their disengagement?<sup>20</sup> The debate recalls the pre-World Wide Web dispute between those who urged divestment from South Africa and those who urged constructive engagement—indeed, I will review that debate to see if we may learn from it.

While many have denounced Google, Microsoft, and Yahoo for betraying their obligations to the people of China and other repressive regimes through complicity with state repression, no one has yet explained why these companies might owe obligations to distant peoples. The many volumes theorizing corporate social responsibility often fail even to consider the possibility that those providing information services over the Internet have such responsibilities.<sup>21</sup> The lacuna is understandable.<sup>22</sup> The corporate social responsibility movement developed in response to the rise of the global supply chain of modern manufacture. Corporate social responsibility audits are accordingly written for this paradigm, reviewing child and forced labor, wages, worker safety and freedom to organize, discrimination, and environmental and

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Press and Reed Elsevier are privately held, and thus their market value is more difficult to assess.

18. Google, Inc., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Quarterly Period Ended September 30, 2009 (Form 10-Q), at 25 (Nov. 4, 2009) (reporting that non-U.S. revenues accounted for fifty-three percent of all revenues).

19. Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1414 (1986) (describing free speech paradigm shift from street corner to CBS); Owen Fiss, *In Search of a New Paradigm*, 104 YALE L. J. 1613, 1614 (1995) (noting pressure on CBS paradigm from information technological revolution).

20. Yet other options are available to those who want to change practices they dislike. For a survey of alternatives ranging from censure to boycott, see Martha Nussbaum, *Against Academic Boycotts*, DISSENT (Spring 2007), <http://www.dissentmagazine.org/article/?article=811>.

21. See, e.g., THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al. eds., 2008); THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY (Steven May et al. eds., 2007).

22. Jonathan Zittrain and John Palfrey offer an important call for industry self-regulation, describing the array of Internet actors who might be called upon to censor and outlining some of the possible voluntary guidelines they might follow to handle censorship and private information requests. Yet Zittrain and Palfrey assume rather than justify these ethical obligations. Jonathan Zittrain & John Palfrey, *Reluctant Gatekeepers: Corporate Ethics on a Filtered Internet*, in ACCESS DENIED, *supra* note 11, at 103.

community impact, not corporate complicity in suppressing dissent. In the burgeoning, largely student, literature focused on Google's and Yahoo's operations in China, the responsibilities of such enterprises to foreign populations are largely assumed, not interrogated.<sup>23</sup> Even Richard Posner, usually a proponent of shareholder wealth maximization, argues—appropriately enough, on his blog—in favor of an obligation on the part of U.S. enterprise to refuse surveillance of Chinese citizens.<sup>24</sup> But why should U.S. corporations have greater obligations to Chinese citizens than to Americans?

Even without a theory of obligation, new media enterprises have sought to improve their human rights practices, especially in China. When it began offering its service from servers in China in 2006, Google agreed to censorship, but deliberately decided not to locate its Web 2.0 services such as Blogger and Gmail there, thus seeking to avoid placing personally identifiable information within reach of the local authorities.<sup>25</sup> Stung by criticism of its complicity in

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23. See, e.g., S. David Cooper, *The Dot.Com(munist) Revolution: Will The Internet Bring Democracy To China?*, 18 UCLA PAC. BASIN L.J. 98 (2000); Richard Cullen & Pinky D. W. Choy, *The Internet in China*, 13 COLUM. J. ASIAN L. 99 (1999); Kristen Farrell, *The Big Mamas Are Watching: China's Censorship of the Internet and the Strain on Freedom of Expression*, 15 MICH. ST. J. INT'L L. 577 (2007); Jianlan Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension*, 30 U. LA VERNE L. REV. 404 (2009); William J. Cannici, Jr., Note, *The Global Online Freedom Act: A Critique of Its Objectives, Methods, and Ultimate Effectiveness Combating American Businesses That Facilitate Internet Censorship in The People's Republic Of China*, 32 SETON HALL LEGIS. J. 123 (2007); Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL'Y J. 361 (1997); Khurram Nasir Gore, Comment, *Xiaoning v. Yahoo!: Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 97 (2008); Brian R. Israel, Note, *"Make Money Without Doing Evil?" Caught Between Authoritarian Regulations in Emerging Markets and a Global Law of Human Rights, U.S. ICTs Face a Twofold Quandary*, 24 BERKELEY TECH. L.J. 617 (2009); Marc D. Nawyn, Survey, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, 2007 COLUM. BUS. L. REV. 505; Jill R. Newbold, Note, *Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights*, 2003 U. ILL. J.L. TECH. & POL'Y 503 (2003); Jennifer Shyu, Comment, *Speak No Evil: Circumventing Chinese Censorship*, 45 SAN DIEGO L. REV. 211 (2008); Nellie L. Viner, Note, *The Global Online Freedom Act: Can U.S. Internet Companies Scale The Great Chinese Firewall at the Gates Of The Chinese Century?*, 93 IOWA L. REV. 361 (2007).

24. Compare Richard Posner, *Google in China*, BECKER-POSNER BLOG (Feb. 20, 2006, 10:47 AM), [http://www.becker-posner-blog.com/archives/2006/02/google\\_in\\_china.html](http://www.becker-posner-blog.com/archives/2006/02/google_in_china.html) ("A possible intermediate solution, however, would be to forbid U.S. [companies] (or for them to agree under pressure of American public opinion) to assist the Chinese government in surveillance of their customers. . . . [F]or our companies actively to assist a foreign, repressive regime to persecute its political and religious dissidents is a step beyond.") with Richard Posner, *The Social Responsibility of Corporations*, BECKER-POSNER BLOG (July 24, 2005, 7:35 PM), [http://www.becker-posner-blog.com/archives/2005/07/the\\_social\\_resp.html](http://www.becker-posner-blog.com/archives/2005/07/the_social_resp.html) (agreeing with Gary Becker that corporations do not have a responsibility beyond profit maximization).

25. Andrew McLaughlin, *Google in China*, THE OFFICIAL GOOGLE BLOG (Jan. 27, 2006, 11:58 AM), <http://googleblog.blogspot.com/2006/01/google-in-china.html>; *Google Move 'Black Day' for China*, BBC NEWS (Jan. 25, 2006), <http://news.bbc.co.uk/2/hi/technology/4647398.stm> (Google's "e-mail, chat room and blogging services will not be available because of concerns the

repressive actions early in its operations in China, Yahoo retreated behind the corporate veil, transferring its operations there to a Chinese company in which it became the largest shareholder.<sup>26</sup> It established a fund to aid Chinese dissidents run by the renowned exile Harry Wu. Most importantly, Google, Microsoft, and Yahoo, along with civil society organizations, have adopted a new human rights policy—the Global Network Initiative, which commits them to consider human rights as they offer their services around the world.<sup>27</sup> Google’s challenge to Chinese repression at the beginning of 2010 was a watershed moment in honoring this commitment.

Though the issue of free speech on the Internet is critical, it has attracted insufficient critical attention. Corporate responsibility codes such as the United Nations Global Compact<sup>28</sup> and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>29</sup> rarely mention free speech outside a general call for corporations to respect human rights. Even the deservedly celebrated reports by John Ruggie issued in 2008 and 2009 address the Internet and free speech only fleetingly.<sup>30</sup> Human rights law for its part restricts its domain largely to the obligations of states, not the obligations of private non-state actors such as corporations.<sup>31</sup> However, the reality is that socially responsible corporations today must attend not only to

government could demand users’ personal information.”).

26. Chris Leahy, *Alibaba Clicks with Yahoo*, EUROMONEY, Oct. 2005, at 96, available at <http://www.euromoney.com/Article/1009375/Alibaba-clicks-with-Yahoo.html> (describing Yahoo’s acquisition of a forty percent stake in Alibaba in return for a transfer of Yahoo’s Chinese operations and one billion dollars).

27. Jessica E. Vascellaro, *Google, Yahoo, Microsoft Set Common Voice Abroad*, WALL ST. J., Oct. 28, 2008, at B7.

28. Facebook, MySpace, Google, Twitter, and Yahoo are not among the six thousand companies participating in the Global Compact. *Participant Search*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/participants/search> (last visited Dec. 24, 2010). Microsoft, however, is a member, perhaps due to its role as a goods manufacturer and thus its longer experience in a global supply chain. *Id.*

29. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 9–11 (2000), available at [www.oecd.org/dataoecd/56/36/1922428.pdf](http://www.oecd.org/dataoecd/56/36/1922428.pdf).

30. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 52, 71, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) (listing “freedom of information and expression” and “[r]ight to privacy” among rights corporations are to respect and mentioning “violations of privacy rights by Internet service providers”); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 68, Human Rights Council, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (noting that “[c]ompanies have faced . . . dilemmas [where national law and international human rights law conflict] in relation to gender equality, and most recently freedom of expression and the right to privacy in the Internet and telecommunications sectors . . .”).

31. Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927 (2005). Corporations cannot, however, aid and abet human rights violations by states. See *infra* note 182 and accompanying text.



the risks for maquiladora workers or remote villagers atop mineral deposits, but also to the risks for bloggers and videographers. These responsibilities must also be understood in the context of the role of media in society, specifically its potential to legitimize or delegitimize state authority. Indeed, my claim is that corporate social responsibility of new media enterprises is central to freedom today—that democracy itself is at stake.

In this Article, I explain why Google and its peers have an obligation to protect the freedoms of political dissidents. I set the stage in Part I by describing two possible futures—one in which governments employ the Internet to achieve the most powerful surveillance regimes in human history, and another in which ordinary citizens use the Internet as a kind of Underground Railroad for information. In Part II, I argue in favor of Google's responsibilities in China and other repressive regimes on three grounds: first, an understanding of the role of enterprise in an *unfree* society; second, the professional ethical responsibility of new media, admittedly as yet inchoate; and third, the foreign policy of a liberal democratic state such as the United States. In Part III, I turn to the historical experience with the Anti-Apartheid Act and the Foreign Corrupt Practices Act, both efforts by the U.S. Congress to regulate the extraterritorial behavior of American and other enterprises. In Part IV, I draw upon these precedents to sketch the contours of a legal regime that encourages global media freedom.

## I.

### DISCIPLINE OR DISCOURSE: THE WEB'S POSSIBLE FUTURES

There are two competing visions of the Internet's role in authoritarian states. The first, drawing from Foucault, sees the Internet promoting the perfection of the surveillance state. The second, drawing from Habermas, sees the Internet promoting the perfection of the public sphere of rational discourse and deliberation.

#### A. *The Internet as a Facilitator of the Surveillance State*

Foucault's famous treatise linking surveillance and punishment, *Surveiller et Punir; Naissance de la Prison*, begins by describing the nineteenth century shift from public punishments such as drawing and quartering to private punishments.<sup>32</sup> But even into the twenty-first century the public execution remains a feature in certain parts of the world. Take a recent example from China:

Shortly after dawn on July 9, the local government here bused several thousand students and office workers into a public square and lined them up in front of a vocational school. As the spectators watched,

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32. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 14 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

witnesses said, three prisoners were brought out. Then, an execution squad fired rifles at the three point-blank, killing them on the spot.<sup>33</sup>

Foucault suggests that the public execution holds a “juridico-political function”: to demonstrate the strength of the “all-powerful sovereign.”<sup>34</sup> We might be tempted to believe that the all-powerful sovereign must necessarily be the all-seeing sovereign, but Foucault notes that the mere possibility of being seen might itself constrain. Borrowing from Bentham, Foucault describes the architecture of the Panopticon prison, where a central tower keeps watch over a perimeter of prisoners. The genius of the Panopticon is that the surveillance itself disciplines: “He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principal of his own subjection.”<sup>35</sup> Even China, with its million-person-plus police force, cannot depend entirely on its gendarme to ensure compliance of its billion person-plus populace. Rather, all police forces must depend on the self-discipline of the citizenry. Wide surveillance combined with swift and terrifying punishment will deter many who might have otherwise engaged in a rebellious act. In the hands of an authoritarian government, does the Internet render an entire population prisoner to a national Panopticon?<sup>36</sup>

### *B. The Internet as a Facilitator of Democratic Discourse*

The dystopian vision of the web as a national disciplinary prison can be met with a more hopeful vision: the web as an ideal mechanism for discourse. By giving all individuals—or at least those with Internet access<sup>37</sup>—a platform to broadcast their views outside government-sanctioned channels, the Internet helps meet one criterion of Habermas’s vision of a discourse ethics fundamental to democracy.<sup>38</sup> From social networking pages and Twitter, to

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33. Edward Cody, *Across China, Security Instead of Celebration*, WASH. POST, July 19, 2008, at A1.

34. FOUCAULT, *supra* note 32, at 48–49.

35. *Id.* at 202–03.

36. See LAWRENCE LESSIG, CODE VERSION 2.0 208 (2006) (“From the simple ability to trace back to an individual, to the more troubling ability to know what that individual is doing or likes at any particular moment, the maturing data infrastructure produces a panopticon beyond anything Bentham ever imagined.”); Lokman Tsui, *The Panopticon as the Antithesis of a Space of Freedom: Control and Regulation of the Internet in China*, 17 CHINA INFO. 65, 76 (2003) (“[P]anopticism is the imperative modus for internet regulation in China.”).

37. The divide between those connected to the Internet and those without robust access is a pernicious fact of modern life, even more so in the poorer parts of the world that are often the locus of the repressive regimes discussed here. While this Article presumes wide access, in reality the absence of large numbers of people from the Internet undermines the Internet’s liberalizing possibilities, especially since this absence reflects an asymmetric marginalization of the voices of the poor.

38. Jürgen Habermas, *Between Facts and Norms: An Author’s Reflections*, 76 DENV. U. L. REV. 937, 942 (1999) (“In highly differentiated societies with an intransparent diversity of

blogs, bulletin boards, and websites, the Internet enables individuals to speak directly to their compatriots and to the world. While Habermas's vision of broad participation in public discourse was articulated before the rise of the World Wide Web, Michael Froomkin has argued that the standards-setting process through which the Internet Protocol evolves—and which utilizes the communications tools made available by the Internet—might well approximate Habermas's discourse ideal.<sup>39</sup> We need not embrace in full Habermas's complex account of political legitimacy to hold broad citizen participation in discourse on public matters essential to democracy. Indeed, this notion is found in a broad array of jurisprudential writings on democracy, from classical liberalism to civic republicanism.<sup>40</sup> Yet, because Habermas's account most fully elaborates the relationship of discourse to democracy and because it is the most influential of such models, it seems an appropriate lodestar for evaluating the role of new media in authoritarian states.

For Habermas, free discourse in the public sphere, not the ballot box alone, legitimizes government. In early writing, he introduces the concept of an “ideal speech situation” in which individuals reason together towards a common purpose.<sup>41</sup> An ideal speech situation can arise only under conditions of “universal access and equal participation,” the details of which are quite demanding.<sup>42</sup> It seems difficult to even imagine an ideal speech situation in a

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interests, it is an epistemic requirement for the equal distribution of liberties for everybody that those citizens affected and concerned first get themselves the chance to push their cases in the public . . .”).

39. A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003).

40. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (1948) (arguing that freedom of speech helps voters make more informed, and thus wiser, decisions); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 22 n.13 (2002) (collecting theorists of deliberative democracy); Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020*, at 179 (Jack M. Balkin & Reva B. Siegel eds., 2009).

41. Ackerman and Fishkin characterize Habermas's proposal as a “thought experiment.” BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 182 (2005).

42. Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43, 89 (1992). He specifies these conditions:

[1] Every subject with the competence to speak and act is allowed to take part in a discourse.

[2] a. Everyone is allowed to question any assertion whatever.  
b. Everyone is allowed to introduce any assertion whatever into the discourse.  
c. Everyone is allowed to express his attitudes, desires, and needs.

[3] No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in [1] and [2].

*Id.* (citation omitted).

In recent work, Habermas has focused on “two critical conditions” for “deliberative legitimation processes in complex societies”: “a self-regulating media system [that] gains independence from its social environments, and . . . anonymous audiences [that] grant feedback between an informed elite discourse and a responsive civil society.” Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The*

polity with tens or hundreds of millions of members, at least in the absence of the Internet. But consider the vision of technologically-enabled discourse offered by Internet pioneer Vint Cerf, which seems to echo Habermas's ideal: "[the Internet] offers a global megaphone for voices that might otherwise be heard only feebly, if at all. It invites and facilitates multiple points of view and dialog in ways unimplementable by the traditional, one-way, mass media."<sup>43</sup> Indeed, the Internet has seen a flowering of speech and discussion on topics of public interest. Habermas defines the "public sphere" as "a realm of our social life in which something approaching public opinion can be formed."<sup>44</sup> In the 1970s, Habermas could write: "[N]ewspapers and magazines, radio and television are the media of the public sphere."<sup>45</sup> In the last decade, we have seen the emergence of what Yochai Benkler has called a "networked public sphere," not just in the United States, but across the world.<sup>46</sup> China is reportedly home to more than fifty million bloggers, who, according to state-owned Xinhua, can collectively "influence government policy-making."<sup>47</sup>

It may appear odd to test the Internet's liberalizing potential in repressive regimes against a set of conditions only imperfectly obtained even in the world's most liberal democracies.<sup>48</sup> But the extent of the absence of these conditions is indicative of the distance yet to travel to achieve fully legitimate governance, at least from Habermas's perspective. More importantly, as I will suggest, even in a compromised speech situation that is far from ideal, there may yet be enough speech to undermine the legitimacy of the existing political order and produce a crisis of confidence in the current regime.

Even if the technology for vibrant discourse now exists, governments across the world have set out to monitor or censor disfavored speech—destroying the general conditions for Habermas's discourse ethics. The

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*Impact of Normative Theory on Empirical Research*, 16 COMM. THEORY 411, 411–12 (2006) [hereinafter Habermas, *Political Communication*].

43. Memorandum, Vint Cerf, *The Internet Is for Everyone 1* (Apr. 2002), available at <http://www.ietf.org/rfc/rfc3271.txt> (quoted in Froomkin, *supra* note 39, at 811).

44. Jürgen Habermas, *The Public Sphere: An Encyclopedia Article (1964)*, 3 NEW GERMAN CRITIQUE 49, 49 (1974) (cited in Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, in HABERMAS AND THE PUBLIC SPHERE 289, 289 (Craig J. Calhoun ed., 1992)).

45. *Id.*

46. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 271 (2006).

47. *China Has More Than Fifty Million Web Bloggers*, CHINA DAILY (Jan. 6, 2009), [http://www.chinadaily.com.cn/china/2009-01/06/content\\_7372280.htm](http://www.chinadaily.com.cn/china/2009-01/06/content_7372280.htm).

48. Habermas laments the inadequacy of public deliberation in Western societies:

Contemporary Western societies display an impressive increase in the volume of political communication, but the political public sphere is at the same time dominated by the kind of mediated communication that lacks the defining features of deliberation. Evident shortcomings in this regard are (a) the lack of face-to-face interaction between present participants in a shared practice of collective decision making and (b) the lack of reciprocity between the roles of speakers and addressees in an egalitarian exchange of claims and opinions.

Habermas, *Political Communication*, *supra* note 42, at 414–15 (2006) (citations omitted).

technology of discipline operates at multiple levels, encompassing Internet gateways, Internet Service Providers, content providers, web hosts, and even cybercafés. The Chinese Internet censorship regime, officially titled the “Golden Shield” but nicknamed the “Great Firewall” by detractors, illustrates the panoply of mechanisms of censorship. An OpenNet Initiative study describes the Chinese censorship and surveillance system as the “most sophisticated effort of its kind in the world.”<sup>49</sup>

First, while the Internet is typically thought of as too decentralized to be subject to control, in China “the Internet came with choke points built in.”<sup>50</sup> Fiber-optic cables carrying the Internet “enter the country at one of three points: the Beijing-Qingdao-Tianjin area in the North, where cables come in from Japan; Shanghai on the Central Coast, where they also come from Japan; and Guangzhou in the South, where they come from Hong Kong.”<sup>51</sup> These choke points permit the authorities to examine and intercept cross-border Internet traffic.

Second, directives to a handful of principal Internet Service Providers (ISP) allow the authorities to block access to websites through the Domain Name Service (DNS).<sup>52</sup> As the ISP orders attest, authorities outsource much of the censorship to private actors, including those that host content and those that relay it.<sup>53</sup> China requires Internet content providers to apply for a license and take the “Public Pledge on Self-discipline for the Chinese Internet Industry,” under which providers pledge to refrain “from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability.”<sup>54</sup> Yahoo is “the only Western company known to have signed the pledge,” signing it in 1999 when it became the first large U.S. Internet service provider to enter the Chinese market.<sup>55</sup> In the United States, Internet hosts are generally immunized from liability for even libelous postings

49. Bambauer et al., *Internet Filtering in China in 2004–2005: A Country Study 3* (Berkman Ctr. for Internet & Society at Harvard Law Sch., Research Pub. No. 2005-10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=706681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=706681); Mr. Tao, *Journey to the Heart of Internet Censorship*, REPORTERS WITHOUT BORDERS (Oct. 2007), [http://en.rsf.org/IMG/pdf/Voyage\\_au\\_coeur\\_de\\_la\\_censure\\_GB.pdf](http://en.rsf.org/IMG/pdf/Voyage_au_coeur_de_la_censure_GB.pdf) (characterizing China as “one of the World Wide Web’s most repressive countries”).

50. James Fallows, “*The Connection Has Been Reset*”, ATLANTIC MONTHLY, Mar. 2008, at 64, 66, available at <http://www.theatlantic.com/magazine/archive/2008/03/andldquothe-connection-has-been-resetandrdquo/6650/>.

51. *Id.*

52. *Id.*

53. Rebecca MacKinnon, *China’s Censorship 2.0: How Companies Censor Bloggers*, FIRST MONDAY (Feb. 2, 2009), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2378/2089> (Domestic website censorship “is carried out almost entirely by employees of Internet companies, not by ‘Internet police’ . . .”).

54. HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM”: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 12 (Aug. 2006), available at <http://www.hrw.org/reports/2006/china0806/china0806web.pdf> [hereinafter HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM”].

55. *Id.*

as long as they are user generated;<sup>56</sup> in China, however, hosts are liable for user-generated content appearing on their websites. Service providers in China routinely block certain politically controversial keywords from use in search engines or blog postings.<sup>57</sup>

Finally, network “sniffers” permit the authorities to examine copies of web traffic for forbidden content. Writing amidst the Iranian protests of 2009, Farhad Manjoo suggests that technology now permits Iranian authorities to exercise control far in excess of that available even behind the Iron Curtain:

Through “deep packet inspection,” the regime achieves omniscience—it has the technical capability to monitor every e-mail, tweet, blog post, and possibly even every phone call placed in Iran. Compare that with East Germany, in which the Stasi managed to tap, at most, about 100,000 phone lines—a gargantuan task that required 2,000 full-time technicians to monitor the calls. The Stasi’s work force comprised 100,000 officers, and estimates put its network of citizen informants at half a million. In the digital age, Iran can monitor its citizens with a far smaller security apparatus. They can listen in on everything anyone says—and shut down anything inconvenient—with the flip of a switch.<sup>58</sup>

### C. Discourse Obstacles

There are at least two significant challenges to the possibility of an Internet-mediated public sphere in repressive countries. First, as described above, many governments are seeking to match evasion of censorship and surveillance by ever more sophisticated and invasive technologies—call this the “Big Brother” challenge. Second, the Internet might abet fragmentation and sectarianism instead of broader public discourse, a critique that Cass Sunstein has pressed with great force—call this the “Balkanization” challenge. I consider each in turn below. I suggest that there is room to believe that despite the Big Brother and Balkanization challenges, the Internet indeed carries the possibility of nurturing a public discourse with political valance.

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56. *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009).

57. HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM”, *supra* note 54, at 27–29; Bambauer et al., *supra* note 49, at 3 (noting that “major Chinese search engines filter content by keyword and remove certain search results from their lists,” while blog services “either prevent posts with certain keywords or edit the posts to remove them”).

58. Farhad Manjoo, *The Revolution Will Not Be Digitized*, SLATE (June 25, 2009), <http://www.slate.com/id/2221397?nav=wp>. For an authoritative account of Iranian state repression of Internet speech, see IRAN HUMAN RIGHTS DOCUMENTATION CENTER, CTRL+ALT+DELETE: IRAN’S RESPONSE TO THE INTERNET (2009), available at <http://www.iranhrdc.org/httpdocs/English/pdfs/Reports/Ctr+Alt+Delete%20--%20Iran's%20Response%20to%20the%20Internet.pdf>.

### 1. The “Big Brother” Challenge

Even against the formidable power of Big Brother governments, technologies of dissent should not to be underestimated.<sup>59</sup> To elude censors, determined users can employ proxy servers, anonymizers such as Tor, peer-to-peer file sharing services, encrypted Voice over Internet Protocol (VoIP) services such as Skype, and virtual private networks.<sup>60</sup> As we saw in the summer of 2009 with the Iranian election protests, even 140-character text messages can disseminate important information that the authorities would otherwise suppress. A Western technologist providing anonymous Tor connections during the protests proclaimed, “We’re Iran’s IT department now.”<sup>61</sup> Not all users will have the technical savvy to evade censors with such tools.<sup>62</sup> Sometimes the evasion might involve low-technology devices. A Shanghai activist, for example, cleverly suggested that bloggers refer to dissident group Charter 08 by the word “Wang”—a name too ubiquitous to banish by automated computer censors but whose meaning would be clear in context to human readers.<sup>63</sup> Even if information reaches only a few by cyberspace, the recipients can transfer it on via other electronic media, such as phones, or via old-fashioned real space interactions. The sum total of these evasions will likely be broader access to information that the authorities would

59. An open letter appeared in the summer of 2009 on Chinese bulletin boards and blogs: “Hello, internet censorship institutions of the Chinese government,” it said. “We are the anonymous netizens. We hereby decide that from July 1, 2009, we will start a full-scale global attack on all censorship systems you control.” Joseph Menn et al., *Control, Halt, Delete, FIN*. TIMES (June 26, 2009, 7:30 PM), <http://www.ft.com/cms/s/0/79bf45cc-627c-11de-b1c9-00144feabdc0.html#axzz1BbKK7JVL>.

60. David Talbot, *Dissent Made Safer: How Anonymity Technology Could Save Free Speech on the Internet*, M.I.T. TECH. REV., May–June 2009, at 60, available at <http://www.technologyreview.com/computing/22427/>. The Chinese government cannot bar devices such as proxy servers entirely because businesses use them for secure communications. As Fallows observes, “To keep China in business, then, the government has to allow some exceptions to its control efforts—even knowing that many Chinese citizens will exploit the resulting loopholes.” Fallows, *supra* note 50.

61. Andrew LaVallee, *Iranians Using Tor to Anonymize Web Use*, WALL ST. J. DIGITS BLOG (June 18, 2009, 11:26 AM), <http://blogs.wsj.com/digits/2009/06/18/iranians-using-tor-to-anonymize-web-use/> (quoting Ian Souter).

62. HAL ROBERTS ET AL., 2007 CIRCUMVENTION LANDSCAPE REPORT: METHODS, USES, AND TOOLS 7 (2009), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2007\\_Circumvention\\_Landscape.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2007_Circumvention_Landscape.pdf) (estimating two to five million users worldwide of censorship circumvention tools in 2007). The Iranian election protests led to a surge in connections to Tor from Iran in the summer of 2009. Jim Finkle, *Web Tools Help Protect Human Rights Activists*, REUTERS (Aug. 19, 2009), <http://www.reuters.com/article/internetNews/idUSTRE5714IE20090819>.

63. Julen Madariaga, *Charter 08: Why it Should be Called Wang*, CHINAYOUREN (Jan. 11, 2009), <http://chinayouren.com/eng/2009/01/charter-08-why-it-should-be-called-wang/>. To ridicule President Hu Jintao’s exhortations for Chinese citizens to create a harmonious society, some wag produced a video satire about a grass mud horse, which invoked a dirty pun. Michael Wines, *Mythical Beast (a Dirty Pun) Tweaks China’s Online Censors*, N.Y. TIMES, Mar. 12, 2009, at A1, available at <http://www.nytimes.com/2009/03/12/world/asia/12beast.html>.

otherwise repress.

Even with the cat-and-mouse game of information repression and dissemination, the Internet is helping to develop a critical public sphere in countries where it has been absent. In Iran, recent “activism is creating a new political space” where the “public is defining its own agenda, with Rafsanjani, Mousavi and other opposition figures responding to sentiment on the street rather than directing it.”<sup>64</sup> In Egypt, some have “created a new political space by deploying the interactive media of Facebook, cell phone text messaging, and YouTube.”<sup>65</sup> Over time, this inchoate public sphere may come to test and question the legitimacy of the existing distribution of power. In her study of eighteenth century revolutions, Hannah Arendt observes that a “loss of authority” precedes successful revolutions:

The loss of authority in the powers-that-be, which indeed precedes all revolutions, is actually a secret to no one, since its manifestations are open and tangible, though not necessarily spectacular; but its symptoms, general dissatisfaction, widespread malaise, and contempt for those in power, are difficult to pin down since their meaning is never unequivocal.<sup>66</sup>

In China, a rag-tag army of citizen activists self-organize into a “human flesh search engine,” rooting out information about perceived injustices and then publishing personal details on the web.<sup>67</sup> While this behavior often results in official or private sanction, the human flesh search engine can expose official misbehavior that would otherwise be hidden.<sup>68</sup> When a Chinese court tried a young woman for killing a government official in the remote Hubei province, bloggers uncovered evidence that the official had tried to rape her, leading the court to conclude she acted in self-defense.<sup>69</sup> Many have rightly criticized the informal citizen brigade for its vigilante character, as well as its ability to hound and threaten individuals and invade privacy based on limited facts.<sup>70</sup> Yet a human flesh brigade of ordinary citizens holds the possibility of

64. Robin Wright, *Iran's Protesters: Phase 2 of Their Feisty Campaign*, TIME, (July 27, 2009), <http://www.time.com/time/world/article/0,8599,1912941,00.html>.

65. Nelson, *supra* note 5, at 14.

66. HANNAH ARENDT, *ON REVOLUTION* 260 (1963) (Penguin Books 1990).

67. See Tom Downey, *China's Cyberposse*, N.Y. TIMES MAG. (Mar. 3, 2010), <http://www.nytimes.com/2010/03/07/magazine/07Human-t.html>.

68. See, e.g., Sky Canaves, ‘Human Flesh Search Engines’ Set Their Sights on Official Misbehavior, WALL ST. J. CHINA REAL TIME REP. BLOG (Dec. 29, 2008, 6:57 AM), <http://blogs.wsj.com/chinajournal/2008/12/29/human-flesh-search-engines-set-their-sights-on-official-misbehavior/> (“Communist Party secretary of Shenzhen’s marine affairs bureau was sacked after being caught on video assaulting a young girl at a restaurant.”).

69. Jane Macartney, *Waitress Deng Yujiao Who Stabbed to Death Communist Official Walks Free*, TIMES (London) (June 17, 2009), <http://www.timesonline.co.uk/tol/news/world/asia/article6513750.ece>.

70. See, e.g., Xujun Eberlein, *Human Flesh Search: Vigilantes of the Chinese Internet*, NEW AMERICA MEDIA (Apr. 30, 2008), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=964203448cbf700c9640912bf9012e05](http://news.newamericamedia.org/news/view_article.html?article_id=964203448cbf700c9640912bf9012e05) (noting that targets of the human flesh



assembling bits of data into a larger story that might challenge the official narrative. In this way, the human flesh search engine might raise issues and facts not discussed in the state-sanctioned media. In Egypt, individuals used social networking sites to expose the murder of blogger Khaled Saied. Saied was allegedly murdered by two undercover police officers, who had arrested him, notably, at a cybercafé.<sup>71</sup> The exposure of Saied's death involved not only citizens networking via cyberspace, but more traditional organizations, such as Amnesty International and an opposition political party.

It is possible that liberalized discourse might not undermine authority, and could, if skillfully managed, strengthen it. Governments can manipulate the media for advantage, typically by rallying the population against a foreign menace. The Chinese blogosphere has often taken a nationalist turn, decrying Western media for its alleged anti-Chinese bias, or denouncing members of the Chinese diaspora for disrupting the global torch relay preceding the Beijing Olympics.<sup>72</sup> Leibman and Wu suggest that “[m]ore wrongs are being exposed in China, but this does not necessarily mean the Party is any less in control than in the past.”<sup>73</sup>

Even so, the Chinese government, for its part, is clearly worried about the rise of the networked public sphere. The authorities worry that the online self-appointed guardians “make it more difficult to manage and prevent protest.”<sup>74</sup> In China, the Internet has even been called a “court of appeals.”<sup>75</sup> The

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search engine were “bombarded with curses [and] threats”); Hannah Fletcher, *Human Flesh Search Engines: Chinese Vigilantes That Hunt Victims on the Web*, *TIMES* (London) (June 25, 2008), [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article4213681.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article4213681.ece). Some worry that concern for public opinion as a result of the human flesh search engine will tilt judges toward popular rulings. Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 *CHI. J. INT'L L.* 257, 261 (2007) (noting the rise of “Internet manhunt[s]” and worrying that “not all criticism is socially useful, and when criticism is used as a political weapon against an already weak judiciary it does not improve governance but endangers progress toward a rule of law system. At its worst, and when supported by the state, cheap mass criticism can cause judges to become unwilling to make decisions that run the risk of inflaming the public, thereby causing a surrender of judicial authority to the vicissitudes of public opinion.”).

71. Amro Hassan, *EGYPT: Alleged Police Beating Death Sparks Nationwide Fury*, *L.A. TIMES* (June 14, 2010, 7:00 AM), <http://latimesblogs.latimes.com/babylonbeyond/2010/06/egypt-alleged-torture-death-scatters-nationwide-fury.html>.

72. Tsui, *supra* note 36, at 72 (“In China, nationalism is the dominant online ideology.”); *Manage That Anger*, *ECONOMIST*, Apr. 26, 2008, at 58, available at <http://www.economist.com/node/11090574> (“At first Chinese [nationalist] anger [at foreign media] was largely confined to the internet, with fiery postings on blogs, message boards and purpose-built sites (eg, [www.anti-cnn.com](http://www.anti-cnn.com)).”); Andrew Jacobs & Jimmy Wang, *I Heart China: Chinese Nationalism on the Internet*, *N.Y. TIMES* (Apr. 20, 2008), <http://video.nytimes.com/video/2008/04/19/world/1194817108148/chinese-nationalism-on-the-internet.html> (describing recent private and governmental nationalist appeals in China in response to Tibetan demonstrations).

73. Liebman & Wu, *supra* note 70, at 314.

74. Sky Canaves, *Local Officials Urged to Get Savvy on Internet PR*, *WALL ST. J. CHINA REAL TIME REP. BLOG* (June 2, 2009, 6:24 AM), <http://blogs.wsj.com/chinajournal/2009/06/02/local-officials-urged-to-get-savvy-on-internet-pr/>.

75. Jim Yardley, *Chinese Go Online in Search of Justice Against Elite Class*, *N.Y. TIMES*,

emergence of a public sphere capable of reviewing supposedly authoritative decisions creates a crucial counterweight to public authority.

## 2. *The Balkanization Challenge*

Cass Sunstein has cogently pressed the Balkanization challenge to the claim of increased democratic deliberation supported by the web. Sunstein argues that the web is unlikely to lead to Habermasian deliberation because of a natural human proclivity to utilize media tools to receive only congenial information. He argues that individuals will use the Internet to affirm an insular “Daily Me,” leading to group polarization. Deliberative discourse will give way to partisan intransigence, whetted by narrow information ecosystems. Sunstein worries that such closed information environments will tend to radicalize those inside them, moving them away from the median—and, seemingly for Sunstein, more reasonable—position: “In many contexts, people’s opinions become more extreme simply because their views have been corroborated, and because they become more confident after learning that others share their views. Many minds, reading like-minded blogs, can badly blunder in this way.”<sup>76</sup> Habermas shares the worry about fragmentation of the public sphere, at least in the context of online chat rooms: “the rise of millions of fragmented chat rooms across the world tend[s] . . . to lead to the fragmentation of large but politically focused mass audiences into a huge number of isolated issue publics.”<sup>77</sup>

The Balkanization critique is not entirely convincing for a number of reasons. First, both Habermas and Sunstein conjure a more ideal information environment in an earlier era than actually existed. For Habermas, that era is the eighteenth century, exemplified by salons and coffee houses.<sup>78</sup> Yet, the bourgeois public sphere that emerged in the eighteenth and nineteenth centuries was largely the domain of “middle class men” in urban settings.<sup>79</sup> For Sunstein, the ideal information universe seems to be pre-Internet America, exemplified by its nightly newscast and morning newspapers. But Sunstein does not pay sufficient attention to the media landscape either before or outside the Internet.<sup>80</sup> The media of yesteryear was hardly a garden of robust debate

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Jan. 16, 2004, at A1. One scholar describes the rise of “informational politics” in China through the Internet. Guobin Yang, *Activists Beyond Virtual Borders: Internet-Mediated Networks and Informational Politics in China*, FIRST MONDAY (Sept. 2006), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1609/1524>.

76. Cass R. Sunstein, *Neither Hayek nor Habermas*, 134 PUBLIC CHOICE 87, 93 (2008).

77. Habermas, *Political Communication*, *supra* note 42 at 423 n.3.

78. HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 32 (1989; 1962, original German version). Habermas places the golden age of the coffee shops in Britain and France between 1680 and 1730, and that of salons as “the period between regency and revolution.” *Id.*

79. John Michael Roberts & Nick Crossley, *Introduction* to AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 1, 2 (Nick Crossley & John Michael Roberts eds., 2004).

80. Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479 (2002) (reviewing CASS

representing the diversity of America. The traditional media failed—and continues to fail—to valorize the voices of many outside the mainstream, particularly those who are not white, heterosexual men. General interest intermediaries such as television “provide shared experiences that focus almost exclusively on the concerns and experiences of the dominant group.”<sup>81</sup> Alongside Sunstein’s worry about the “Daily Me” supplied by the Internet, we might worry about the “Daily Them” provided by the mass media—“a vision of society focused on its dominant members.”<sup>82</sup> I have argued elsewhere that for minorities “this ubiquitous vision of society confirms their status as marginal and their concerns as irrelevant.”<sup>83</sup> Nowhere is this marginalization more apparent than in undemocratic societies where state-run media tightly constricts speech to a narrow set of voices. The problem of Balkanization resulting from the emergence of diverse voices into public discourse seems a distant concern in such circumstances.

A second reason to distrust the Balkanization critique of the power of electronically accelerated change can be found in Habermas’s own writings. Habermas has not himself had much to say directly about the Internet.<sup>84</sup> The quote above lamenting the fragmentation arising from the Internet comes from an undeveloped footnote.<sup>85</sup> Yet even in that footnote there is a suggestion that Habermas takes a more optimistic view of the Internet’s role in relation to repressive regimes. He offers a caveat to his claim that the Internet is undermining a public sphere: “[C]omputer-mediated communication in the web can claim unequivocal *democratic* merits only for a special context: *It can undermine the censorship of authoritarian regimes that try to control and repress public opinion.*”<sup>86</sup> Indeed, in his early work, Habermas noted that the demise of censorship helped foster the emergence of the public sphere:

The elimination of the institution of censorship marked a new stage in the development of the public sphere. It made the influx of rational-critical arguments in the press possible and allowed the latter to evolve into an instrument with whose aid political decisions could be brought before the new forum of the public.<sup>87</sup>

In today’s authoritarian states, it may not be the demise of official censorship,

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SUNSTEIN, REPUBLIC.COM (2001).

81. *Id.* at 1485.

82. *Id.* at 1484.

83. *Id.*

84. Consider, for example, his *fin de siècle* observation: “The mental consequences of the Internet—which is proving more resistant to incorporation into the routines of the lifeworld than a new electronic gadget—are still very hard to discern.” *Learning from Catastrophe? A Look Back at the Short Twentieth Century*, in JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 38, 43 (Max Pensky trans., 2001).

85. Habermas, *Political Communication*, *supra* note 42, at 423 n.3.

86. *Id.* (second emphasis added).

87. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 58 (Thomas Burger trans., 1991) [hereinafter HABERMAS, STRUCTURAL TRANSFORMATION].

but its undermining via the Internet, that may nurture a public sphere.

#### *D. Tweeting Against Tanks*

That the Internet might spur political revolutions may seem an outlandish expectation for a mere communications medium. Yet the printing press itself is partly responsible for the emergence of the modern nation-state: “The printing press helped create modern nationalisms, as books and newspapers came to be written in the vernacular, encouraging a conception of a shared community among groups of people who would never actually meet.”<sup>88</sup> Political organization and even self-definition depend upon people’s ability to communicate.<sup>89</sup>

One might question the effectiveness of Tweeting against tanks, but even authoritarian governments allege a public mandate to govern and assert that the government is acting in the best interests of the people. Accordingly, few countries have dared to dispense with elections entirely—of course, they might limit voters to a single choice or otherwise manipulate the elections. The Internet offers a means for citizens to discover that dissatisfaction with the current government might be widespread, that the government lacks the popular support it claims. This discovery might embolden citizens to demand political reform. Dissident Iranian websites now cite Gandhi’s dictum that “even the most powerful cannot rule without the cooperation of the ruled.”<sup>90</sup> Bloggers and Twitter users can reveal the falsehoods at the heart of the existing regime. Neda’s murder, broadcast around the world, demonstrated the homeland government’s brutality to Iranian expatriates—some of whom had previously supported the government.<sup>91</sup> Color revolutions, Tim Garton Ash observes, typically follow elections. The election

provides the occasion for an initial mobilization behind an opposition candidate, whether Vojslav Ko[s]tunica in Serbia, Viktor Yushchenko in Ukraine, or Mir Hussein Moussavi in Iran. Real or

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88. Chander, *supra* note 80, at 1479 (citing BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 37–46 (Verso rev. ed. 1991)).

89. Two scholars summarize the importance of communication to political change as follows: “[A]ll revolutions are . . . communicative processes, including the articulation of sometimes-competing ideologies and demands, the development of leaders and followers, the circulation of information, the exhortations to participation and mobilization.” ANNABELLE SREBERNY-MOHAMMADI & ALI MOHAMMADI, *SMALL MEDIA, BIG REVOLUTION: COMMUNICATION, CULTURE AND THE IRANIAN REVOLUTION* 19–20 (1994).

90. Wright, *supra* note 64 (quoting Mohandas Gandhi).

91. Farnaz Fassihi, *Iranian Crackdown Goes Global*, WALL ST. J., Dec. 3, 2009, at A1, available at <http://online.wsj.com/article/SB125978649644673331.html> (“Previously, Iran generally enjoyed good relations with its diaspora. Most opposition movements were on the fringe—for instance, royalists calling for the shah’s return. But the violent suppression of street protests ‘showed people the true nature of Iran’s regime,’ says Karim Sadjadpour, an Iran analyst for the Carnegie Endowment for International Peace.”).

alleged rigging of the election by incumbent powerholders is then the spark for a wider social mobilization, with burgeoning demands for change not merely in but *of* the system. The color symbolic of the opposition candidate—orange in Ukraine, green in Iran—becomes, or at least is now claimed to be, the color of the whole cheated nation . . . .<sup>92</sup>

The broadcast of mass and widespread demonstrations following an election can undermine the official claim of a wide electoral mandate. The broadcast of the repression of such demonstrations, as in Neda’s tragic case, can demonstrate the government’s desperate need to suppress dissent.

Whether the technologies of dissent will ultimately prevail over the technologies of control remains uncertain, and the outcome is likely to vary by time and place.<sup>93</sup> It is clear, however, that foreign publishers can prove especially valuable for dissident speech. Local service providers are more vulnerable to repressive demands than foreign service providers simply because local providers can be locked up and their servers and presses wrecked. Of course, some foreign publishers might have local employees or assets subject to local sanctions. Some might also face the potential loss of revenue from being officially barred from local operations. Even so, foreign publishers likely have greater freedom of expression than local media.

In seventeenth-century Britain, Habermas reports, the monarchy feared coffee houses: “Already in the 1670s the government had found itself compelled to issue proclamations that confronted the dangers bred by the coffee-house discussions. The coffee houses were considered seedbeds of political unrest . . . .”<sup>94</sup> Today, the Iranian government has voiced fears of a “velvet revolution” nurtured on the Internet.<sup>95</sup> If such a revolution materializes, its seedbed will be found in chat rooms, bulletin boards, Twitter feeds, blogs, and videos.<sup>96</sup>

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92. Timothy Garton Ash, *Velvet Revolution: The Prospects*, N.Y. REV. BOOKS, Dec. 3, 2009, at 21.

93. Talbot, *supra* note 60, at 64 (“[I]n Mauritania, Tor appears to have single-handedly overwhelmed state censorship.”); Declan McCullagh, *Iranians Find Ways to Bypass Net Censors*, CNET NEWS (June 17, 2009), [http://news.cnet.com/8301-13578\\_3-10267287-38.html?tag=newsEditorsPicksArea.0](http://news.cnet.com/8301-13578_3-10267287-38.html?tag=newsEditorsPicksArea.0) (describing use of proxy servers and anonymizers such as Tor).

94. HABERMAS, STRUCTURAL TRANSFORMATION, *supra* note 87, at 59.

95. Dan Murphy, *Do Iran’s Hard-Liners Really Believe ‘Velvet Revolution’ Plot?*, CHRISTIAN SCI. MONITOR (Aug. 14, 2009), <http://www.csmonitor.com/World/Global-News/2009/0814/do-iran-s-hard-liners-really-believe-velvet-revolution-plot>.

96. In Egypt, for example, dissidents have used Facebook to organize political opposition to President Hosni Mubarak, who has led that country for 28 years. Magdi Abdelhadi, *Egypt Facebook Campaign for ElBaradei Presidency*, BBC NEWS (Feb. 16, 2010), [http://news.bbc.co.uk/2/hi/middle\\_east/8518765.stm](http://news.bbc.co.uk/2/hi/middle_east/8518765.stm).

## II.

## WHAT GOOGLE OWES THE WORLD

What obligations do Google, Yahoo, and Facebook have to the people of China, Iran, and Cuba? I consider this question through three lenses: (1) contemporary understandings of the social responsibilities of corporations; (2) the role of new media in society; and (3) American foreign policy goals. As I will show, each of these approaches offers an independent, but complementary basis for imposing on new media enterprises an obligation toward political dissidents in unfree societies.

*A. The Social Responsibility of Business in an Unfree Society*

The idea that corporations bear responsibilities other than the simple obligation to profit maximize within the law<sup>97</sup> on behalf of their shareholders is controversial.<sup>98</sup> For some, for managers to temper the corporation's actions by social considerations that reduce profit is to violate obligations to those who provided or own the corporation's capital. "Spend your own money if you want to do good," the argument goes. Some thirty states have nonetheless statutorily authorized corporate managers to consider constituencies other than their shareholders in their decision making, though many academics and courts would still encourage or require managers to justify these extra-shareholder considerations as redounding ultimately to benefit the shareholder's pocketbook.<sup>99</sup> Others have contested the shareholder wealth maximization

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97. Even the notion of a corporate obligation to obey the law, or at least "regulatory laws," is controversial. Some would justify a breach when the expected costs of the breach are less than the expected benefits therefrom. See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) ("Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance."). For a contrary view, see Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001).

98. See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 419–29 (2002); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34–39 (1991); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, § 6 at 32. But cf. John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (1986) (arguing that managers, unlike shareholders, often hold long term investments in corporations similar to those most directly affected by corporation's operations); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (favoring mandatory disclosure of a corporation's policies and practices with respect to social and environmental issues).

99. This idea is captured in the classic case of *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968), in which the court upheld as a permissible business judgment a decision not to install lights at Wrigley Field in consideration of neighbors who disfavored night games, with the court reasoning that the corporation's directors might have been acting in the best interest of the corporation and its shareholders by considering, for example, the "long run interest of the

norm on the ground that shareholders themselves—or employees or customers—might favor altruistic behavior by corporations, and thus that socially regarding actions by managers are likely to maximize shareholder utility, if not wealth.<sup>100</sup>

Shareholder wealth maximization generally translates into the international arena without modification—call this the “Global Shareholder Wealth Maximization” view. If the responsibility of a corporation is to maximize shareholder wealth, within the bounds of the law, that limitation on management should extend to its operations abroad—or so it would seem. After all, how can we justify greater social obligations to foreigners than to one’s compatriots? I will suggest precisely such a heightened obligation below, but first let me develop this view of the multinational corporation as global profit maximizer a bit further.

Under the Global Shareholder Wealth Maximization view, the state charters corporations to allow a means to assemble capital to apply to legal purposes. Corporate competition then channels capital to where it is most valuable, at least as measured by market forces. Benefits from maximizing shareholder wealth flows as widely as the distribution of shareholders themselves. All capitalists from around the world are welcome to take advantage of this single-minded corporation. It is the job of governments to circumscribe the operation of a corporation, through antitrust law, consumer protection law, labor law, worker health and safety rules, and so forth; it is not the job of the captains of industry themselves. Indeed, by imposing their own views of rectitude, capitalists would be second-guessing governments. That, the argument goes, is the arrogance of crusaders. On this view, anything short of piracy is fair game.

An alternative view sees the corporation as a global citizen—call this the “Global Corporate Citizenship” view. This view saddles the multinational corporation with obligations that extend to all of humanity, or more precisely, to the communities in which its employees and consumers live. These obligations go beyond satisfying the statutory minimum, especially in the developing world. It is not enough, for example, that a corporation pays the minimum wage; it must ensure that it affords a living wage, one that allows workers to meet their basic human needs. The obligations also extend to reviewing the practices of suppliers; one cannot simply hide behind the

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corporation in its property value,” which might decline with neighborhood deterioration. *Id.* at 780.

100. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (arguing that shareholders often prefer corporations to sacrifice profit maximization to avoid social or moral sanction); M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (arguing that the corporation’s stakeholders—by whom they mean its investors, employees, and customers—often demand that corporations engage in philanthropy).

corporate veil, turning a blind eye to the practices of those with whom one does business. The source of these obligations is respect for human dignity.

A third view seeks the best of both worlds—call this the “Global Corporate Citizenship as Global Shareholder Wealth Maximization” view. This view sees human rights and good citizenship as instrumental to achieving long-term business success.<sup>101</sup> Local disorder might itself harm future business prospects. More importantly, consumers might boycott businesses they find distasteful; they may have a “preference for process” as Douglas Kysar tells us.<sup>102</sup> This view suggests a happy coincidence between the goals of the Global Shareholder Wealth Maximization proponents and those of the Global Corporate Citizenship proponents.

Each of these views has its weaknesses. The narrow mandate for corporate actions in the Global Shareholder Wealth Maximization view is inconsistent with the broad discretion that the business judgment rule in fact vests in management. The market for corporate control<sup>103</sup> or the discipline of creditors will likely prove a far more effective check on errant managers than a narrow but toothless legal mandate to maximize profit. Furthermore, such a vision is inconsistent with how firms and managers describe themselves, though the sincerity of such descriptions may at times be open to challenge. For its part, the Global Corporate Citizenship view relies on an ethical construct that seems hard, though not impossible, to source. It is also unclear whether shareholders have signed up for such an altruistic corporate orientation, if it comes at the price of dividends or share price. Finally, the coincidence between shareholder wealth maximization and socially responsible corporate behavior in the Global Citizenship-as-Global Shareholder Wealth Maximization view seems too uncertain to offer a reliable basis for other-regarding action. It is not clear that the costs of higher wages, higher environmental standards, and better working conditions will always generate precisely offsetting revenues.

The second and third views seem readymade to insist on the responsibilities of Google and its peers in repressive states. Under the Global Corporate Citizenship view, the corporation must treat the people of China and Iran with respect, whatever their governments say. That respect must include providing them with full and fair information, and refusing to divulge

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101. DAVID VOGEL, *THE MARKET FOR VIRTUE* 16–17 (2005) (arguing for a “business case for corporate responsibility” on the ground that a “more responsibly managed firm . . . will be more likely to avoid consumer boycotts, be better able to obtain capital at a lower cost, and be in a better position to attract and retain committed employees and loyal customers”).

102. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 529 (2004) (noting that “consumer preferences may be heavily influenced by information regarding the manner in which goods are produced”).

103. Jonathan R. Macey, *Market for Corporate Control*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (David R. Henderson ed., 2008), available at <http://www.econlib.org/library/Enc/MarketforCorporateControl.html>.



information that might lead to political arrests. The third view, Global Corporate Citizenship as Shareholder Wealth Maximization, would see respect for political freedoms as advancing the corporate bottom line by improving the company's brand.

However, it is the first view, Global Shareholder Wealth Maximization, that I want to explore. When Milton Friedman characterized a business's social responsibility as maximizing profit, he was describing a business "in a free society."<sup>104</sup> It thus seems fair to ask: Does the responsibility of a business change in an authoritarian state?<sup>105</sup> Friedman's assumption is that individuals enter into voluntary relationships with the corporation and thus do so in a mutually beneficial manner. But what if the corporation provides information to totalitarian governments—essentially serving as a secret spy of the secret police? Then entering into a voluntary relationship with the corporation might actually reduce an individual's utility. The individual then might stand as the unwilling victim of a tort rather than the beneficiary of a freely made contract. Indeed, all those who enter into relationships with the corporation—including employees, suppliers, and creditors, as well as customers—stand at risk of being ratted out to the authorities for politically disfavored behavior.<sup>106</sup> In such an environment, unadulterated profit maximization—including acting in a manner indifferent to the political freedoms of one's patrons—becomes unethical. Such indifference is a luxury of freedom. With this concept, we can reconcile Judge Posner's preference for shareholder wealth maximization in free societies with his charge that Internet companies "assist[ing] a foreign, repressive regime [in] persecut[ing] its political and religious dissidents" are going "a step beyond."<sup>107</sup>

Limiting a company's operations so they do not undermine the freedom of consumers in an unfree society carries few of the risks to corporate governance that some associate with corporate social responsibility mandates. Easterbrook and Fischel acutely observe that "a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is

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104. Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at SM17.

105. Asked late in life whether China or India faced a brighter future, Friedman favored India because of its greater political freedoms, saying of China: "China has maintained political and human collectivism while gradually freeing the economic market. This has so far been very successful but is heading for a clash, since economic freedom and political collectivism are not compatible." Tunku Varadarajan, *Milton Friedman @ Rest*, WALL ST. J. (E. ED.), Jan 22, 2007, at A.15.

106. Companies could respond to this difficulty by clearly and explicitly notifying users of their policy of censorship and surveillance. A bland statement, buried among other ordinary terms, that they will disclose information or censor their results based on the directives of governmental authorities may fail to provide sufficient notice to consumers. We will return to the issue of disclosure in the final Part.

107. See *supra* note 24 (stating that U.S. corporations should not actively assist surveillance of political and religious dissidents).

answerable to neither.”<sup>108</sup> But a political freedom limitation acts simply as a constraint on behavior within the traditional structure of corporate governance rather than a new, and conflicting, maximand.

In sum, Milton Friedman’s mandate for corporate behavior indifferent to social consequence not internalized in corporate profits cannot be readily extended to unfree societies. Media companies must be mindful that they bear special responsibility because of their particular role in disseminating the information necessary for citizens to watch over their government. This is true in our own society as well, but in unfree societies, new media enterprises in particular can be turned from watchdog on behalf of citizens to watchdog over citizens. In the following Section, I explicate this special responsibility.

### *B. New Media, New Responsibilities*

No matter how much one pays, one cannot buy a *New York Times* editorial.<sup>109</sup> This is true of other traditional print media, even that now owned by the famously conservative Rupert Murdoch. When Time Inc., the parent company of *Time Magazine*, merged with Warner Communications, Inc., the parent company of Warner Bros. Pictures, it took steps to insulate its editorial independence from inevitable shareholder pressure.<sup>110</sup> Yet at the same time, Warner Bros.’ movies—like those of other film studios—often serve as advertising vehicles for their paying sponsors.<sup>111</sup> We seem to accept the fact that content produced by Warner Bros. may seek to manipulate us for corporate profit, while refusing to accept that the movie studio’s sister entity *Time Magazine* might do the same.

Media today must be understood as encompassing more than radio, television, newspapers and magazines, whether in analog or digital forms. Today, any account of media must include blogs, social network groups, search engines, and the electronic platforms upon which those services depend. Should we think of these new media enterprises as more akin to *Time Magazine*, with strong ethical responsibility to consumers, or Warner Bros., with few, if any, obligations to consumers?

It is now banal to observe that cyberspace has transformed how people communicate. The emergence of Web 2.0, with its focus on broad public

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108. EASTERBROOK & FISCHER, *supra* note 98, at 38.

109. For a detailed account of the ownership structure at the *New York Times*, see Rachel Smolkin, *Challenging Times*, AM. JOURNALISM REV., Feb./Mar. 2007, at 16, available at <http://www.ajr.org/Article.asp?id=4262>; see also Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819 (2008).

110. *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1146, 1151–52 (Del. 1990) (describing *Time*’s board committee structure designed to protect editorial independence in merged Time-Warner entity).

111. Cf. Roger Dobson, *Tobacco Company Considered Funding a Film to Promote Smoking in Eastern Europe*, BMJ (May 18, 2006), available at <http://pubmedcentralcanada.ca/articlerender.cgi?artid=466184>.

participation and social networks, has sparked a culture of creation and sharing across the world. Web 2.0, Tim O'Reilly tells us, "harnesses collective intelligence."<sup>112</sup> Web 2.0 has been driven less by technological innovation than by a "fundamental mind shift," one that encourages individuals to participate in developing content.<sup>113</sup> Citizen journalists can now turn the spyglass on the government, exposing and reviewing its every move. But the revolutionary power of cyberspace depends on a degree of faith in the intermediaries. As a *New York Times* editor writes, "There is no need for neighborhood informants and paper dossiers if the government can see citizens' every Web site visit, e-mail and text message."<sup>114</sup> The interactive nature of new media companies means that as they supply information to individuals and disseminate onward information contributed by those individuals, they also gain information about those individuals. The same technology that shares information can also monitor electronic activity, dutifully reporting to the authorities every acquaintance and personal correspondence. As Part I describes, the same media that can be credited with assisting the development of a critical public sphere can also be accused of perfecting the terror of a totalitarian state.

Given the special role of new media in empowering or oppressing individuals, it seems incumbent upon us to demand the inculcation of a professional ethic among new media companies to protect the freedom-enhancing aspects of cyberspace.<sup>115</sup> If Web 2.0 depends on a particular mindset, that mindset is open to change, and is thus a source of risk.

Indeed, both Google and Yahoo have already established internal policies adopting a social responsibility ethic, although their adherence to this ethic has been uneven. In signing on to the Global Network Initiative, Yahoo cofounder Jerry Yang declared, "Yahoo was founded on the belief that promoting access to information can enrich people's lives and the principles we unveiled today reflect our determination that our actions match our values around the world."<sup>116</sup> That is not to say that Yahoo has always lived up to this commitment; indeed, just the previous year it had settled an Alien Tort Statute suit arising out of its disclosure of information leading to the arrest of

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112. Tim O'Reilly, *What is Web 2.0*, O'REILLY (Sept. 30, 2005), <http://www.oreilly.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>.

113. J. Kolbitsch & H. Maurer, *The Transformation of the Web: How Emerging Communities Shape the Information We Consume*, 12 J. UNIVERSAL COMP. SCI. 187, 206 (2006); accord Graham Cormode & Balachander Krishnamurthy, *Key Differences Between Web 1.0 and Web 2.0*, FIRST MONDAY (June 2, 2008), <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/2125/1972>.

114. Adam Cohen, *The Already Big Thing on the Internet: Spying on Users*, N.Y. TIMES, Apr. 5, 2008, at A16.

115. For an account of new media's role in democratizing culture, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

116. Maggie Shiels, *Tech Giants in Human Rights Deal*, BBC NEWS (Oct. 28, 2008), <http://news.bbc.co.uk/2/hi/technology/7696356.stm>.

dissidents within China.<sup>117</sup> When Yahoo signed China's Public Pledge of Self-Regulation, committing it to fight "indecent" and "unhealthy" content on the web,<sup>118</sup> the head of the Yahoo-owned AltaVista search engine disapproved, declaring, "Censorship just flies in the face of everything we're about as a company. We're about open access to information."<sup>119</sup> Announcing its 2006 decision to place servers in China to better serve that market, Google conceded that "[f]iltering our search results clearly compromises our mission."<sup>120</sup>

Despite these steps backward, new media enterprises have begun to demonstrate increasing concern with their role in freedom worldwide. During the popular uprising in Iran in the summer of 2009, Twitter rescheduled a system update to occur at 1:30 a.m., Tehran-time—even at the price of some inconvenience to its American users, who now faced a down system from 2 to 3 p.m., Pacific standard time.<sup>121</sup> Twitter recognized its important role in disseminating information about the protests and the repression, and did not want to interrupt that flow. During the same time period, Google and Facebook quickly rolled out services in Persian to assist Iranians in accessing their distribution platforms.<sup>122</sup> As noted above, when it entered China, Google intentionally avoided placing its personal information collecting services such as Blogger and Gmail on its Chinese servers so that the company could not be readily compelled to turn over such information to the local authorities.<sup>123</sup> Similarly, Yahoo conducted a human rights assessment prior to entering Vietnam, and decided as a result to place its servers in Singapore.<sup>124</sup> Google's dramatic move in January 2010 denouncing both Chinese censorship and the infiltration of the email accounts of Chinese human rights activists

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117. See Farrell, *supra* note 23; Gore, *supra* note 23; Newbold, *supra* note 23.

118. Bruce Einhorn, *China's Pledge of Allegiance*, BUS. WK. (Apr. 27, 2006), [http://www.businessweek.com/technology/content/apr2006/tc20060427\\_804460.htm](http://www.businessweek.com/technology/content/apr2006/tc20060427_804460.htm).

119. Peter S. Goodman & Mike Musgrove, *China Blocks Web Search Engines; Country Fears Doors to Commerce Also Open Weak Spots*, WASH. POST, Sept. 12, 2002, at E1 (quoted in Newbold, *supra* note 23, at 513).

120. See McLaughlin, *supra* note 25 and accompanying text (describing Google's refusal to place servers for services that gather extensive amounts of personal information in China).

121. Biz Stone, *Down Time Rescheduled*, TWITTER BLOG (June 15, 2009, 4:17 PM), <http://blog.twitter.com/2009/06/down-time-rescheduled.html> ("A critical network upgrade must be performed to ensure continued operation of Twitter. In coordination with Twitter, our network host had planned this upgrade for tonight. However, our network partners at NTT America recognize the role Twitter is currently playing as an important communication tool in Iran. Tonight's planned maintenance has been rescheduled to tomorrow between 2-3p PST (1:30a in Iran).").

122. Murad Ahmed, *Google and Facebook Go Farsi to Help Spread Iran Message*, THE TIMES (U.K.), (June 20, 2009), [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article6537531.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article6537531.ece).

123. See *supra* note 25.

124. Colin Maclay, *Can the Global Network Initiative Embrace the Character of the Net?*, in ACCESS CONTROLLED 87, 87 (Ronald Deibert et al. eds., 2010); Douglas MacMillan, *Yahoo's Delicate Dance in Vietnam*, BUS. WK. (May 28, 2009, 7:31 PM), [http://www.businessweek.com/technology/content/may2009/tc20090528\\_660986.htm](http://www.businessweek.com/technology/content/may2009/tc20090528_660986.htm).

demonstrated a commitment to media freedom.<sup>125</sup>

In 1947, the Hutchins Commission on Freedom of the Press declared that a free press required not just freedom from governmental pressures, but also imposed a duty on the press to “overcome any biases incident to its own economic position.”<sup>126</sup> The globalization of media, especially via cyberspace, requires media enterprises to redefine themselves within a global information architecture. They must see the people living in authoritarian states as not merely eyeballs that can be monetized, but rather as individuals deserving respect. The recent moves of Google and Yahoo described above suggest that these companies have begun to recognize this duty.

### *C. Promoting Color Revolutions*

Given the Iraq invasion debacle, the possibility of humanitarian intervention to promote democracy seems increasingly remote. In most cases, military intervention is infeasible, the cost in blood and treasure too high to generate any coalition of the willing. Economic sanctions, too, often prove unattractive, harming the population and creating large black market economies. Moreover, one of the world’s most repressive states also happens to be the factory to the world. To impose broad economic sanctions on China would be to cause worldwide economic disruption.

Because outside humanitarian intervention is improbable, change is most likely to arise through dissidents and people’s campaigns within the repressive states themselves. Cyberspace is likely to provide the principal mechanism for disempowered individuals to organize.<sup>127</sup> Peer-to-peer campaigns for change will rely on peer-to-peer networks, Skype’s encrypted voice-over-IP (itself a peer-to-peer technology), and technologies yet to come. Today’s underground resistance is networked through Facebook campaigns and text messaging networks. Information is disseminated via Twitter and YouTube. Of course, two can play at this game. Governments, too, will utilize the tools of new media to stoke nationalist fires.<sup>128</sup>

The Velvet Revolution that brought down the Stalinists in Czechoslovakia was spurred by the dispersion of an earlier copying technology, one relying on ink and paper: “Handbills, posters, and slogans became a feature of the

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125. See *Google and China: Flowers for a Funeral*, *ECONOMIST*, Jan. 13, 2010; see also Drummond, *supra* note 16 (“We launched Google.cn in January 2006 in the belief that the benefits of increased access to information for people in China and a more open Internet outweighed our discomfort in agreeing to censor some results.”).

126. *COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* 18 (1947). The official name for the Commission is the “Commission on Freedom of the Press,” but it is perhaps better remembered as the Hutchins Commission, after its Chairman, Robert Hutchins, then President of the University of Chicago.

127. For a country-by-country account of the use of blogs for political dissent, see ANTONY LOWENSTEIN, *THE BLOGGING REVOLUTION* (2008).

128. See *supra* note 72 and accompanying text.

revolution. They provided an alternative to the mass media, still largely under government control . . . .”<sup>129</sup> Indeed, media have often proved crucial to popular revolution. Many scholars have described the importance of the printing press to the French Revolution.<sup>130</sup> But the importance of foreign printers has been less recognized. During the French Revolution, the Ancien Régime fell in part due to the undermining of political leaders in the *libelles*, pamphlets widely circulated during the two decades before 1789. These *libelles* were often published abroad, in London, Amsterdam and elsewhere, and then smuggled into the kingdom.<sup>131</sup>

Today, the United States has begun to notice the diplomatic potential of modern forms of publishing, including the Internet. Defense Secretary Robert Gates has written about the role of *samizdat*—self-publishing—in undermining the Soviet Union.<sup>132</sup> He observes, “The freedom of communication . . . is a huge strategic asset for the United States.”<sup>133</sup> Secretary of State Hillary Clinton has embraced the “freedom to connect” as an aim of what she calls “21st century statecraft.”<sup>134</sup> She argues for this freedom not as a strategic resource for the United States but rather as a universal right of humankind, citing the Universal Declaration of Human Rights.<sup>135</sup>

In observing the Internet’s role as dissident soapbox, we should not hold Panglossian expectations of successful revolutions just around the bend. If liberalization does occur, it might arise through a punctuated revolutionary moment or through a gradual process of attrition and evolution.<sup>136</sup> The rapid discontinuity of a People Power revolution might prove unavailable, but slow, incremental change might be possible. An example of the latter can be found in

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129. BERNARD WHEATON & ZDENEK KAVAN, *THE VELVET REVOLUTION* 63 (1992). See generally Owen V. Johnson, *Mass Media and the Velvet Revolution*, in *MEDIA AND REVOLUTION*, 220 (Jeremy D. Popkin ed., 1995).

130. See, e.g., *supra* note 6.

131. ROBERT DARNTON, *THE LITERARY UNDERGROUND OF THE OLD REGIME* 195 (1982); HUGH GOUGH, *THE NEWSPAPER PRESS IN THE FRENCH REVOLUTION* 4 (1988) (“Books and pamphlets frequently avoided [the] problem [of local censorship] by publishing abroad, or adopting a fictitious foreign imprint, and then circulating through the underground distribution system, a practice which became commonplace during the eighteenth century.”); *id.* at 7 (“London was one centre for such publications, Amsterdam, Bouillon and Neuchâtel others . . .”).

132. See Noah Shachtman, *Social Networks as Foreign Policy*, N.Y. TIMES MAG., Dec. 13, 2009, at 62; see also ROBERT M. GATES, *FROM THE SHADOWS* 91 (1996) (describing “White House effort [during the Carter Administration] to attack the internal legitimacy of the Soviet government” through support for, inter alia, *samizdat*); *Russia: Notes from the Underground*, TIME, Nov. 28, 1969, available at <http://www.time.com/time/magazine/article/0,9171,840418,00.html> (discussing *samizdat*).

133. Shachtman, *supra* note 132.

134. Hillary Rodham Clinton, Transcript of *Remarks on Internet Freedom*, Jan. 21, 2010, available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

135. *Id.*

136. Rebecca MacKinnon argues that, in China, the Internet is more likely to lead to evolution, not revolution. Rebecca MacKinnon, *Flatter World and Thicker Walls? Blogs, Censorship and Civic Discourse in China*, 134 PUBLIC CHOICE 31 (2008).

recent events: in response to recent protests, Iran has taken the step of permitting women to join the cabinet.<sup>137</sup> Color revolutions “often take[] a long time to succeed, after many failed attempts, in the course of which opposition organizers, but also some of those in power, learn from their own mistakes and failures . . . .”<sup>138</sup>

For Habermas, discourse can avoid violence, at least under certain conditions: “[i]n this [ideal communication] community, the only available mechanism of self-organization is the instrument of discursive opinion and will-formation, and by using such means the community is supposed to be able to settle all conflicts without violence.”<sup>139</sup> Perhaps discourse can even prevent the blood that often attends revolution. One can imagine a Gandhian blogger, penning tracts urging peaceful resistance.<sup>140</sup>

Because media is essential to democracy, we should encourage new media companies based in liberal countries to engage citizens of repressive regimes directly. New media democratizes speech in a way that ultimately promotes democracy itself, at least as long as the media is not hijacked to become part of the state censorship and surveillance apparatus.<sup>141</sup> That, of course, is a big condition, to which we now turn.

### III.

#### LEGISLATING CORPORATE MORALITY ABROAD

Even if we find an obligation on the part of corporations to act ethically in their extraterritorial activities, should that obligation be turned into law? It is possible that American companies bear an ethical obligation to pay a living wage, avoid pollution, and promote racial and gender equality wherever they operate. Yet, we do not see repeated efforts to legislate such obligations. How then can we explain the efforts during the last few years to pass a statute imposing obligations on Internet service providers abroad? The final two Parts of the Article seek to explore this puzzle.

There are two principal precedents for moral regulation of American companies abroad: the Foreign Corrupt Practices Act of 1977 (FCPA) and the Anti-Apartheid Act of 1986. A review of these two examples is instructive, both as to what led Congress to intervene in extraterritorial corporate behavior and as to the mechanisms for such intervention. I first consider the debates

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137. Najmeh Bozorgmehr, *Iran to Let Women Join Cabinet*, FIN. TIMES, Aug.17, 2009, at 5.

138. Ash, *supra* note 92, at 21.

139. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 323 (William Rehg trans., 2d prt. 1996).

140. This is not entirely Panglossian: note the Gandhian message in recent Iranian dissident activity. *See supra* note 64 and accompanying text.

141. *Cf.* MANUEL CASTELLS, THE POWER OF IDENTITY 341 (2d ed. 2004) (arguing that new media technologies enable citizens to “enhance their control over the state”).

leading to the passage of the Anti-Apartheid Act. I then step back a decade earlier to the concerns that prompted the passage of the FCPA.

We can distinguish these two Congressional efforts to regulate extraterritorial behavior of corporations from some other extraterritorial extensions of U.S. law based on the class of persons they are designed to protect. After the Supreme Court held that Title VII protections against discrimination for employees in the workplace did not extend to foreign workplaces of American corporations,<sup>142</sup> Congress amended Title VII to extend such protections abroad—but only to American citizens.<sup>143</sup> Both the FCPA and the Anti-Apartheid Act, on the other hand, regulate the treatment of foreign citizens.

#### *A. The Anti-Apartheid Model*

In 1986, after years of official “constructive engagement” by the U.S. government, the House of Representatives voted to require American companies to divest entirely from South Africa. The House had sickened of any engagement, preferring to abandon the country entirely on the theory that any presence equaled complicity with Apartheid. The Senate, however, insisted that an American corporate presence had positive possibilities. The Senate proposed requiring that U.S. companies operate in South Africa only in accordance with the human rights principles set forth by the Reverend Leon Sullivan, an American anti-Apartheid activist who served on the General Motors Board of Directors. The Sullivan Principles obliged American corporations to counter the central tenets of Apartheid by (1) refusing to treat black persons as inferior and (2) training and promoting black persons and other persons of color.<sup>144</sup> An estimate at the time suggested that only sixty-five percent of American

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142. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

143. 42 U.S.C. § 2000e(f) (2006) (defining covered “employee” as including, “[w]ith respect to employment in a foreign country, . . . an individual who is a citizen of the United States”).

144. At the time Congress acted, the Sullivan Principles consisted in the following:

1. Nonsegregation of the races in all eating, comfort, and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of blacks and other nonwhites in management and supervisory positions.
6. Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.
7. Working to eliminate laws and customs that impede social, economic, and political justice.

FRANCIS NJUBI NESBITT, RACE FOR SANCTIONS: AFRICAN AMERICANS AGAINST APARTHEID, 1946–1994 187 n.85 (2004).



companies had voluntarily adopted the Sullivan code.<sup>145</sup> Many in Congress believed that American corporations, by remaining engaged, might improve the lot of non-white South Africans. One Senator expressed the worry that requiring American corporations to depart would only leave foreign businesses with fewer moral qualms to substitute.<sup>146</sup> Call this the problem of the “Amoral Rival,” a problem to which we return later. Some observed that American companies had campaigned for civil rights in South Africa, supported educational programs, criticized police actions, advocated housing integration, and donated millions for housing, educational and employment programs there.<sup>147</sup> Relenting on its earlier demand for disengagement, the House passed the Senate version of the bill,<sup>148</sup> only to be met by a Presidential veto. Both Houses then overrode President Reagan’s veto.<sup>149</sup>

Moral outrage at Apartheid clearly drove Congress; indeed, condemnation of Apartheid appears on nearly every page of the legislative history.<sup>150</sup> At the same time, Congress saw strong anti-Apartheid measures as important for long-term relations with a post-transformation South Africa. By 1986, it had become increasingly clear that “the days of apartheid in South Africa [we]re numbered.”<sup>151</sup> Congress wanted to ensure that the new South African government would prove an ally. Senator George Mitchell warned, “Make no mistake about it: Change is coming to South Africa. . . . And when the new order arrives . . . what will we want said about our own role in this process?”<sup>152</sup> Some feared that, absent U.S. action, a new government would turn to the

145. 132 Cong. Rec. 21,572 (1986) (statement of Helen Suzman).

146. 132 Cong. Rec. 21,546 (1986) (doubting that foreign corporations “will have the concern for the standard of life of those black citizens of South Africa that we have had as Americans”); *see also id.* at 21,572 (praising those American corporations that have remained in South Africa despite Apartheid).

147. 132 Cong. Rec. 14,234 (1986); *see also id.* at 14,248; *id.* at 14,272.

148. 132 Cong. Rec. 23,153 (1986).

149. Veto Message from President Ronald Reagan (Sept. 26, 1986), *reprinted in* 132 Cong. Rec. 27,076–77 (1986); 132 Cong. Rec. 27,101 (1986) (House override); 132 Cong. Rec. 27,859 (1986) (Senate override).

150. *See, e.g.,* 132 Cong. Rec. 14,277 (1986) (“[W]e must make the statement, we must cleanse ourselves in this country, and we must assert our role in the international community as a nation committed to the dignity of people, to freedom of human beings, to the concept of human rights; not as an abstract idea but as a reality.”); *id.* at 21,472 (“We must take action that will put meaningful pressure on the South African Government and also make it clear to South African blacks that we are on their side.”); *id.* at 21,823 (“[T]he Senate must act in a clear and unmistakable way to express the outrage of the American people at the continuation of apartheid.”).

151. 132 Cong. Rec. 14,285 (1986).

152. 132 Cong. Rec. 21,852 (1986); *see also id.* at 14,250 (“Eventually apartheid will collapse. If we are perceived to be on the wrong side we will have little or no influence with the new majority government in that country. The consequences of that would be grave.”); *id.* at 21,477 (“For once, let’s be on the ‘right’ side.”); *id.* at 21,589 (“One day, the blacks will rule in South Africa, and they will look back and ask where the United States stood at this time when we were tested.”); *id.* at 23,146 (“[W]hat this bill will do is to make it clear that the United States is on the side of change rather than the status quo.”).

Soviet Union, which had long supported the anti-Apartheid African National Congress.<sup>153</sup> It would be far better to be on the right side of history.

The legislative history thus reveals that Congress was driven by both moral condemnation of Apartheid and a desire to maintain a long-term American relationship with the people of South Africa, if not the government then in power.

### *B. The Anti-Corruption Model*

A decade earlier, the Watergate imbroglio caused Americans to reexamine not only government but also the corporate sector. A Securities and Exchange Commission investigation revealed that “[i]t was largely corporate funds, laundered in foreign countries and returned to the U.S. in black satchels, that financed the Watergate break-in and the subsequent illegal payoffs to cover it up.”<sup>154</sup> Congress began a series of hearings, and discovered that some 400 U.S. corporations, including more than a hundred of the Fortune 500 companies, had paid over \$300 million in bribes to foreign officials.<sup>155</sup> Congress was concerned that the disclosure of corrupt payments would interfere with diplomatic relations and destabilize other countries. Senator William Proxmire noted, “Bribery brought down a friendly government in Japan, nearly brought down the monarchy in the Netherlands and complicated our relationships with Italy, a key NATO ally in the Mediterranean.”<sup>156</sup> With FCPA, Congress asserted its authority to prevent corporate interference with its diplomatic goals.

The morality of bribery was also very much on the mind of Congress. Representative Eckhardt noted “a clear consensus that foreign bribery is a

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153. See, e.g., 132 Cong. Rec. 14,229 (1986); *id.* at 14,290. In arguing against the bill, Senator Helms sought to show that the African National Congress leaders were Communist-sympathizers. S. COMM. ON FOREIGN RELATIONS, SETTING U.S. POLICY TOWARD APARTHEID, S. Rep. No. 99-370, at 23-47 (1986).

154. Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES MAG., Oct 5, 1975, at 19.

155. 123 Cong. Rec. 36,304 (1977). Some even called the scandal involving Lockheed Aircraft Corporation’s payment of \$24.4 million in bribes “the corporate Watergate.” Robert M. Smith, *Corporate Bribery Files: The Latest in Diplomatic Secrets*, N.Y. TIMES, Mar. 21, 1976, at § 4, p. 6.

156. Senator William Proxmire, *Letters to the Editor: Bribery Law Must Be Enforced*, WALL ST. J., Oct. 30, 1978, at 25; see also FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, S. REP. NO. 95-114, at 3 (1977) (summarizing bill intended to criminalize corporate bribery of foreign officials); UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 95-640, at 5 (1977) (“[I]n 1976, the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhad of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received \$1 million in pay-offs from Lockheed. In Italy, alleged payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian Government eroded public support for that Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.”); 123 Cong. Rec. 36,304 (1977); *id.* at 38,599.

reprehensible activity.”<sup>157</sup> Although outside commentators argued that bribes are merely a different way of doing business in a different system,<sup>158</sup> members of Congress condemned bribery as immoral. Representative Luken, for example, declared, “[T]he payment of foreign bribes runs counter to the moral expectations and values of this country.”<sup>159</sup>

Congress also took the view that bribery is “bad business.” The House Committee Report concluded:

[N]ot only is [bribery] unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency.<sup>160</sup>

Corrupt payments presented a collective action problem: no company desired to be the only one not paying bribes, letting its bribe-paying competitors steal a march. A statute barring all corporations (or at least those that could be reached by the regulation) from paying bribes would solve this collective action problem.

At least one Congress member also noted that “[c]orporate bribery undermines the free market system”<sup>161</sup> and distorts domestic markets, because it gives corporations that use bribery overseas an advantage over corporations that do not use bribery overseas—either because they refuse to use bribery or because they do not operate overseas.<sup>162</sup> Others noted that a legal ban could encourage the rejection of demands for bribes. As the former Chairman of Gulf Oil Company testified before Congress: “If we could cite our law which says we just may not [give bribes], we would be in a better position to resist these pressures and refuse those requests.”<sup>163</sup>

To extend the reach of the law as broadly as possible, Congress piggybacked the FCPA on the federal securities laws, which govern all corporations, both domestic and foreign, that raise capital in U.S. public markets. At the time of passage, some expressed hope that the Act could serve

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157. 123 Cong. Rec. 36,304 (1977).

158. See, e.g., Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES, Oct 5, 1975, at 19 (referring to bribery as a “traditional way of doing business abroad”).

159. 123 Cong. Rec. 36,306 (1977); see also *Carter Approves Bill on Corporate Bribes*, N.Y. TIMES, Dec. 21, 1977, at 79 (quoting President Carter as saying: “I share Congress’ belief that bribery is ethically repugnant and competitively unnecessary.”).

160. H.R. Rep. No. 95-640, at 4–5.

161. 123 Cong. Rec. 38,600 (1977).

162. See 123 Cong. Rec. 38,600 (1977).

163. 123 Cong. Rec. 36,304 (1977); see also *The Crime of Bribery*, N.Y. TIMES, Aug. 5, 1976, at 30 (describing an article by Theodore C. Sorenson arguing that business people would welcome a prohibition on bribery).

as a model for other countries or as the basis for multilateral agreements.<sup>164</sup>

The FCPA served three primary goals: it furthered Congress's *moral* interest in condemning corruption; it furthered the country's *diplomatic* interest in maintaining a good reputation and friendly relationships with allies; and it furthered a *business* interest in protecting a free enterprise system and seeking to ameliorate a collective action problem.

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With these examples of historical interventions regulating the extraterritorial behavior of corporations vis-à-vis foreigners and with a theory of corporate social obligation for new media enterprises abroad, we turn to sketching a model for regulating new media as it extends its reach across the globe.

#### IV.

##### TOWARDS GLOBAL MEDIA FREEDOM

If corporations have social obligations, what can we do to promote the likelihood that new media will fulfill these obligations? What can we do to promote "Googling freedom" around the world? More specifically, how can we minimize American corporate complicity in state censorship and surveillance against political dissidents?

Two principal approaches have been assayed in recent years. The first is a statutory proposal, the Global Online Freedom Act, which Congress has debated over the last few years.<sup>165</sup> The second is a private initiative, the Global Network Initiative, which proponents launched in the fall of 2008. I assess these alternatives before sketching a third. None of the approaches below, including mine, is entirely satisfactory. Each struggles to balance the social responsibilities of new media with respect for state sovereignty and the specter of the "Amoral Rival," eager to step in to gain market share when a more responsible party hesitates.

##### *A. Public: Global Online Freedom Act*

The Global Online Freedom Act would impose strict obligations on American corporations to refuse to store personally identifiable information in countries designated as "Internet-restricting" by the U.S. State Department and to turn over personal information to a repressive government only for

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164. 123 Cong. Rec. 38,601 (1977) (Senator Williams stated that the FCPA "sets the ground rules for unilateral and multilateral agreements. . . . Once this bill is law, the U.S. Government will be in a position to argue forcefully, with integrity and credibility, for bilateral and multilateral agreements.").

165. Global Online Freedom Act ("GOFA"), H.R. 2271, 111th Cong., §§ 201–204 (1st Sess. 2009); Joanne Leedom-Ackerman, *The Intensifying Battle over Internet Freedom*, CHRISTIAN SCI. MONITOR, Feb. 24, 2009, at 9, available at <http://www.csmonitor.com/2009/0224/p09s01-coop.html>.

“legitimate [foreign] law enforcement purposes” as determined by the U.S. Department of Justice.<sup>166</sup> Under the heading of “transparency,” the Act would also require search engines and content-hosting companies to report what is being censored to the U.S. State Department.<sup>167</sup> The Act would impose civil penalties of up to two million dollars for corporations, and authorize criminal penalties of up to five years in prison.<sup>168</sup>

I note here three principal objections to the Act. First, by directing the reporting obligations to the U.S. government, rather than to the people of the repressive state, the Act effectively turns new media companies from spies for China to spies for the United States. Second, because of the criminal and civil penalties of the Act, a company that violates the terms faces serious risks at home; because of these risks, many companies may choose to abandon the repressive state entirely.<sup>169</sup> Third, if U.S. corporations do choose to abandon repressive states, this abandonment will leave a hole for other companies, both indigenous and foreign, to fill; such companies may evince less concern for human rights than their departing U.S. competitors. I consider this problem—what I call the “Amoral Rival”—in the last Section below.

#### *B. Private: Global Network Initiative*

Working with human rights organizations and other civil society groups, three new media companies—Google, Microsoft, and Yahoo—have announced a shared set of voluntary principles that are to govern their response to government pressures that may infringe on the freedom of expression or privacy.<sup>170</sup> Rather than requiring companies to withdraw from repressive states, the Global Network Initiative permits companies to remain as long as they have procedures in place to protect freedom of expression and privacy, including

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166. GOFA §§ 201–202. As the Center for Democracy and Technology notes, however, the reference to “personally identifiable information” may exclude personal information in the content of emails or personal information stored statically. CENTER FOR DEMOCRACY AND TECHNOLOGY, ANALYSIS OF THE GLOBAL ONLINE FREEDOM ACT OF 2008 [H.R. 275], 5 n.9 (2008) [hereinafter CDT, ANALYSIS OF GOFA], available at <http://www.cdt.org/international/censorship/20080505gofa.pdf>.

167. GOFA, §§ 203–204.

168. *Id.* § 206. The President can waive the application of these provisions with respect to any business or country. *Id.* § 207.

169. The Center for Democracy and Technology notes its

fear that any mandate to U.S. companies to store data outside of Internet restricting countries will simply provoke those countries to retaliate by requiring companies to store personal information about local users on servers located within their borders, thereby placing the companies in the untenable situation of having to comply with conflicting laws of the U.S. and such host countries.

CDT, ANALYSIS OF GOFA, *supra* note 166, at 4.

170. *Diverse Coalition Launches New Effort to Respond to Government Censorship and Threats to Privacy*, GLOBAL NETWORK INITIATIVE (Oct. 28, 2008), [http://www.globalnetworkinitiative.org/newsandevents/Diverse\\_Coalition\\_Launches\\_New\\_Effort\\_To\\_Respond\\_to\\_Government\\_Censorship\\_and\\_Threats\\_to\\_Privacy.php](http://www.globalnetworkinitiative.org/newsandevents/Diverse_Coalition_Launches_New_Effort_To_Respond_to_Government_Censorship_and_Threats_to_Privacy.php).

human rights impact assessments of their operations around the world. The Initiative also commits its signatories to independent reviews of firm practices related to privacy. However, what the Initiative requires in practice remains to be seen. The Initiative's principles declare it a work in progress, and experience will likely require change.

The Initiative is subject to at least four principal critiques.<sup>171</sup> First, because of its voluntary nature, a large number of companies may remain outside its purview.<sup>172</sup> Even those who did commit to the Initiative could fall short of its obligations and would be subject only to the social sanction of "naming and shaming."<sup>173</sup> Second, "I'm sorry but I've signed on to a set of principles" is hardly an excuse likely to prove effective when a company is forced to defend against a repressive government order. Third, a voluntary arrangement will not stand against a legal requirement—even in the new media company's home country. Finally, the private initiative lacks the legal sanctions available to enforce a statutory obligation.<sup>174</sup>

### C. Public-Private: Global Media Freedom Act

Writing about how peoples should treat each other, John Rawls observes: "[T]here is no easy recipe for helping a burdened society to change its political culture."<sup>175</sup> Even accepting my argument that new media have special responsibilities in unfree societies, a failsafe method of ensuring that companies live up to their obligations remains elusive. Indeed, state intervention to enforce such obligations introduces two difficulties that some might find insurmountable: (1) the problem of the Amoral Rival—the company, either domestic or foreign, lacking any moral compunctions about either censorship or surveillance; and (2) the allegation leveled by authoritarian regimes that domestic dissidents are merely stooges of a foreign power.

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171. For an additional set of critiques, see Maclay, *supra* note 124, at 101–02 (noting arguments that the Initiative does not require companies to develop technologies of dissent, that it does not cover sufficient ground, and that it permits too much room for interpretation).

172. More than a year after its launch, only a handful of corporations have signed on. See *Participants*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/participants/index.php> (last visited Jan. 8, 2011).

173. Such a failure might well result from pressures for profit. Speaking of the media corporations of the twentieth century, Owen Fiss argues for state regulation on the ground that press "[o]wners will seek to maximize profits," and the state might then serve to "counteract those constraints placed on the press by the market." OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 143–44 (1996).

174. Morton Sklar, executive director for the World Organization for Human Rights USA, complains of the Initiative: "It is very little more than a broad statement of support for a general principle without any concrete backup mechanism to ensure that the guidelines will be followed." Miguel Helft & John Markoff, *Big Tech Companies Back Global Plan to Shield Online Speech*, N.Y. TIMES, Oct. 28, 2008, at B8.

175. JOHN RAWLS, *THE LAW OF PEOPLES* 110 (1999).

Despite these difficulties, the challenges of a laissez-faire approach may be even greater than the challenges created by state intervention. The Global Network Initiative is certainly a laudable and serious private effort to meet the responsibilities of new media. Yet, as described above, a private approach lacks some of the virtues of law. First, as with the Sullivan Principles before they were enshrined into U.S. law,<sup>176</sup> many U.S. corporations are likely to remain outside the Global Network Initiative absent a legal mandate. Facebook, one of the principal tools of dissenters around the world,<sup>177</sup> has offered no commitment as yet, and even two years into the Initiative's work, only three new media companies are members. Second, voluntary guidelines must yield to legal obligations, both abroad and at home. A Global Media Freedom Act—giving the Initiative principles the force of law—might allow corporations to stave off repressive requests by arguing that honoring those requests could place the corporation in legal jeopardy at home.<sup>178</sup>

What might a Global Media Freedom Act learn from earlier efforts to regulate morality abroad? Neither the anti-Apartheid legislation nor the FCPA is on all fours. When Congress passed the anti-Apartheid statute, business with Apartheid South Africa represented a small fraction of U.S. foreign business as a whole, and thus the threat of its loss would have had little impact on the economy generally; China, in contrast, is one of the world's leading export markets and matters a great deal to the U.S. economy.<sup>179</sup> Furthermore, under Apartheid, corporations had some freedom to educate, employ or promote according to their internal views—quite unlike the conditions in information-repressive states that mandate censorship and surveillance. With respect to the FCPA, there is likely to be agreement between home and host country about the immorality and illegality of corruption; this is unlike censorship and surveillance, about which home and host countries are likely to differ.

Still, both historical examples of regulation of offshore corporate behavior

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176. See *supra* note 145 and accompanying text.

177. See *supra* note 5 and accompanying text.

178. For this rationale in the context of corruption, see *supra* note 163 and accompanying text. This might also have an impact as these companies defend themselves in the United States. Consider the question at the heart of the American cases in the Yahoo–France dispute, a question still to be decided: Can an American court enforce a foreign order that would curtail the speech of the American company only with respect to that foreign country? Judge William Fletcher of the Ninth Circuit described the “extent of First Amendment protection of speech accessible solely by those outside the United States” as “a difficult and, to some degree, unresolved issue.” *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199, 1217 (9th Cir. 2006). Judge Fletcher hints here that the U.S. Constitution may not bar the suppression of speech directed outside American borders. However, if U.S. courts confine the First Amendment’s reach to recipients within American borders, then the United States may not be a safe haven for foreign information. It may then even be possible to enforce a foreign information repression order in the United States.

179. Many repressive regimes, however, do not offer a huge market for new media enterprises. In these smaller economies, new media enterprises have less reason to yield to local demands.

hold valuable lessons. A Global Media Freedom Act could borrow a central feature of the Anti-Apartheid Act—the enactment into law of a privately developed code of conduct. But why should we give such private principles the force of law? While we may occasionally seek to legislate professional or business ethics, this is certainly an important motivation for the anti-Apartheid and anti-corruption statutes, Congress should enter the arena because of foreign policy concerns—specifically the desire to promote democracy around the world.

But does national legislation then not create a new problem: Will citizens of repressive states perceive new media enterprises as agents of foreign powers? Worse, repressive states might cast local dissidents as stooges of the United States. Indeed, the Iranian government has blamed “[i]nterventionist countries” for fomenting the recent public demonstrations.<sup>180</sup> But we need not require the covered corporations to report their censorship or surveillance to the U.S. government—in contrast to the Global Online Freedom Act. More fundamentally, the Initiative principles require compliance with *international* human rights norms of freedom of expression.<sup>181</sup> These norms do not reflect Western imposition, but are founded on international legal principles.

While these principles generally place obligations on governments, not corporations or individuals, private parties can be in breach if they aid and abet government violations.<sup>182</sup> These international legal principles also help distinguish political repression from government censorship of public morals and ordinary police surveillance.<sup>183</sup> The Universal Declaration of Human Rights permits incursions upon the freedom of expression to secure “morality, public order and the general welfare in a *democratic* society.”<sup>184</sup> Thus, governments cannot silence speech on the trumped up grounds of “public

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180. *Iran Blames Foreign Countries for Protester Deaths*, USA TODAY (Jul. 31, 2009, 5:44 AM), [http://www.usatoday.com/news/world/2009-07-31-iran-protester-deaths\\_N.htm](http://www.usatoday.com/news/world/2009-07-31-iran-protester-deaths_N.htm).

181. The Initiative cites specifically the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. For a defense of these concepts as universal, not Western, see Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1989).

182. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188–89 (2d Cir. 2009) (holding that drug company can be liable for international law violation in drug testing if the company acted in concert with the government); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (imposing aiding and abetting liability under the Alien Tort Statute only where defendant purposefully assisted violation of international law); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (permitting suit against U.S. and European corporations for aiding and abetting Apartheid).

183. For a metric offered to distinguish permissible from impermissible censorship based not on international legal standards but rather on a process-based account, see Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377 (2009) (arguing for greater legitimacy of censorship based on degree of openness, transparency, narrowness, and accountability).

184. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 29(2) (Dec. 10, 1948) (emphasis added).



order” when doing so would undermine a “democratic society.”

Two other virtues of the Global Network Initiative principles make them a useful basis for legislative action. First, the Initiative recognizes that the principal burden of protecting political rights online will lie with companies themselves. After all, companies can silently hand over information to authoritarian governments without anyone the wiser. Even the dissident rounded up as a result would have only suspicion, not proof, of who gave him or her up. The Initiative encourages accountability by requiring companies to both establish internal compliance procedures—including whistleblower systems—and utilize outside auditors. Second, the Initiative requires corporations to “use best efforts to ensure that business partners, investments, suppliers, distributors and other relevant related parties follow these Principles.”<sup>185</sup> Given that Yahoo retreated from China by simply transferring its assets into a joint venture in which it was a minority partner, it seems important to seek to reach beyond even majority-owned subsidiaries. The FCPA follows a similar rule, holding companies liable for the actions of their agents.<sup>186</sup> We should not permit companies to abet repression simply by outsourcing it.

The approaches arrayed here do not seek to force American new media companies to withdraw entirely from repressive states. Because of the Amoral Rival problem, forcing companies from liberal states to quit repressive regimes may undermine the cause of freedom. Google, for one, insists that its practices are better for human rights than its rivals’: “In China, we believe we are the least-filtered, most transparent search engine available.”<sup>187</sup> Indeed, it seems likely that indigenous competitors will have the least capacity to avoid repressive demands.<sup>188</sup> It is useful to keep in mind that by their nature, censorship regimes are characterized by what we might call “leakiness” and “evadability,” the more so the less zealous the company effectuating the censoring. Leakiness refers to the imperfection of censorship, especially the automated censorship often necessitated by the sheer volume of data provided by the Internet. Evadability refers to the ability of individuals to use technical means to elude the restrictions—of course to capitalize on evadability, individuals must have technological savvy or access to tools provided by

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185. *Principles, Responsible Company Decision Making*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/principles/index.php#20> (last visited Jan. 8, 2011).

186. 15 U.S.C. §§ 78dd-1(a), 78dd-2 (2006).

187. Global Internet Freedom: Corporate Responsibility and the Rule of Law: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2008) (testimony of Nicole Wong), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?id=3369&wit\\_id=7183](http://judiciary.senate.gov/hearings/testimony.cfm?id=3369&wit_id=7183).

188. *See, e.g.,* Eva Woo, *Baidu’s Censored Answer to Wikipedia*, BUS. WK., Nov. 13, 2007, at 19 (“[T]he case of Baidu Baiken shows that if American companies don’t work with Chinese censors, there are plenty of other companies that will.”). There is variation in censorship practices even among domestic media enterprises. Rebecca MacKinnon, *China’s Censorship 2.0: How Companies Censor Bloggers*, FIRST MONDAY (Feb. 2, 2009), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2378/2089>.

others. Leakiness and evadability suggest that rather than force American new media enterprises to abandon territories at the slightest provocation, the better policy would be to equip such companies with the tools to resist repressive demands as much as possible.

Despite repeated attempts over the last few years, Congress has failed to pass any regulation of new media's censorship and surveillance. This failure may be in part because the bills currently under consideration have substantial counterproductive defects—such as the requirement that U.S.-regulated corporations serve as spies for the U.S. government.<sup>189</sup> A Global Media Freedom Act might offer two key incentives likely to increase corporate support. First, if states and localities began testing their procurement decisions based on the extraterritorial speech and privacy actions of new media companies, a federal law could potentially preempt such actions. A corporate preference for the simplicity of a single regulatory regime might induce support for a single federal rule.<sup>190</sup> A second possibility is that such an Act might offer a safe harbor from Alien Torts Statute claims. As described above, Yahoo has previously settled one such claim arising out of its actions in China.<sup>191</sup> The prospect of other similar suits might prompt support for a statute that reduces such exposure.

The problem of the Amoral Rival may not prove entirely intractable. First, using the anti-corruption regime as a model, we might seek to internationalize a commitment to media freedom among liberal states. After passing the FCPA, the United States convinced Organization for Economic Co-Operation and Development (OECD) states to adopt similar measures in their domestic laws.<sup>192</sup> The regime leverages the jurisdictional reach of the U.S. securities laws to cover companies that raise capital through registered offerings.<sup>193</sup> There is indeed a securities law nexus in such activity; after all, the exposure of Yahoo's participation in Chinese repression posed a substantial public relations problem for the company and led the company's CEO to bow down before

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189. See *supra* notes 166–169 and accompanying text.

190. The Apartheid era offers an interesting contrast. The Anti-Apartheid Act was passed in the wake of some thirty-six municipal ordinances that blocked, in whole or in part, municipalities from doing business with firms that failed to abide by varying anti-Apartheid constraints. David D. Caron, *The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances*, 21 BERKELEY J. INT'L L. 159, 162–64 (2003). Yet, it did not preempt these municipal ordinances. Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L. J. 443, 491–92 (1998).

191. See *supra* note 117 and accompanying text.

192. Consider the \$1.6 billion fine paid by the German conglomerate Siemens to the German and American authorities for bribery across the globe. Siri Schubert & T. Christian Miller, *Where Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 21, 2008, at B1.

193. The Global Online Freedom Act borrows the FCPA's extension to corporations raising capital in the public markets through SEC-registered offerings. Global Online Freedom Act of 2009, H.R. 2271, 111th Cong. § 3(16)(B) (1st Sess. 2009).

family members of a jailed Chinese dissident—all with potential material adverse impact on the company’s fortunes.<sup>194</sup>

Second, it might be that the indigenous alternatives are not as attractive as might initially appear. Producing a search engine for the world’s information is enormously expensive. Indeed, Google’s threat to leave China has led to concerns within China. “If Google leaves, I will be blind, and our country will be blind,” one scholar warns.<sup>195</sup> One young Chinese engineering student worries about the loss of Google Scholar, which she uses to find academic papers in polymer science—she also uses Google to find videos of the television show *Desperate Housewives*.<sup>196</sup> By insisting that all American companies form a united front against political repression, it might be harder for repressive countries to play one company against another. In China, for example, while Yahoo stood “aligned” with Google in confronting Chinese repression in January 2010, Microsoft declared that it would “respect the laws of China.”<sup>197</sup>

The securities law model also suggests an additional requirement for a successful media freedom strategy: disclosure. Companies must be required to be transparent in their censorship and surveillance. As we have noted, the Global Online Freedom Act demands “transparency”—but in the service of the U.S. government, which is to receive notice of all foreign demands, not in the service of Internet users.<sup>198</sup> True transparency would require notice of censorship to users—as is currently the practice of search engines such as Google—and notice of surveillance, including detailed information of the number and type of requests for information.

Liberal states can also fund the development and distribution of technologies of dissent. While many private parties have been developing such services on a pro bono basis, the cat-and-mouse technological struggle between the dissident and the state will require continued investment. Moreover, it may not be clear to someone in a repressive state that software downloaded to evade the government does not in fact carry malware, such as spyware. Criminals can offer third-party interfaces that purport to make one’s Internet activities anonymous, all the while learning information that might allow them to steal

194. *Yahoo Criticized in Case of Jailed Dissident*, N.Y. TIMES, Nov. 7, 2007, at C3.

195. Kristine Kwok & Stephen Chen, *Fears That Life Without Google ‘Will Leave the Mainland Blind’*, S. CHINA MORNING POST, Jan. 15, 2010, at 6 (quoting Wang Zheng, a senior researcher at the Chinese Academy of Sciences’ Institute of Policy and Management).

196. Sharon LaFraniere, *China at Odds with Future in Internet Fight*, N.Y. TIMES, Jan. 17, 2010, at A12.

197. Hibah Yousuf, *Yahoo Sides with Google over China Cyber Attack*, CNN MONEY (Jan. 13, 2010, 1:35 PM ET), [http://money.cnn.com/2010/01/13/technology/Yahoo\\_Google\\_China/?postversion=2010011313](http://money.cnn.com/2010/01/13/technology/Yahoo_Google_China/?postversion=2010011313); Steve Ballmer, *Microsoft & Internet Freedom*, THE OFFICIAL MICROSOFT BLOG (Jan. 27, 2010, 3:01 PM), [http://blogs.technet.com/microsoft\\_blog/archive/2010/01/27/microsoft-internet-freedom.aspx](http://blogs.technet.com/microsoft_blog/archive/2010/01/27/microsoft-internet-freedom.aspx).

198. *See supra* notes 167–169 and accompanying text.

financial and other important information from users. Government funding of technologies of dissent should promote the identification and development of trustworthy software, preferably through international civil society collaborations.

#### CONCLUSION

The freedom of the press distinguishes free societies from unfree ones. Today, the Internet can serve as an underground newspaper for unfree societies, a printing house whose operators might lie beyond the authorities' reach. Recognizing this development, repressive governments have increasingly targeted online dissenters. Half of all media workers jailed worldwide are "bloggers, Web-based reporters, and online editors."<sup>199</sup> China, Cuba, and Burma are the worst offenders. As Joel Simon of the Committee to Protect Journalists observes, "The image of the solitary blogger working at home in pajamas may be appealing, but when the knock comes on the door they are alone and vulnerable."<sup>200</sup> Vietnamese dissident Tran Anh Kim, age sixty, is charged with the capital offense of "working to overthrow the state" based on his membership in outlawed political organizations and for publishing pro-democracy articles on the Internet.<sup>201</sup>

Will Iranian and Pakistani blasphemy law, Thai *lèse-majesté* law,<sup>202</sup> and Chinese state subversion law destroy the freedom-enhancing properties of cyberspace? History's most important platform for communication might turn out to be the zone most restrictive of free speech, with dissident speech frequently followed by an ominous knock on the door. Rather than the tumult of Speaker's Corner, we might have the enforced quiet of Tiananmen Square—after the tanks.

But there is reason to be hopeful. Protests today are organized via electronic media, and they are not confined to liberal states.<sup>203</sup> Social networking technology is being used in Iran to support the "One Million

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199. *CPJ's 2009 Prison Census: Freelance Journalists Under Fire*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 8, 2009), <http://cpj.org/reports/2009/12/freelance-journalists-in-prison-cpj-2009-census.php>.

200. *CPJ's 2008 Prison Census: Online and in Jail*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 4, 2008), <http://www.cpj.org/imprisoned/cpjs-2008-census-online-journalists-now-jailed-mor.php>.

201. Seth Mydans & Mark McDonald, *Vietnam Sentences a Dissident to 5 Years in Prison as Part of a Crackdown*, N.Y. TIMES (Dec. 28, 2009), <http://www.nytimes.com/2009/12/29/world/asia/29viet.html>.

202. James Hookway, *In Thailand, Insulting the King Can Mean 15 Years in Jail*, WALL ST. J., Oct. 16, 2008, at A1.

203. In Egypt, social networking sites were used to disseminate photos of the mangled face of Khaled Saied, leading to excessive force charges against the police. Amro Hassan, *EGYPT: Police Accused of Beating Khaled Saied to Death Appear in Court*, L.A. TIMES (July 27, 2010, 8:55 AM), <http://latimesblogs.latimes.com/babylonbeyond/2010/07/egypt-trial-for-cops-accused-of-torture-commences.html>.

Signatures” campaign against gender apartheid.<sup>204</sup> As this article goes to press, Facebook, Twitter, and other social media—along with other sources such as the Al Jazeera television news service—helped topple two autocrats, one in Tunisia and the other in Egypt.<sup>205</sup> Peaceful revolutions measured in days, informed and organized in part by the Internet, felled these rulers, who had held power for twenty-three and twenty-nine years, respectively.

In perhaps every country where there is political repression, there are brave bloggers who challenge the official narrative.

We in liberal states can do our part. The Norwegian Nobel Committee, for its part, has sought to highlight the problem of political dissidents by awarding the 2010 Peace Prize to Liu Xiaobo, imprisoned for helping author the Charter 08 manifesto, published on the Internet on the sixtieth anniversary of the United Nations’ Universal Declaration of Human Rights.<sup>206</sup> At the dawn of Enlightenment, “works ‘condemned by Italian censors sail[ed] to England to be printed.’”<sup>207</sup> In our own young century, Silicon Valley might yet turn out to be the dissident’s powerful partner for freedom.

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204. Change for Equality, <http://www.we-change.org/english/> (last visited 2/21/2011).

205. Mona Eltahawy, *Tunisia’s Jasmine Revolution*, WASH. POST, Jan. 15, 2011; *Cairo’s Facebook Flat*, N.Y. TIMES, Feb. 9, 2011, <http://video.nytimes.com/video/2011/02/08/world/middleeast/1248069622796/cairo-s-facebook-flat.html>.

206. Press Release, Norwegian Nobel Committee, The Nobel Peace Prize 2010 (Oct. 8, 2010), [http://nobelprize.org/nobel\\_prizes/peace/laureates/2010/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2010/press.html).

207. EISENSTEIN, *supra* note 6, at 665.

