TECHNOLOGIES OF PROTEST: INSURGENT SOCIAL MOVEMENTS AND THE FIRST AMENDMENT
IN THE ERA OF THE INTERNET

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INTRODUCTION

In each era of American history, distinctive forms of organization and communication have characterized insurgent social movements. Revolutionary agitation against Great Britain made use of committees of correspondence, boycotts, liberty poles, and pamphlets. Abolitionists published newspapers, wrote books, evolved networks of religious congregations, and developed the Underground Railroad. The labor movement wielded the strike, the paid organizer, the boycott, the “free speech fight,” and the mass rally, while the Civil Rights movement supplemented these tactics with civil disobedience and protest marches organized in large part through networks of African-American churches and chapters of the NAACP.

These repertoires of protest have been a function of tradition and social context, but specific technological developments—and here I...
use the term "technology" to include modes of organization as well as machinery—have spurred particular leaps in insurgent activity. The explosion of membership in the Ku Klux Klan during the 1920s was triggered by the adoption of a commission marketing scheme.\footnote{2} The portable phonograph made possible the Jehovah's Witnesses' campaigns of the 1930s; the radio underlay Father Coughlin's contemporaneous success in building a mass movement.\footnote{3} National television networks give force to the use of civil disobedience by the Civil Rights movement.\footnote{4} In the last generation, the availability of photocopying and desktop publishing allowed the developments of alternative "zines" and the associated "Riot Grit" movement, while computers, high-speed printers, and direct-mail technology facilitated the development of independent and bureaucratized single-issue advocacy organizations on both the Left and the Right.\footnote{5} The elimination of the Fairness Doc-

\footnote{2} See ROBERT A. GOLDBERG, CROSSBUTTS RESISTANCE: SOCIAL MOVEMENT IN TWENTIETH CENTURY AMERICA 87 (1991) (describing the commission marketing scheme of the Southern Publicity Association's contract with the Ku Klux Klan).

\footnote{3} See DOUGLAS v. CITY OF JEANNETTE, 319 U.S. 152, 167, 169 (1942) ("Each home was wired, a bell was rung or the door knocked upon, and the householder advised that the Witness had important information. If the householder would listen, a record was played on the phonograph."); SHERLOCK v. PENNSYLVANIA, 319 U.S. 105, 106 (1943) ("In connection with [their door-to-door solicitations], petitioners used a phonograph on which they played a record exhorting certain of their views on religion."); JONES v. OPELKA, 316 U.S. 304, 307 (1942) (describing the activity of a Jehovah's Witness who went door to door attempting to sell literature and "play a portable phonograph"); CAMPBELL v. CONSIDINE, 310 U.S. 256, 261 (1940) ("[T]he [Jehovah's Witnesses] were individually equipped with...a portable phonograph and a set of records.").

\footnote{4} See WILLIAM N. KAMNIS, THE STRATEGIES OF SOCIAL PROTEST 137 (2d ed. 1999) (citing Father Coughlin, "the radio priest," as "demonstrating[ ]the potential of electronic media by mobilizing a following for the National Union for Social Justice").

\footnote{5} See id. at 157 ("However well-intentioned expressionism has worked before 1945, the interaction of challenger strategy and media coverage made it ineffective against the civil rights movement...").

See JANIS, RESISTANCE & VIETNAM WAR RESISTANCE, FROM WILSON, 23 SIGNS 809, 811 (1988) ("[Z]ines have created a network of East Gerta..."; Judy Sarkies, Identity and Agency: East Gerta's Journals, ENDOCULTIVATION, Spring 1999, at https://www.santa.edu/links/endocultivation/2/2/1999/journals/ ["Zines are the ones that mesh the East Gerta movement together, for all members can write about their emotions, experiences, and critical social issues with a backdrop of safety and acceptancy."]

See JEN SACAIKIS, MOBILIZING RHEUMUS: CONSERVATIVE RESISTANCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISK HEATERS 43-45 (1999) (describing the effect of technology in developing direct-mail funding for right-wing mobilization); Pamela E. Oliver & Gerald Marissen, Mobilizing Technologies for Collective Action, in FRONTIERS IN SOCIAL MOVEMENT THEORY 241, 244 (Alison D. Metz & Carol Moseley Mulder eds., 1992) (describing the effect of the "computer revolution" on direct-mail techniques and the recruitment of "members" who give donations but expect to exercise little
ciate in 1987 allowed the evolution of politicized “talk radio” that has served as a network of right-wing mobilization.

Few prior elements of the American repertoire of protest have faded away (though liberty poles are rarely seen), last at the turn of the millennium, the Internet has clearly emerged as a dominant development in the technology of communications. This Article begins to explore the implications of this emergence for the repertoire of protest in the United States and the attendant First Amendment issues.

I. “POORLY FINANCED CAUSES OF LITTLE PEOPLE”

Before the advent of the Internet, A.J. Liebling famously observed that “[f]reedom of the press is guaranteed only to those who own

control over the organization(s).” Theda Skocpol, Advocate Without Members: The Pragmatic Transformation of American Civil Life, in CIVIL ENGAGEMENT IN AMERICAN DEMOCRACY 461, 493 (Theda Skocpol & Morris P. Fiorina eds., 1999) ("Pioneered by new right groups, direct-mail solicitation spread during the 1970s and 1980s [across the political spectrum].").

one."” Given the structure of twentieth-century communications media, established or well-financed contenders in the public arena came to the contest for authority with a built-in advantage: the cost of disseminating arguments or information to a broad audience threatened effectively to exclude outsiders from public debate. The repertories of protest, as they have developed in twentieth-century America, in large part have been keyed to the need to develop methods of organization and communication to reach the public without large capital expenditures. Picketing, leaflets, and rallies on public property allowed the labor movement to organize without relying on newspapers with hostile owners or expensive meeting halls; civil rights organizers used mass marches, boycotts, and sit-ins, all of which built on existing internal organization to reach an otherwise unavailable national audience.

The Supreme Court, at its most appealing, has been sensitive to this dynamic: in a series of cases, the Court has taken special pains to provide protection against government interference with mechanisms of communication that are, as Justice Black put it, "essential to the poorly financed causes of little people."” Citing the importance of these "historic weapons in the defense of liberty," the Court on occasion has protected the right to disseminate leaflets in public thoroughfares and door to door, the right to picket, the right of access

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1 See Herald v. City of Great Falls, 425 U.S. 619 (1976) (upholding the right to solicit house to house). In Lavelle v. City of Gaffney, 388 U.S. 444 (1968), the Court allowed the distribution of leaflets without a city permit and noted: "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others are in our own history abundantly amply." Id. at 452; see also Scales v. Egan, 378 U.S. 181, 205 (1964) (quoting Lavelle in support of the exclusion of a newsletter from summary limitations); Jamison v. Texas, 318 U.S. 182 (1943) (striking down a law prohibiting the distribution of leaflets containing an advertisement for religious books); Schneider v. New Jersey, 308 U.S. 147, 155-56 (1939); (citing Lavelle and striking down municipal regulations limiting the distribution of leaflets in order to control litter).

A similar sensibility underlay the landmark holding protecting paid editorial advertisements from libel judgments.

[Another conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the propagation of information and ideas by persons who do not themselves have access to publishing facilities—those who wish to exercise their freedom of speech even though they are not members of the press.

to public property for rallies and demonstrations, the right to engage in politically based boycotts, the right to post signs on one’s own property, and the right to distribute anonymous literature.

15 See, e.g., Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (striking down a prohibition on posting near a place of business, which eliminated the only "practicable, effective, and inexpensive channels of communication by which the people are made aware of the issues and candidates who are to be confronted by their votes and the results of the ballot box.

16 See, e.g., Schenck v. Proctor, Newbry, 519 U.S. 387, 387 (1997). "Leafleting and communicating or disseminating matters of public concern are classic forms of speech that are at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a governmental example of a traditional public forum."

17 See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 1030 (1982), upholding the right to boycott and patrol inside boycottaries’ stores against a Sherman Act challenge.

18 See City of Lakwe v. Gilbo, 512 U.S. 44, 57 (1994), protecting evidentiary signs, which are "an essential and convenient form of communication," especially for persons of modest means or limited property.

19 See, e.g., McEnroe v. Ohio Elections Commission, 514 U.S. 354 (1995) (holding that the Four Amendments prevents the right to distribute campaign literature anonymously); Talley v. California, 362 U.S. 60, 67 (1960) (quoting Loomis)’s language describing pamphlets and leaflets as being "incendiary weapons in the defense of liberty" in support of the right to distribute anonymous pamphlets).

The recent events of Hurricane Katrina to justice Kennedy’s disbarment to Hill v. Colorado, 350 U.S. 705 (1955), Justice Kennedy quoted from Loomis, Schenck, and Caruso v. California, 310 U.S. 106 (1940), to support his contention that the Court has a long history of supporting "peaceful and useful" methods of protest, such as handing out pamphlets, picketing, displaying respiratory signs, distributing books and engaging in verbal communications like those prohibited by Colorado’s statute.

20 350 U.S. at 761-67.

Unfortunately, the refrain seems to occur even more often in disaster. See FTC v. Superior Court Trial Lawyers Ass’n, 495 U.S. 411, 451 (1990) (Blackmun, J., dissenting) ("Expensive boycotts are inevitable as a means of communication. Because they are essential to the ‘proper functioning of the courts.’") In no accident that boycotts have been used by the American colonists to throw off the British yoke and be the puppets to insert their civil rights. (citation omitted); Costello v. NCAA of Legal Football, Inc., 211 U.S. 661, (1914) (Blackmun, J., dissenting) ("Access to government property permits the use of the low-cost means of communication as ‘essential to the proper functioning of the courts.’") (citation omitted); Clark v. Cloud, 300 U.S. 398, 514, 514 (1938) (Blackmun, J., dissenting) (noting that "[t]he boycotts lack the financial means necessary to buy access to lawmakers of persuasion," and complaining that the outcome "[t]he court today is the rightful beneficiaries of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, itself systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas.") Members of City Council v. Taxpayers for Vincent, 456 U.S. 75, 89 (1984) (Byravan, J., dissenting). (Cf.)"

In our public property we double" essential to the poorly financed crimes of the people" and thus prohibition constrains a total turn on an important medium of communication. (citation omitted); United States Postal Serv. v. Council of Creighton Civic Ass’n, 425 U.S. 144, 144 (1976). (Marshall, J., dissenting) (By serving door to door to hand deliver their messages to the homes of community members, ap
At one level, the growth of the Internet in the past five years has changed this dynamic, for while few citizens own their own printing press, almost any social movement can put up a website. Access to the Internet lowers the cost of producing and disseminating information and argument, and hence the capital required to enter public dialogue. As the Supreme Court rhapsodized in Reno v. ACLU about the "fast democratic forums of the Internet," "[i]t provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that 'as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.'" The Court continued:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer...["T]he content on the Internet is as diverse as human thought."

pelletis employs the method of analysis expression most accessible to those who are not powerful, established, or well-funded."

5 521 U.S. 844, 868, 890 (1979) (citation omitted). In fact, the Internet has grown even beyond those projections. In January 2001, a reported 168 million Americans (three of every four that logged on to the Internet. An upward trend accounts for sixteen percent of all web connections (used by 41 million office workers), while home Internet access comprised fifteen percent. 75% of Americans Go Surfing on Internet, BRITISH JOURNAL Feb. 20, 2001, at 24; see also Nielsen Net Ratings, Average Web Usage, at http://www.npa.com/survey/average-weekly (last visited Aug. 24, 2001) (giving current monthly estimates of web usage). It is estimated that 607 million people worldwide had Internet access by the end of 2000. How Many Online?, N.U. The World's Leading Resource for Internet Trends and Statistics, at http://www.nua.ie/surveys/how_many_online/index.html (last visited Sept. 8, 2001) (estimating the number of people online throughout the world).

11 Reno, 521 U.S. at 870 (citations omitted). Judge Bader in the District Court opinion was even more enthusiastic:

It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plentitude in this new medium, correctly described the "democratizing" effect of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalism and Anti-Federalism may defuse the structure of their government nugatory, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Lysander still post their theses, but electronic bulletin boards rather than the door of the Wittenberg Schloßkirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or Fly fishermen.

...As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.

As a first approximation, this effect would appear unambiguously to benefit insurgent social movements. Certainly, in the last five years, the presence of insurgent movements on the Internet has multiplied at a remarkable pace. From neo-Nazism and Christian Identity to gay liberation and disability rights, from libertarians, home schoolers, and property-rights enthusiasts, to environmentalists, Zapatistas, and anti-corporate activists, it is hard to find an aspiring social movement, new or old, of left, right, or center, without a website, a bulletin board, and an email list. This global access in turn facilitates challenges to the status quo.

A. "Direct Access"

In the past, intermediary institutions stood aside access to the mass public. Those who controlled newspaper chains or political parties could filter or block insurgent messages. During the 1980s, both Father Coughlin on the Right and Franklin Roosevelt on the Left used direct radio broadcasts as pathways to the public that avoided the interception of hostile newspaper chains. So, today, insurgent web

Indeed, the perception of the openness of the Internet fuels the sense in AC/UY, flow that regulations that differentially increase the costs of using the Internet for a type of content are particularly suspect.

(5) Gary W. Blumow, Electronic Whistle-Blower: The Impact of the Internet on American Politics (1997-99) (1999) (discussing proliferation of case-based websites). Two benchmarks of the scope of Internet usage are the growth of neo-Nazi websites on the far Right and gay and lesbian websites on the cultural Left. Compare Julia Schweller, Who's Watching the Internet Now, Which Now, at http://www.worldnet. com/news/culture/2/12541/256590.html (Oct. 18, 2001) (describing the neo-Nazi websites, with a mailing list, chatrooms, and multimedia libraries, that log 4000 to 6000 hits per day, and spoiling Rabbi Abraham Cooper of the Simon Wiesenthal Center in having identified over 2300 "problematic" extremist sites), with Carrie Kennedy, The Threat to Online Moral Gifts and Lesbian Sex, handmade and Col- lage Sympathy from the Internet, SF. Chronicle, June 23, 2000, at 10 ("PlanetOut was visited by 800,000 unique users in April, according to Robin Meris, rival portal Gay. com, also based in San Francisco, had 480,000 visitors in the same month."), PlanetOut, at http://www.planetout.com (last visited Sept. 2, 2001) (dedicating itself to the issues affecting gays and lesbians), and Search the Queer Interior, at http://www.naziwebspy.com (last visited May 10, 2001) (eliciting 128,652 entries in query for "gay").

For a list of several hundred dissident websites from around the world from Aksja in Zurbab on, see Sebastian, Insignificant Military Intelligence, and All Organizations, at http://www.crownsandjewels.com/security/newscom/ inertia (last updated Dec. 4, 2001).

(6) See Gansho, supra note 4, at 147-48 (discouraging Roy’s and Coughlin’s confrontational use of radio). Similarly, Richard Viguerie, a conservative activist, has characterized direct mail during the 1990s as the "advertising medium of the underdog. It allows organizations or causes not part of the mainstream or not popular target
sites make directly available to potential listeners information and analysis that is not carried in the mainstream press.

In the summer of 2000, I found myself in California during the demonstrations surrounding the Republican National Convention in Philadelphia. Commercial news media and the websites of 24-hour news services offered some coverage of the convention proceedings, but only occasional glimpses of the protests in the streets. My access to information, however, was not tied to the lens of the network television cameras. The protestors and their allies had established a separate website that provided real-time reports and visual images of ongoing confrontations between protestors and police.12

Similarly, during the weeks of legal and political maneuvering surrounding the Florida ballots in the 2000 presidential election, I found that the most timely sources of information did not come from established national news media. Rather, I combined information from the constitutional law professors' email list and the right-wing "freerepublic.com" website, which encourages a dispersed array of "members" to post copies of news stories and public documents on a central bulletin board.13 While I admit that constitutional law professors are not (yet) an insurgent social movement, and that the free republicans are more fellow travelers of the current administration than embattled outsiders, neither group is comprised primarily of mainstream political actors.

The Web allows insurgent groups to make available a volume of information that could not conceivably have been carried by traditional media outlets. Thus, the Center for Responsive Politics posts an interactive list of contributors to political campaigns that can be searched by their contributing group, Political Action Committee (PAC), or industry, by candidate, or by contributor's zip code at its site, "opensecrets.org." In the years before the Internet, the group sold roughly 1000 copies of a far less detailed directory every year. At

12 Indeed the RNC 450, at http://www.rnc450.org (last visited Sept. 2, 2003); see also, e.g., Independent Media Center, at http://www.indymedia.org (last visited July 16, 2001) (covering social process and letfordimmer movements and listing 60 other Independent Media Center (IMC) sites); IMC 174A Coverage: Independent Media Center, at http://www.indymedia.org/has (last visited Sept. 2, 2003) (providing up-to-date coverage of the process in Quebec).
this point, the organization logs over 270,000 user sessions month.\textsuperscript{24}
Similarly, the Environmental Defense's website allows visitors to
post in their rip codes and discover the status of air and water polu-
tion in their areas, along with the prevalence of lead contamination,
waste disposal, and toxic waste sites, as well as the identity of local pol-
luters and officials\textsuperscript{25} and the Home School Legal Defense Association
provides state-by-state updates of proposed and pending legislation
affecting home schooling.\textsuperscript{26}
Not only does the Internet allow insurgents to bypass the "safe"
censorship of the mainstream media, but it allows evasion of the more
direct efforts at suppression of information by local, state, or national
authorities. Examples from abroad include the successful efforts by
Zapatista rebels in Chiapas to display accounts of their activities to the
world community on the Internet,\textsuperscript{27} by Vietnamese dissidents to post

\textsuperscript{24} Tom P. Price, CHERV IS A CHAS: ADVOCACY GROUPS AND THE INTERNET 11 (2000). For
other examples, see the Environmental Working Group's Chemical Industry Ar-
chives, at http://www.chemicalexposure.com (last visited Sept. 2, 2001), a
searchable database of documents discovered by freedom of information requests
and litigation disclosures; and The Right-to-Know Network, at http://www.ckt.net (last
updated May 4, 2001), operated by ORBI Watch and the Center for Public Data Access,
where visitors can search a variety of EPA toxic release information.
\textsuperscript{26} Home School Legal Defense Association, at http://www.hsla.org (last visited Sept.
2, 2001).
\textsuperscript{27} See Dean Ronyeldt et al, THE ZAPATISTA'S "SOCIAL NETWORK" IN MEXICO 85-55 (1999).
Discussing the Zapatistas' use of "new media" including email and the
Internet to disseminate information, to mobilize their forces, and to coordinate joint
action), available at http://www.thenet.org/publications/8R/8MISM/ Mondor &
Schott, "Globalization and the Internet: The Internet's Impact on Society", 43 ST.
COMM. 

\textsuperscript{24} http://www.evansrn.edu/faculty/Chavers/zapata.html (Nov. 1995) ["[To] borrow the
Zapatista's ability to extend their political reach via modern communications
media, the Zapatista have used a new electronic form of struggle to carry their
struggle to the world-wide web.
\textsuperscript{25} Harry Chavers, THE ZAPATISTA AND THE ELECTRONIC FORM OF STRUGGLE, at
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Zapatista's ability to extend their political reach via modern communications
media, the Zapatista have used a new electronic form of struggle to carry their
banned novels, and by Serbian Radio Station B-92 to substitute Web broadcasting for the radio reception that had been jammed by the Milosevic government.

My favorite domestic example concerns the effort to suppress a program used to thwart the copy protection of movies sold on DVD. After Universal Studios and the Motion Picture Association of America (MPAA) had obtained an injunction prohibiting an online magazine from posting copies of the program at issue on its website, copies of the program appeared on websites around the world (including a website that featured the program embedded in the code of a portrait and rendered in haiku). The defendant magazine itself responded to the injunction by engaging in what it called "electronic civil disobedience," encouraging the establishment of more sites presenting the contested program and posting links to them. Unfazed, the federal judge issued an injunction precluding the magazine from posting links to any sites containing the contraband code. The magazine complied, but proceeded to post a link to the Disney search engine.

26 Banned Vietnamese Book Goes Online, Digital Freedom Network, at http://www.dfn.org/hosts/vietnam/toingphutrm.htm (Feb. 8, 2001). For a report of the banning and a reproduction of extracts from the book, see Bui Tin, A Novel Which Scores, Reporters Sans Frontieres, at http://www.rsf.org/sf Hugh Fong, In a hearing before Congress, Carl Gershman, President of the National Endowment for Democracy, presented testimony from a Radio B-92 official: The Internet became vital to us when Radio B-92 was banned in December 1996. We had been reporting professionally on the peaceful mass demonstrations over local election fraud... The ban lasted only 31 hours, primarily because we reacted to the Internet... [We] continued to produce our programs, which were distributed worldwide on the Internet in RealAudio format. Our colleagues from the VOA, the BBC, Radio Free Europe and Deutsche Welle picked up our signal and rebroadcast our news programs. In those few days more people than ever before were listening to our programs. This rendered the ban meaningless and counterproductive.


along with instructions on how to use Disney’s facilities to search for the decryption program.4 The injunction has been appealed, but it is almost irrelevant, since as best I can discern the program remains easily available to a reasonably sophisticated Internet user.

The availability of insurgent websites, combined with the nature of


5. A search on March 28, 2001, for “DeCSS” using the Disney search engine, www.disneycdn.com, uncovered three sites in the top ten results that contained links to copies of DeCSS.

The MPAA has begun sending cease and desist letters to sites that harbor copies of the program and to Internet service providers (ISPs) that host such sites. Film Cos-
tolics, MPAA Personal DeCSS Policy and Links, IDG-NE, at http://www.idg.net/pc/439981, 1798, 10000.html (Sept. 6, 2000); e.g., letters from Harmsworth Nigori, Director, Worldwide Internet Enforcement, Motion Picture Association of America, to dmcx.com and carbonate@ndmre.com (Feb. 3, 2001), available at http://www.2.com/news/doc/DeCSS; Gallery/mpa/pahasvu-

Some sites have removed the program. See MPAA.com, at http://www.mpaa.com/articles/169/decss_remove.html (last visited Oct. 12, 2007) (reporting removal of The Computer Code Handbook’s “squarewave” calling version of DeCSS). Others have refused the offending material. See Response to MPAA Threat Letter from Dr. David S. Tsaokrsky, Principal Scientist, Computer Science De-

partment, Carnegie Mellon University, to Harmsworth Nigori, Director, Worldwide Internet Enforcement, Motion Picture Association of America (Feb. 3, 2001) (requesting a specific description of the program and links to the MPAA’s request to Tsaokrsky to remove the “illegal” de-compacting code, available at http://www.nasa.gov/esc/decss/gallery/mpaap yi25.html; email from Roger Thompson, Com-

puting & Communications Information, University of Washington, to nabulae@washington.edu (May 23, 2001) (addressing a student who was contacted by the MPAA for displaying decompilations, the University of Washington responding by telling the student that no immediate action was necessary), available at http://www.washington.edu/police/notice/00/05/05/05.html; see Gallery of CSS Decom-

pressers, at http://www.2.com/gallery/DeCSS/DeCSS-Gallery (last visited Apr. 30, 2001) (displaying the decompilation code at a number of locations). More generally, other pro-

grammers have generated other, shorter decompilation programs—seven lines and

seconds—which continue to circulate widely. See Daniel McCollough, A Threat in Holy-


A similar stance occurred at the efforts of the Church of Scientology to

block access to one of its documents. The Scientology (threatened Slushbox org, a

news site, with action under the Digital Millennium Copyright Act (DMCA) for al-

lowing the posting of a document called “OTT III.” Slushbox.org responded to taking down the material in question and replacing it with an essay on free speech, combined with links and methods of searching for “OTT III” from other sites. Roger Porter, Threat of Scientology’s Legal Wings Prompts Slushbox in Cozzio & P.Euting, SCIENTOLOGY.COM, May 16, 2001, available at LEISA: Code 720, Scientology Fact Com-

mittee (Slushbox). Slushbox, at http://slushbox.org/article/06/01/05/16/ 12380260;mode (Mar. 16, 2001).
competition in the news business, makes it more difficult for news intermediaries themselves to suppress uncomfortable information that is likely to catch the attention of the public at large. Whatever the mainstream media's own attitude toward presidential candidates, publications on Matt Drudge's website detailing the Lewinsky allegations made a concerted effort to suppress the information futile. Conversely, the seamier quality of the Starr Report became impossible to disguise when the text of the report became available online. 14

Media critic Douglas Rushkoff tells the story of a consultation with an airline facing a threat by pilots to publish adverse safety statistics on the World Wide Web. Rushkoff advised that once the material had been published, the company would face not only the pressure of the individuals who had access to the relevant website, but the inevitable follow-up of coverage from competitive media. "Isn't there a way to use the Internet to stop them?" asked Rushkoff's client plaintively. The answer, of course, was "no," at least within the bounds of the law. 15

Finally, the Web makes it possible to establish two-way linkages with potential sympathizers. Unlike the unidirectional nature of most mass media, websites, bulletin boards, chatrooms, and email are potentially interactive. Information can flow toward movement organizers as well as away from them. Every sympathizer or movement member becomes a potential reporter; the capacity of insurgent movements to expose local abuses multiplies. Thus, the FreeRepublic.com site mentioned earlier encourages subscribers to post links to stories of interest from online media around the country, while the Independent Media Center (IMC) network of websites offers a medium for what it refers to as "open source journalism," allowing grass-roots activists to post words, sounds, or images from any source on topics relevant to a variety of left-wing activism. 16

14 See DANIEL BENNETT & PASC FELDING, THE NET EFFECT 99-24 (1999) (delineating the effect of the Drudge Report and the release on the Internet of the Starr Report, including 800,000 downloads of the Staff Report from AOL in the first twenty-four hours after it was posted). In both cases, of course, it is possible that conventional tabloids could have served the same function, but the vast multiplication of pronouncements of public discourse made possible by the Internet has similarly multiplied the complicity pressures that militate against suppression of information.

15 FreeRepublic.com—The Premier Conservative News Forum, at http://www.freerepublic.com; Independent Media Center, at http://www.indymedia.org (listing sixty-two regional IMC sites as of May 20, 2001); see MARELLA BOMBARDIER, WAY OF TRADITIONAL RENS, MANY TIDES TO THE WEB: "MEDIA ACTIVISTS" FUSING MEDIAN TO AIR OWN NEWS, BOSTON CLARE, OCT. 10, 2000, at B1 (describing the
B. Wells and Nuss: Recruitment and Internal Organization

Interactivity also allows information to bleed into recruitment and mobilization; any visitor to a website or bulletin board who is sympathetic inclined can easily enter into dialogue with other members of the movement. It is a well established observation in the study of social movements that their success depends on preexisting social networks. What the shop floor, the neighborhood, or the church was to prior generations of insurgents, the chat room, the email list, and the website may be to this generation.

Online venues gain importance in the case of dispersed potential members whose local social setting makes them less inclined to align themselves with a potentially stigmatized identity group. Conversely, online interaction with potential converts and fellow members can strengthen the commitment of those who already identify theselves with the movement. The traditional social science finding that even a single silly measurably stresses the capacity to withstand social pressure is borne out in the observed importance of email and the


Analogous uses of the Internet to gather information without formal organization have begun to appear in a variety of other political venues. See Kels Black, In the Question: John Ashcroft, Index, STANDARD, Apr. 17, 2000 ("I put up an appeal for phone numbers for Parmenon Even. Within days, someone sent the entire external phone list. The Net gives you a million inside sources for free"); (quoting John Ashcroft, the attorney who established www.thatisnew.info), available at LEXIS; Henry Krim, the Internet Now Exor, 104 TEX. L. REV. 97, 97 (2001) (describing Boston's Big Media Collective Big Noise and the Seattle IMC's distribution of credentials to 100 actors at the Seattle WTO protest, from which they produced a protest film available over the Internet); Julia Schoeres, The Net as Confrontation Discourse, Wired News, at http://www.wired.com/news/politics/0,1282,265060,00.html (Dec. 28, 2001) (discussing the use of private Internet disclosure as means of disciplining official corruption in Latin America).

See GOLDBERG, supra note 2, at 218-19 (listing a number of movement 'created by men and women who mobilized resources from established groups, authorities, challenged, and the rank and file'); FRONT Mobilization, supra note 1, at 81-89 (tolling democrat networks are preconditons to mobilization); Jo Freeman, On the Origin of Social Movements, in WAYS OF PROTEST 1-8 (Jo Freeman & Victoria Jakubowicz eds., 1989) (recording the finding that social movements are predicated on the availability of a respectable processing communications network); Doug McAdam & Dieter Rucht, The Cross-National Dimensions of Movement Mobil, 36 ACAD. POL. & SOC. SCI. 56, 61-11, 12 (1993) (collecting sources for the same proposition).

See Soloim R. Arch, Opinione and Social Pressure, S.Cl. AM., Nov. 1955, at 35, 36-35 (noting one the strength of majority pressure diminishes greatly when a tippring
Web for the capacity of gay, lesbian, and bisexual teenagers to develop a sense of their sexual identities." And, as one set of commentators observed, when "ordinary citizens become others like themselves" involved in contentious politics, "demonstrations have a demoralizing effect." Unfortunately, that same capacity to resist social pressures dilutes more functional social norms as well; despite a dominant social consensus against violent racism for example, the Web makes equally available "role models" of the neo-Nazi right to those so inclined.

Beyond recruitment, the Web multiplies the capacity of movement organizers to mobilize members and sympathizers. The most straightforward applications funnel interested website visitors into partner is present), William N. Morris & Robert S. Miller, The Effects of Converse—Blocking and Converse—Prompting Partners on Relocation of Confrontation, 11 J. EXP. SOC. PREC. 215, 215 (1975) (describing and testing Solomon Asch's finding that having a quartet "liberate" a person from the pressure to conform on the basis that the partner breaks consensus with the majority group).

"We, e.g., GAY & LESBIAN ALLIANCE AGAINST DEFRAUDATION, ACCUSE NEW YORK TIMES—IMPACT OF INTERNET PUBLISHING; SOFTWARE ON THE HOMO AND LESBIAN COMMUNITY 17—19, 4620 (1997) (hereinafter ACCUSE DESIRED) (giving first-hand accounts of the sense of community experienced by gay persons on the Internet), available at http://www.glaad.org/homseydef/GLAAD.PDF/pdf_file/12.pdf; Jennifer Egan,Lonely Gay Teen Seeking S Incorporated, N.Y. TIMES, Dec. 10, 2000, B1 (Magazine); at 110 (describing how gay youths find "friendship, sex, sex after— and [thereafter]—online"); Kirby, supra note 20 (explaining how the Internet has "contributed to the strength and visibility of the gay and lesbian community").


"See, e.g., Hate in the Internet—Hate Crime on the Internet, 106th Cong. 2A-50 (2001) (statement of Howard Berman, National Chairman, Anti Defamation League) (noting that while "deeply disturbing," the increase in hate and extreme views on the Internet reflects the expansion of Internet use, detailing how specific hate groups use the Web as a forum, and suggesting how to respond to such hate on the Internet); Hate Crime on the Internet—Hate Crime on the Internet, 105th Cong. 5055 (2001) (statement of Joseph T. Roy, Sr., Director of Intelligence Project, Southern Poverty Law Center) (describing the Southern Poverty Law Center's finding that the Internet plays an increasingly important role in recruiting and propagating hate groups); Les Back, White Siberia is Calabria, UNICEF COURIER, Jan. 2001, at 41 (describing how through the Internet, individual "white power" supporters have come together in a community); Anne Hodges, Logging on to Hate, HOUSTON CHRON., Oct. 19, 2000, at D4 (discussing how hate websites are marketing themselves to children and teenagers); Lakshani Chandrathna, Hate Sites Bad Boosting Tool, WIRED NEWS, at http://www.wired.com/news/culture/ 0,1284,26478,00.html (May 25, 2000) (arguing that the proliferation of hate websites has resulted in greater public scrutiny for the hate community without improving its influence).
constituent mode. Once a visitor identifies her zip code, it is common currency, from the Environmental Defense Fund (EDF) to the American Conservative Union to Napster, to offer the capacity to send email to local and national representatives. The Rainforest Action Network allows website visitors to send faxes to targeted business executives whom the organization seeks to convince to avoid the use of timber from old-growth forests, while the National Abortion and Reproductive Rights Action League (NARAL) offered the opportunity to email legislators to oppose the Ashcroft nomination for Attorney General. Combined with emailed "action alerts," such tactics can generate floods of email or phone calls regarding issues that touch a popular chord. The NARAL campaign generated 75,000 emails; the Libertarian Party in 1999 spurred hundreds of thousands of emails opposing an FDIC rule on disclosure of bank records, which were credited with prompting withdrawal of the rule; and the Rockefeller Foundation-funded "Ourforests.org" claims to have generated over 700,000 public comments in support of designation of "heritage for-

See BENNET & FELDMAN, supra note 34, at 64 (discussing "CapitolWin,") a product by which, for $1500, websites can provide the capacity to allow visitors to type in their zip codes and send an email to their representatives in Congress); RICHARD DAVIS, THE WEB OF POLITICS 79 (1999) (reporting that fourteen percent of political websites surveyed provided an online form for sending comments directly to policymakers). For examples of websites that utilize such software, see Save Our Environment Action Letter, at http://www.sooenvironment.org (last visited Aug. 18, 2001), and Acton Network, at http://www.actonnetwork.org (last visited Aug. 19, 2001).


For an early move in this direction, see LAURA J. GURKA, PEER TO PEER AND PRIVACY IN CYBERSPACE: THE ONLINE PROTESTS OVER LOTUS MARKETPLACE AND THE CLIPPER CHIP 75-76 (1997) (recording how protests against the Lotus MarketPlace database published online the email address of the chief executive of Lotus Corporation and encouraged fellow protesters to email their opinion). I suspect that such efforts are becoming less effective as executives install automated filters on their email.

Editorial, Idaho Roll Call, Mar. 22, 2001, ("[D]uring the confirmation fight over Attorney General John Ashcroft, Senate email users started resembling the California electrical system, suffering the electronic equivalent of brownouts for hours—in some cases, even days"); Anna Quindlen, Singing Protest to the Grand, N.Y. TIMES, Jan. 29, 2001, at 60; see also Jennifer Laid, FDA for Classic VILLAGE VOICE (New York), Feb. 6, 2000, at 37. ("Through NARAL's 'Ten Minute Action' page, you can write Congress, check congressional voting records, email reports to friends, sign up for email action alerts, and donate to the group's prochoice efforts.");

See BENNET & FELDMAN, supra note 34, at 8884 (discussing the course of the cybercampaign waged against the EDF); Fox Gerber, Accused "Computer Mafia," at http://www.menn.com/HeyWait/j69/05-12/HeyWait.htm (May 12, 1999) (noting that the libertarian Party's protest website, www.defendyourprivacy.com, received 171,208 email complaints to EDF).
exs" by the Department of the Interior. Nor is this method limited to established groups. The ease of generating a Web presence, and the possibility of word-of-mouth "viral marketing" allows ad hoc "flash campaigns" to generate large and decentralized responses to issues that catch public consciousness. Thus, the ad hoc website "StopDr.Laura.com" registered six million hits, and defuged Paramount and advertisers with telephone calls and emails; censureandnoveon.com generated over a half-million messages to Congress.

For other examples, see Bennett & Fielding, supra note 34, at 95-107, describing an Internet-based campaign led by National Endowment for the Arts to persuade subscribers for Internet access by educational institutions.

There is some question as to how long these mechanisms will prove successful. Recent reports suggest that congressional offices are overloaded with emails, with House offices logging 8000 emails per month and senators logging 55,000. Associated Press, Congress Swamped, House E-Mail System Under Stress, U.S. NEWSWEEK, Feb. 23, 2001 (reporting that 650,000 emails from visitors to www.SaveEveCrispReframe.org overloaded the White House email server, which returned thousands of emails unread); Katie Goldschmidt, E-mail Overload as Congress, Congress Online Project, at http://www.congressionalid Projekt.org/email.html (April 30, 2001) (observing among other things that during the presidential election recount, the House received seven million email messages). This suggests that for problems of "digital attention deficit" referred to below must begin to affect lobbying, as well. A great deal will turn on the way in which policymakers choose to use their email. A sophisticated artificial intelligence system could allow wide-spread messaging groups to gain influence. On the other hand, a system that simply responds to raw numbers of emails is likely to be subject to gaming by either electronic calls sophisticated or well-financed lobbying.

David Frum, Taming Dr. Laura, NEWSWEEK, Sept. 18, 2000, at 80 (noting that website identified advertisers on talk show, "ossecitized the personal telephone numbers, email addresses and fax numbers of key executives— , and telling fellows to flood them with complaints" regarding their sponsorship); Adam Prink, Enraged in CUE, A Dallas Actor Helps Lead the Charge Against Dr. Laura, DALLAS OBSERVER, Sept. 21, 2000 (describing a website organized by six activists from around the country that joined the advertisers on a talk show to denounce homosexuality, organize demonstrations, and directed phone calls), available at LEXIS. Commentators suggest, however, that the demise of the television show was a function of its lack of audience response rather than the process. See, e.g., Brian Lowry, Dr. Laura's Last Gasp, Sivcer Than Just Points, L.A. TIMES, Apr. 6, 2001, at F2 (noting that while protest and boycott may have contributed to the failure of Laura Schlessinger's television show, the show may not have been a viable format for its host from the beginning).
Equally important, Internet resources allow movements to organize offline activities. As a first step, the increased transparency provided by the Internet makes it possible for insurgent movements to monitor and seek to influence activities that otherwise would be known only to political insiders. Once relevant subjects of pressure are identified, the Internet multiplies the capacity of insurgent groups to muster resources. Thus, in successfully organizing 1200 non-governmental organizations (NGOs) in sixty countries, the marginally financed principals of the International Campaign to Ban Landmines relied heavily on the capacity of email to allow organizers to marshal information and political pressure at critical times and places around the world.15

Ease of communication and internal organization allow groups with relatively small organizational infrastructures to mobilize a dispersed constituency. In the spring of 2000, if reports are to be believed, Donna Dees-Thomas in New Jersey used a website operated out of her home to organize the Million Mom March, an event that...
brought hundreds of thousands of gun control advocates to Washington, D.C., and that continues to form the nexus for a series of local and national activities. Using the Internet, Dees-Thomases was able to generate a geographically dispersed network of organizers who both contributed to the functioning of the national organization and encouraged the marshaling of local forces. Demonstrators against the World Trade Organization (WTO) and the International Monetary Fund (IMF) in Washington, Seattle, Prague, and Quebec, and at the Democratic and Republican National Conventions in Los Angeles and Philadelphia, like anti-globalists in London and Australia, have used similar tactics. In more conventional venues, Senator John McCain is reported to have deployed an email list of 150,000 supporters of campaign finance reform "who were kept abreast of the bill's progress and told which Senate offices to barrage with calls and email" on an hour-by-hour basis during debate and Senate maneuvering.

76 PRICK, supra note 24, at 5, 59. A precursor to this effort was the web-based organization of a 156,000 person anti-cancer march in 1998. See BENNETT & FIELDING, supra note 34, at 6448 (discussing the "e-organizing" that led to the success of "The March: Coming Together to Conquer Cancer"). See, e.g., David Boren, Out of Work, Out of Mind, PH. TIMES, May 4, 2001, at 12 (describing the organization of May Day protests in Australia and England over the Internet, and stating that "It is difficult to see how, with only lawyers, postmen and word of mouth anything on this scale could possibly have been organized"); Creating a Dis- cum, FASHION Wkly., Nov./Dec. 2000, at 105 (noting the use of email listservs in organizing protests against the IMF and the World Bank in Prague); Andrew O'Hear, Slow to Play Chess, N.Y. TIMES, Apr. 15, 2001, § 4 (magazine), at 16 (reviewing the use of email lists to increase the audience for the call to action for a protest at the 2001 Summit of the Americas in Quebec City); Rene Sanchez & William Borch, Protest Mass-Med Lines to Swamp In Haor of C.A., WASH. POST, Aug. 20, 2000, at A35 ("Most of the demonstrations [at the 2000 Democratic National Convention] were organized by small leaderless groups on something borders, spreading the word of their causes largely through the Internet."); US Schmidt, World Trade Targeted Under, Chi. Trib., Sept. 12, 2000, at 1 (discussing the use of websites to organize protests against globalization in Australia); Diane Yar, Case Study: How Actions Coin the Internet a O- ggressive Process Against the Spring Meetings of the International Monetary Fund, World Bank and the World Trade Organization Scheduled for April 16-17, 2000 in Washington, D.C., at http://cardiffwww.rutgers.edu/~wood/415/ url.htm (Apr. 25, 2000) ("The Internet not only permitted the wide disbursement of information it did so irresponsibly."); Aaron Pizzuto, Civil Disobedience on the Web, BLOOM, at http://biozini.com/ nerelectronic/entries/000728_07281.htm (July 28, 2000) ("[T]he website set up by activists planning to disrupt the Republican National Convention in Philadelphia was used as a central point from which civil disobedience was to be a key hub spreading word of impending protest and dis- ncting them."); Kim Doane, Fight the Power: Online, Right Now, TIMES, Mar. 29, 2001, at 12 (recounting the use of a terrorist website, www.aleph.net, to "monitor provocations toward civil disobedience" against the Milosevic regime).

77 Nancy Gibbs & Karen Tumulty, A New Day Dawning, TIME, Apr. 9, 2001, at 48, 49:50; see Straight Talk America, at http://www.straighttalkamerica.com (last modified...
The capacity of the Internet for asynchronous but instantaneous communication will particularly facilitate efforts to organize constituencies whose time is inelastic. Reports of stay-at-home mothers who participated in the organization of the Million Mom March "late at night after the kids were in bed" match earlier accounts of women who participated in the anti-abortion movement and the so-called "wise us" movement. Asynchronous electronic communications enable otherwise home-bound citizens to participate in social protest.

Finally, the Internet is a potential home to what I would call the "really new" social movements: movements organized as decentralized networks based on peer-to-peer "electronic communication."
one example from the right, the producers of the "Nuremberg files," an anti-abortion website, sought to make use of the Internet's capacity to enable decentralized action by highlighting for harassment or attack the names and addresses of abortion providers. The files were removed by American Internet service providers (ISPs) fearful of liability after a $109 million verdict was levied against some of the posters, but the files returned to the Internet in the form of a so-called "ru486 registry" hosted by a South African ISP, even before the verdict was reversed. On the Left, "www.rtmark.com" purports to allow contributors to "invest" in "mutual funds" that offer bounties for a variety of anti-corporate pranks, most recently the "www.voteauction.com" website. Likewise, in recent months, websites frequented by mechan-
ics for United Airlines and pilots for Delta have provided the locus for the organization of extra-legal job slowdowns without formal union organization. And whether one calls the mass disobedience to the copyright laws facilitated by Napster a "social movement" or not, this development, like the emergence of open source computer systems like Linux, suggests the possibilities for the future in which, social movements evolve from the contributions of widely dispersed and uncoordinated individuals and groups."
II. THE PERILS OF THE NET AND THE FIRST AMENDMENT

Does this mean the twenty-first century brings nothing but millennial prospects for insurgent social movements? Unfortunately, no. Let me briefly address three sets of dynamics that can serve to limit the prospects of online activism: the "digital divide", the "digital attention deficit", and the "vices of visibility."

A. The "Digital Divide"

In assessing the limits on the insurgent potential of the Internet,
there is much discussion of the problem of the "digital divide." In order to make use of the Internet, one must have access to it, and such access is not easily distributed through American society. Affluent groups and Caucasians are more likely to be connected to the Internet than the poor and most racial minorities; likewise, older Americans are less likely to be Internet users than younger.

But for the United States, this limitation will, in my view, be a passing one. Penetration of the Internet has already achieved the levels associated with radio in 1930 and television in 1955,2 and the access divide is rapidly narrowing. Already, the American gap in Internet access between women and men, and between urban and rural residents has vanished, and the rates of Internet connection among Hispanic and African Americans are rising more rapidly than the rates among the racial majority.3

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(2) See Nancy Lawrence, Internet in Media Time, INSTITUTIONAL STANDARD, Mar. 1, 2000, at http://www.standard.net/articles/23902.14571.0.html (noting that 50% of American households will have Internet access by the end of 2000, and conjuring that number to the 65% of Americans with TV in 1955 and 45% of Americans with radio in 1930).

(3) Kate Miller, Digital Divide Now a Fact, 2 INDUSTRY STANDARD.COM, Feb. 22, 2001, available at LEADS, or see U.S. GENERAL ACCOUNTING OFFICE, CHARACTERISTICS AND CHOICES OF INTERNET USERS: REPORT TO THE RANKING MINORITY MEMBER, SUBCOMMITTEE ON TELECOMMUNICATIONS OF THE HOUSE COMMITTEE ON ENERGY & COMMERCE (2000) (reporting the results of a study that documents the increasing use of the Internet among varying American households), available at http://www.gao.gov. In addition, the Pew Research Center made similar findings: The increase in internet access by all kinds of Americans highlights[s] the fact that the Internet population looks more and more like the overall population of the United States.

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88% of American men have Internet access now and 54% of women have access;
45% of black women and Internet access by year's end (2000), compared to just 34% at mid-year.

LEE RAPPEL & DAN PACKE,/Pew Internet and America Life Project: More Online, DOWNS MORE (2001), http://www.pewinternet.org/reports/toc.asp?Report=90. Furthermore, the Pew Research Center reports:

There is a preponderance in the Internet population—80% of those online are women and 65% are men. However, women still lag behind men in their relative participation in the online world. When it comes to race and ethnicity, whites are notably more likely to have Internet access than blacks or Hispanics. Still, there are striking similarities in the online and offline population once the economic situation of various groups is taken into account. 74% of women do not have Internet access; 48% say they do not have access. 36% of whites have access; 56% of blacks have access; 44% of Hispanics have access.

78% of whites in households earning more than $75,000 are online; 79% of Hispanics in smaller economic circumstances are online; and 89% of blacks in those types of households are online.
The capacity to make use of the Internet is still, at this point, contingent on levels of literacy and technological sophistication that are unevenly distributed in American society and are likely to remain so in the near future. Thus, even with the comparable levels of physical access that are likely to emerge in the near future, the potential of the Internet for organizing among middle-class women, for example, is likely to be greater than its potential among impoverished members of the disabled community left behind by the American educational system. The open question is whether this differential will be greater than the existing inequalities in political and associational participation.

B. If a Website Falls in the Forest... the "Digital Attention Deficit"

More important than the digital divide, in my view, is what I would characterize as the "digital attention deficit." The reduction of the costs of access to a mass audience does not mean a similar reduction in the costs of actual communication with that audience, because the

66% of whites in households earning less than $30,000 are not online; 75% of blacks in similar households are not online; and 74% of Hispanics are not online.


Seven months later, white access was still more pervasive, but black households had the same proportion of Internet access as that reported by whites in September 2000. Michael Parente, Minority lawn-scene Internet Use Increases, The Big Picture Demographics, at http://cyberanias.internet.com/48 pictures/demographics/article/6_5061_768144_00.html (May 17, 2001) (reporting 51% of African-American households online, as compared with 66% of Caucasian households).

In addition, in terms of mechanical ability to access the Internet, access at school and libraries, combined with inexpensive access from Internet cafes, dilutes the class bias of technology. See, e.g., Daniel Colker, Streaming a Virtual-Mending Po, L.A. TIMES, Feb. 20, 2001, at A1 (testing use of Internet cafes as a lifeline for immigrants, tourists, and the poor).

See Gretchen K. Berland et al., Health Information on the Internet, 285 JAMA 2652 (May 25/30, 2001), at http://jama.ama-assn.org/issues/285n26/isfull/pd05274.html (finding that in survey of health-related websites, all English-language websites had material requiring at least a tenth-grade reading level, and more than half had material at college level, while 48% of the adult American population and 75% of welfare recipients were unable to function at these levels).

If Ray Lehman Scholzman et al., Civic Participation and the Equality Problem, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, supra note 7, at 427, 459 (comparing families with incomes under $15,000 and over $125,000, and finding that 12% of high-income families received no direct-mail political solicitation, while 52% of low-income families received some; finding also that high-income families were three times as likely to be members of organizations).
scarce resource in the emerging communications environment is limited audience attention. As the cost of dissemination of information falls toward zero, the amount of available information increases toward infinity, and there are, after all, only twenty-four hours (and for most of us—sixteen waking hours) in the day. Time spent on eBay or the Diary group cannot be used to pursue the Rainforest Action Network. Thus, although 168 million Americans can read an insurgent website, the question is how many in fact will do so, with 5 billion other webpages competing for their attention. The most cogent cri-
tique of the status quo or the most stirring call to common action will be futile if no one encounters it.

The cost of disseminating information declines rapidly on the Internet, but resources necessary to garner attention for that information do not. As sources of information proliferate, the constant rack of audience attention becomes the object of increased competition, and competing sources of communication must expend greater efforts to "bid" for that attention. The Internet thus places a premium on the ability to get and retain attention, and as a number of commentators have observed, established groups are likely to hold a sub-
stantial advantage over insurgents in the production of expensive graphics, the purchase of online and offline advertising, and the paid placement of links on attractive websites. Moreover, their prior expenditures outside the Internet make their online presence more recog-
nizable amid the clamor for attention.60

rate domination of the World Wide Web based on surveys of users’ website visits and Internet links); Timothy Wu, Application-Limited Internet Access, 85 VA. L. REV. 1160, 1180 (1999) (arguing that the "impact of a message on the World Wide Web has al-
ready begun to depend heavily on the identity (that is, mostly the wealth) of the speaker," though this is not necessarily true for other applications). But cf. SELKON, supra note 20, at 85-84 (arguing that the cost of access to the Internet is very small compared to traditional mass media). The effect applies equally to the efforts of social movements to organize (or obtained or targeted campaigns). See BENNETT & FIELDING, supra note 34, at 82-83 (stating that the efficacy of the ACLU’s online organizing is the result of the expenditures of substantial resources).

While search engines may ameliorate the advantage that wealth to economic re-
sources in the battle for attention, there are indications that the capacity to obtain at-
tention among sites returned by search engines will be responsive both to the sophisti-
cation of the site’s efforts to game the search engine system—which will often combine
What routes, then, are open to insurgents? At the risk of flippancy, it seems to me that the strategies fall into three categories: begging, borrowing, and stealing. Insurgents can beg for attention by seeking notice directly from a voluntary audience, they can borrow the attention voluntarily provided by an audience of intermediaries, or they can steal attention by imposing their messages on an unwilling audience.

1. Begging

Traditional social movements utilize a variety of means to "beg" for attention. One-on-one organizing, door-to-door canvassing, leafleting, and mass mailings all seek to persuade recipients to attend as a movement's message voluntarily. So, too, in the online world, organizers may seek to interest future or chatroom participants in their message, or in visiting the movement's website to encounter the message, or to induce supporters to nodly friends and acquaintances digitally of such opportunities. These efforts raise no legal issues directly, but the ongoing efforts to induce or enable webmasters, libraries, and ISPs to utilize filters that limit access to websites might well interfere with the capacity of insurgent social movements to take advantage of attention they have garnered in these efforts. Such fil ters—whether economic resources—and to the capacity to pay placements directly. See, e.g., Lucas D. Introna & Helen Nissenbaum, Mapping the Web: Why the Politics of Search Engines Matter, 63 U. CHI. L. REV. 169, 174-55 (2000) (discussing the importance and challenges of indexing and ranking to the success of a website); Danah S. Sullivan, Buying Your Way to the Top, Search Engine Watch, at http://www.searchenginewatch.com/webmasters/paid.html (last modified May 7, 2001) (listing the current paid placement policies of major search engines).

See, e.g., Bennett & Feldman, supra note 34, at 82 (recording the ACLU's efforts to visit online chatrooms and forums in order to organize online); Prins, supra note 24, at 919 (same).


ters, even without overt ideological censorship, are likely to have a differen-
tial impact on insurgent websites, which are more prone to ex-
press cultural values regarded as deviant by the mainstrem authors of
filtering software. And it is far from clear that filters will in fact be
free from direct ideological bias.
Likewise, filters will have a differential impact on low-affluent and
sophisticated viewers, who are unable to purchase or navigate their
way to unrestricted access. An indigent lesbian teenager whose access
to a feminist website is screened by government-mandated software in
the public library becomes substantially less likely to visit that web-
site. A First Amendment jurisprudence concerned with the "poorly
financed causes of little people" would thus look with some disfavor
on government efforts to establish filters.
More intrusively, an organizer may adopt the digital version of
door-to-door canvassing or direct mail; having gathered Internet ad-
dresses of potential allies or members of the movement, the organizer
may seek to gain their attention by emailing information or links that
might be of interest. On the ground, such efforts are generally consti-
tutionally protected in the absence of some objection from recipi-
ents.55

55 See ACCESS BLOCKED, supra note 39, at 25 (discussing library software blocks); GAS
AND LESBIAN ALLIANCE AGAINST DEPRIVATION, ACCESS BLOCKED VERSION 2.0: THE
CONTINUING THREAT AGAINST INTERNET ACCESS AND PRIVACY AND ITS IMPACT ON THE
LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITY 12 (1999) (discussing the ef-
fects of overgeneral filtering in relation to its themes), available at

56 Cf. Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (invalidating a statute that
allowed the post office to destroy "seditious propaganda" until the intended recipient
returned a reply card to the post office indicating a desire to receive the mail); Barnum
that creates the "Commission to Encourage Morality in Youth," whose powers in-
cluded the public identification of "corrupting" publications). Conversely, to enable
unsolicited information to insurgent filters would be hostile to efforts to possible de-
volution of technical measures. Plaintiffs have challenged a federal statute requiring
the installation of filtering software as a condition of access to federal websites for
Internet access in schools and libraries as a violation of the First Amendment. Com-
plaint for Declaratory and Injunctive Relief, Multnomah Cty. Pub. Libraries v. United
States, No. 01-1322 (D.D. Or. filed May 29, 2001), available at
United States, No. 01-1322 (D.D. Or. July 26, 2001) (order denying motion to dismiss).

57 Marion v. Gus of Sherburne, 310 U.S. 149 (1940) (striking down an ordi-
nance that banned door-to-door canvassing); cf. Bolger v. Youngs Drug Products Corp.,
463 U.S. 60, 75 (1983) (overruling an appellate act that prohibited the mailing of in-
formation concerning contraception); Rosen v. U.S. Post Office Dept., 397 U.S. 728,
740 (1970) (upholding a statute which permits an altemative to give notice to the post
office that he no longer wants delivery of certain communications). But cf. Rosen v.
Online, however, a storm is brewing, as both ISPs and employers have begun to take the position that their ownership of the conduits that connect subscribers or workers to the Internet gives them legal authority, under common law "trespass to chattels" doctrines, state anti-"spam" statutes, or federal and state anti-hacking statutes, to invoke legal sanctions against outsiders who seek to contact employees or subscribers or gather information from corporate websites for future use. Most of the cases litigated thus far have involved commercial advertisers and have favored the ISPs, but for insurgent move-

Cooper, 336 U.S. 77, 88-89 (1949) ("Those more people may be more easily and cheaply reached . . . is not enough to for the constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."); Lower courts, however, have upheld prohibitions of unsolicited commercial tele-
phone and fax advertisements. See Mont v. FCC, 54 F.3d 979, 979 (9th Cir. 1995) (upholding FCC regulation prohibiting prerecorded telephone calls); Destination Ventures v. FCC, 48 F.3d 54, 57 (9th Cir. 1995) (upholding statute banning unsolicited fax advertisements); Texas v. American Blasting, 121 F. Supp. 2d 1095, 1091-92 (W.D. Tex. 2000) (same); Kenzo v. Fax Daily, 962 F. Supp. 1162, 1168-69 (S.D. Ind. 1997) (holding that the "mere existence" of "imaginable alternatives" to the Telephone Consumer Protection Act does not show the statute is improperly tailored).

bers); Computerise Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (same); Intel Corp. v. Hamidi, No. 98-AM0600, 1999 WL 450494 (Cal. App. Dep't Super. Ct. Apr. 28, 1999) (invoking trespass action against former employee who sent bulk email to company's employees); see also Martin Malin, National Labor Rela-
ally Steve Heick, 25 P.3d 494, 415 (Wash. 2001) (upholding state anti-spam statute as sufficiently limited to misleading and deceptive emails); Dan L. Burk, The Trouble with Trespass, 4 J. SMALL & EMERGING BUS. L. 27, 27-29 (2000) (criticizing courts' use of common law trespass as a response to spam and proposing digital nuisance); David L. Goldstone, A Foxy Thing Happened on the Way to the Cyberforum: Public v. Privacy in Cy-
tional law and antitrust theories that could protect appropriate access to subscribers); Sabra-Ariane Keller, State Regulation of Unwanted Commercial E-Mail, 16 BERKELEY TECH. L.J. 435, 443-49 (2001) (discussing the problem of spam and the legislative attempts to control it).
ments, a great deal will turn on the question of whether, in non-commercial cases, the courts will give priority to the metaphor of property rights in the servers or to the proposition—recently affirmed by the Court in *Hill v. Colorado*—that "the First Amendment protects the right of every citizen to 'speak the minds of willing listeners and to do so there must be the opportunity to sign their attention.'"

2. "Borrowed Attention"

In the world of protest on the ground, it is common for insurgent social movements to ride on the coattails of more established patterns of attention. The National Mall in Washington, like the Liberty Bell in Philadelphia, attracts demonstrations because the eyes of the nation are already focused on the venue. By stepping into these high-


An inquisitive recent bit of analysis occurred in *Fontana Tobacco Co. v. AGF*, 121 S. Ct. 1594, 1588 (2001), in which the Court struck down a ban on outdoor advertising because it failed to provide sufficient "alternative avenues" for communication. A ban on advertising was said to leave retailers with "no means of communicating to passersby on the street ... because alternative forms of advertising, like newspapers, do not allow the retailer to propose an instant transaction." *Fontana*, 121 S. Ct. at 1587. If the Court acts in a principled fashion, this recognition of the importance of avenues of spontaneous communication should be even more salient in the area of political speech.

*CompareYG*., 483 U.S. at 72 ("But we have never held that the Government itself can shut off the flow of notices to prevent those who might potentially be offended."). *Rowan*, 396 U.S. at 780-81 ("Whether the highly important right to communicate ... against the very basic right to be free from sights, sounds, and tangible matters we do not want. It seems to me that a retailer's private communications must step at the mailbox of an unsuspecting addressee."). *Marsh v. Alabama*, 396 U.S. 510 (1969) ("Whether a corporation or a municipality owns or possesses the land upon which a public utility operates, it must accept the intrusion of the community in such a manner that the owners of communication remain free."). *Snow v. Martin*, 343 U.S. at 149-50 ("[S]ee no abuse of it... . Those to whom the rights are not ascribed, whether as a privilege to be enjoyed by the owner of the property or the right of a shopping center owner to prohibit pictures from publicizing their market on the property."). *Brando v. City of Albuquerque*, 341 U.S. 622, 628 (1951) ("It would be... . a misuse of the great guarantee of free speech and free press to use police gate-keepers to forestall the objectionable use of public streets to the tincture premises of its undesirability.").
visibility sites, protesters immediately step into the spotlight.71

Equally important, where insurgent social movements contend with established opponents on the ground, they regularly make use of the attention focused on the venues created by those opponents in order to convey their own messages. The First Amendment protects them in this endeavor. Thus, labor organizers picket the worksites of non-union employers;72 civil rights movements demonstrated around discriminatory places of public accommodation;73 proponents of Soviet Jews took to the pavement around the Soviet embassy;74 and opponents of abortion have sought out the sidewalks surrounding abortion clinics.75

On the Internet, there are no malls nor sidewalks. Since Web browsers move users directly to the site sought, there is no opportunity for insurgents to seek the notice of their opponents’ audience as they pass. The digital protestor, however, has at least two modes of borrowing attention, each of which raises distinct legal issues.

First, to the extent that the insurgents can induce high visibility sites to post links to protest sites, they can demonstrate on the equivalent of a digital mall. The low cost of such links, their potential inter-

71 See, e.g., Pamela E. Oliver & Daniel J. Myers, How Events Enter the Public Sphere: Conflict Location and Sovereignty in Local Newspaper Coverage of Public Events, 105 Am. J. SOC'Y 50, 62-64 (1995) (observing that certain physical locations, such as universities and government buildings, tend to attract automatic media attention). This is true, of course, only some of the time. As John Roddick put the point in comments to this paper, “a demonstration of 25 picketers on the [National Mall] probably wouldn’t garner much attention; 100,000 people marching in Lubbock, Texas, probably would.”


est to surfers, and the emerging convention of posting links to web-sites regarding reported events combine to allow a substantial amount of insurgent material to filter through high-traffic portals. Links to insurgent sites are almost non-existent as a first approximation. Yet they can attract non-mainstream viewers to the portal site, either because non-mainstream viewers search out specific information, or because they come to believe that their "type" of information is likely to be found at the portal links. This additional audience is likely to provide immediate benefits sufficient to counterbalance possible long-term commercial costs associated with giving influence to insurgent movements. After all, even if the management of a high-traffic portal is concerned that the agenda of a linked insurgent site is bad for business, in a competitive market a refusal to link will only marginally and contingently decrease the ability of interested surfers to find the offending site through other portals. By contrast, losing potential viewers to portals that provide links immediately decreases advertising income. Thus, Yahoo, the second most popular site on the Internet with 54 million visitors monthly, links to a series of human rights sites on Mexico, and a "best of RIAA" site at a third level of inquiry. Importantly,


6 In addition, some insurgents purchase space. See, e.g., Union the Internet to Disrupt "Virtual Coffee." ASPAID, Jan. 21, 2000, at 5 (describing banner advertisements of a union which appeared when certain keywords were inputted), available at 2000 WL 7991299.

7 In a competitive market characterized by network externalities, there are great incentives not to forfeit even a marginal current advantage out of fear that competitors will establish market dominance. Insurgents can benefit from this dynamic. (J.L. Ackrill, Ruins of Empire: a New Review, Sept. 1993, at 147, reprinted in REPUTABLY QUOTED 51 (Sara Platt ed., 1992) (reporting V.C. Linus, as stating: "[a]t the outset we will furnish covers which will serve on far the support of the Communist Party in their countries and... will store our military industry necessary for our future success against the foreign oppressor. To put it in other words, they will work on the preparation for their own suicide.")

once a surfer has contacted an insurgent website, he or she immediately has hyperlinked access to a series of other sites.

But insurgents in such situations are dependent on the kindness of strangers. The more controversial the message, the more it alienates existing viewers, imposing short-run costs on the portal that may counterbalance the revenue gain of attracting viewers interested in links. The greater the tension between the insurgent’s message and the interest of the sponsors of the website and the more concentrated the market for attention, the larger the potential payoff to refusing to link. The game-theoretic analysis of when it is to the advantage of portal sites to refuse linkage to insurgent sites is complex; out-going reports of efforts to discourage links to competing websites by high traffic portals suggest that in at least some circumstances, insurgent websites risk being frozen out.*

The difficulty will intensify if widely used filters begin to block access to websites with links to insurgent materials.** If the cost of unprotected access to broad markets becomes the exil of controversial links, portals seeking to maximize viewership will ostracize those links. By triggering self-censorship on the part of high-traffic portals, a filtering regime would thus put insurgent social movements at a disadvantage in seeking the attention even of a potential audience that declines to use filters.

Equally important, potential legal liability for linking to websites may make self-censorship an attractive option for mainstream portals and ISPs faced with the option of linking to controversial websites. If

*See, e.g., Drew Cal*len, CyberPatriot Unlocks The Register, REGISTER, at http://www.theregister.co.uk/content/archive/17405.html (Sept. 3, 2001) (recounting that Cyberpatriot barred access to an Internet magazine because the magazine had published links to an anti-filter site).

linking to a website brings with it the threat of legal liability or even ultimately unsuccessful litigations. The potential benefits of a gain in viewership may be swamped by the costs that a high-traffic website risks by giving space to controversial views. A First Amendment analysis concerned with the "causes of little people" will be reluctant to impose liability on search engines or linking sites.

Thus, for example, insurgent social movements have a strong interest in a First Amendment analysis that would place limits on efforts to impose liability for links to websites under the Digital Millennium Copyright Act's (DMCA) "notice and take-down" provisions. common law informational torts, or other regulatory measures that discourage linking.

Finally, in the case of a website maintained by a public entity, the First Amendment may grant mandatory access to the linkage provided


67 See, e.g., RebeccaFAIRNESS Act, ATTI Card in the N.Y. TIMES, Feb. 12, 2001, at C3 ("The most crucial question [the IRS is considering] is whether charities were link to the West sites of political campaigns without the links being considered "targeted advertising."); Amy Keller, Tax-Exempt Organizations Under IRS to Get Exam, Internal Revenue Service, RUL. 2001 (Feb. 21, 2001), at 10 ("[T]ax-exempt organizations are urging the IRS to allow non-profits to maintain links to the Web sites of candidates, parties or DMCA under the condition that they are part of unbiased voter education sites."). For full discussion of the issue, see Swidler for Comments Regarding Need for Guidance Clarifying Application of the Internal Revenue Code in Use of the Internet by Foreign Organizations, Announcement 2000-04, 2000-04 I.R.B. 385, available at http://www.irs.gov/ pub/irs-xml/t368c04.pdf; and Alliance for Justice, Prufa Alliance for Better Comments on Internet Activity by Nonprofits, Jan. 17, 2001, available at http://www.afl.org/
by the site, depending on the vagaries of the public forum doctrine. Thus, in one recent case, a local newspaper critical of the city administration won a place on the city’s webpage for its links based on the fact that similar links were provided to more favored community groups.

Insurgent social movements can develop a second strategy for borrowing attention, less dependent on the willingness of other actors to provide space on their websites, because search engines and domain names are beginning to provide the digital analogue of a neighborhood. A protest site that can situated itself “near” a popular opposition in terms of search proximity, can potentially borrow attention like a leafletter who is stationed in a geographically neighborhood. Businesses which are the subjects or potential subjects of protests have shown themselves to be acutely aware of this possibility, and have sought to deploy a series of legal obstacles in the path of critical sites’ use of their informational neighborhood.

One line of skirmish swells around “sucks” sites; businesses have claimed regularly that the use of their names as the domain names of websites critical of them are violations of their intellectual property rights. In 1998, a court rejected a claim that the site name, “Bally Exercises,” infringed its federal trademark, reasoning that the First Amendment precluded such an assertion of intellectual property rights against a site that was clearly distinct from any critical of the trademark holder. Similar results have followed with

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Footnote:


79 Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 116, 116 (E.D. Cal. 1999). The analysis in Player Enterprises v. Netserve Communications Corp., 55 F. Supp. 2d 1070 (E.D. Cal. 1999), is illustrative: (a) PFI is seeking to leverage its trademarks “Playboy” and “Playsite” (which cannot be registered on the Internet) into a monopoly on the words “playboy” and “playsite.” Indeed, by soliciting a prohibition of the term from the search engines “playboy” and “Playsite.” (b) PFI would effectively monopolize the use of these words on the Internet. This violates the First Amendment right of (a) Excite and Netscape; (b) other trademark holders of “playboy” and “Playsite”; and (c) members of the public who conduct Internet searches.
respect to "Luvcatsucks.com" under both federal trademark and "anti-cybersquatting" statutes." On the other hand, courts have found efforts by an anti-abortion activist to use "plannedparenthood.org," as an admittedly "logo's "Jeans for Jesus" site operated by an opponent of Christian evangelism," and "www.peta.org," operated by "People Eating Tasty Animals" to violate intellectual property rights, based in part on the potential for actual confusion of consumers. Similar disputes have arisen in the domain name arbitration panels of the World Intellectual Property Organization (WIPO) implementing the Uniform Domain Name Dispute Resolution policy of the Internet Corporation for Assigned Names and Numbers—embound by the First Amendment. Panels have involuntarily transferred rights to "wal-martstands.com," "guineasucks.com," and "directlysucks.com" to the targets of those sites. Other WIPO panels, more cognizant of free
speech values and/or confronted with sites which seem more honestly to engage in critique, refused to transfer rights to "lockheedsucks.com," "inclaisenorthbeastsucks.com," and "walmartcanaraeousucks.com."

A cognate set of issues emerges from the use by critical sites of business names or trademarks in the hypertext markup language (HTML) "meta tags" which are used to direct search engines to relevant websites. Thus, in Habbri v. Gaw, the defendant successfully resisted efforts under federal intellectual property and anti- cybersquatting statutes to preclude them from using the name "Bihari Interiors" in a meta tag of their "designdream" site criticizing the plain-


With the emergence of the "sucks" convention, one would expect companies to begin registering cognate "sucks" domain names preemptively as a matter of course. The degree of success of such a tactic will depend on the number of top level domain names available, and the emergence or failure of another convention for criticat sites.

For other critical domain name cognates, see, for example, Leander Kahney, Hacker Suited Raises GMS Hack's Wired News, at http://www.wired.com/news/technews/0,1283,95885,00.html (Oct. 21, 2000), reporting the sending of cease and desist letters following the registration of "backgatemotorworks.com" by a hacker magazine. See generally Fuckmicrosoft.com, at http://www.fuckmicrosoft.com (answering that "FuckMicrosoft.com was formed essentially to show off the fact that we got this domain name, and the hundreds of other anti-Microsoft sites out there didn’t."). The South Bend Hacker's Club also started a site criticizing the movie industry's campaign to ban DoCSS. The site was located at www.fuckmipa.com and offered links to DoCSS. David McGuire, Hacker Group Launches Anti-MPAA Hit Site, NEWSWIRE, at http://www.newsbytes.com/news/01/195593.html (May 4, 2001). In addition, www.sucks.com provides a tor browser site for criticism of several hundred companies.
And in Canada, the Supreme Court of British Columbia—relying in part on *Bally Total Fitness*—upheld the use by a union "cyberpicker" site of meta tags which came close to mirroring the tags for the union employer's site.

Although trademark holders have obtained injunctions against the use of trademarks by competitors, the meta tag suit has generally been unsuccessful in obtaining legal relief against critical websites. But this lack of success has not deterred attorneys for the targets of outside criticism from sending demand letters that often intimidate either the site owners or ISPs whose interest in hosting insurgent sites may be easily discouraged.

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3. Stolen Attention: Hacktivism

Direct disruption of daily life forces a community to take notice; thus, civil disobedience and disruptive demonstrations have become a standard element of insurgent activity in America during the last half of the twentieth century. Public authorities for the most part have adapted themselves to the task of containing rather than suppressing such demonstrations, and the disorder accompanying them has been shown to be an effective entree into the public sphere.33

Insurgent organizers in recent years have experimented with a parallel set of online activity that has been dubbed "hacktivism." Beginning in the mid-1990s, political activists adopted three sorts of approaches. The first, an electronic equivalent of graffiti, gains entrance to high-visibility websites and either confronts visitors with political messages, or redirects their browsers to sites of the activists' choosing until the break-in is detected and remedied. Thus, in 1998, several Indonesian government websites briefly bore the motto "Free East Timor;" in 1999, visitors to "www.kkk.com" were briefly redirected to "www.hatewatch.org;" and, in the same year, a British antinuclear group hijacked 500 web addresses.34 The Kosovo conflict sparked re-
ciprocated defacements among Albanian and Serbian websites. More recently, the ongoing conflict between Israel and the Palestinians has generated escalating attacks, defenses, and counterattacks, including the incapacitation of websites, and the dissemination by a Pakistani hacker of credit card numbers stolen from an American pro-Israeli lobbying group's website. The tensions over the downing of an American spy plane in China have produced politically based electronic graffiti on American sites.


In a second tactic, activists tailor viruses or worms to carry political messages or to use other digital tools to attack the computers of political opponents. This has been a particular development in the recent conflict between Palestinians and Israelis. Each of these tactics seems to be clearly barred by current anti-hacking law; each differs from the hacks that are perpetrated against websites daily, and the viruses that float through the Internet only if the message conveyed and the sustained hostility that the attacks often embody. Because of the ease with which such tactics carry, each has—thus far—had relatively little political impact either in recruiting members or persuading converts. And given the security measures that are necessary to deal with these-every hacker, political hackers have imposed relatively little inconvenience cost on their targets outside of the Israeli-Palestinian venue.

Activists going under the name of Electronic Disturbance Theater pioneered a variant on this approach. Utilizing software that can be downloaded by thousands of sympathetic activists from around the world, these organizers have sought to establish "electronic sit-ins" by repeatedly flooding targeted websites until the websites overheat.

In 1998, the Electronic Disturbance Theater coordinated "sit-ins" directed at the websites of President Ernesto Zedillo, the Pentagon, and the Clinton White House, protesting the treatment of Zapata rebels in Mexico. Claiming 10,000 participants who purportedly were able to deliver 600,000 hits per minute, the demonstrations clearly

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In addition to federal limits, states generally have their own criminal prohibitions. See, e.g., The Hacker Who's Charged Under Michigan Fleeing Sex Offense, People v. Salcedo, 18 Andrews Computer & Online Index, Ltd, Rep. 9 (2000), Vol. 15 No. 1 (providing that a high school student was charged with fleeing by hacking the Dearborn public school's computer system and placing a pornographic picture on the site and programming it to alternate with a photo of the school superintendent). See also, at http://www.antivirus.com (last visited Sept. 7, 2001) (providing news and information relating to computer security), Antivirus: Evolution, at http://www.antivirus.org/maint/antivirus (May 21, 2001) (providing accounts of recent hacking).
generated attention. The argument of the EDT has been that the sending of queries is merely a repeated exercise of free speech rights. Whatever the merits of this claim (and it seems debatable that a properly drawn slogan could not limit the repeated barrage of electronic communication any more than it would be usable to prevent repeated chanting of slogans at such a level as to make communication impossible) the longer term impact of the "slogans" has been relatively limited. The Pentagon—no slouches at information warfare—reponded to the pro-Zapatista attack by sending back malicious programs that caused the attacking computers to crash. The Frankfurt Stock Exchange—subject to an electronic attack in late 1998—reported that the protesters were lost among the six million queries the site received daily. More recently, in 1999, a group going by the name "Electrohippies" organized a "WTO virtual sit-in" which, they claim, reduced the WTO's websites speed by half for four to five hours.


108 See Kornes v. Cooper, 536 U.S. 57, 7879, 87 (1949) (upholding an ordinance forbidding the use of an instrument that emits loud and furious sounds).


110 Denning, supra note 102.

And the “Federation of Random Action” claims to have slowed the IMF and World Bank servers coincidentally with the anti-WTO demonstrations in Prague.\(^{11}\) Like viruses, these attacks operate outside of the law, and at this point seem more likely to function as methods for gathering attention than actually coercing opponents. Like viruses, moreover, they are likely to be drowned out by the noise of non-ideological hacks.\(^{12}\)

Finally, insurgent movements may seek to “steal” attention by obtaining information without authorization and making it available as a way of drawing the interest of more attention-rich actors to the movement’s claims. While this tactic is not unique to the age of the Internet,\(^{13}\) both the acquisition and dissemination of information are obviously facilitated by the current electronic environment. Thus, in a protest against closure of the recent World Economic Forum meeting in Davos to protesters, a group of hackers calling themselves “Virtual Monkeys With a Trashcan” invaded the forum’s computers, stole confidential personal data on a series of world leaders, and released a copy of the stolen data to the press, which in turn posted it to a website.\(^{14}\)

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2003.\(^{15}\) See Ferguson, supra note 108, at 50 (reporting the Federation of Random Action’s attack on the IMF and World Bank websites, which flooded the servers each time the protesters typed with such as “poverty,” “finance,” “incompetence,” and “financial power in an online that room); Federation of Random Action, at http://hicks.research.ex (last visited Sept. 2, 2003) (promoting the anticipated attacks on the World Bank, IMF, and WTO websites and emphasizing the importance of “notifying” them).

2004.\(^{16}\) See David Moore et al., Referring Internet Damage/Activity: GADA, at http://www.crit.org/outreach-papers/hackerware (last visited Aug. 24, 2004) (noting the prevalence of worldwide denial of service attacks, and estimating 12,000 attacks on 5000 different targets during the study, which used three week-long data sets).

In early 1991, the “paper” was illegally copied and disseminated to the press “Penang Papers,” denouncing American involvement in the war in Vietnam; governmental efforts to suppress the dissemination were unavailing. NY. Times Co. v. United States, 803 U.S. 753 (1991) (rejecting the government’s request to enjoin certain newspapers from publishing the “Penang Papers”). Similarly, in March 1971, a well-schooled “CIA/NSA Commission to Investigate the FBI” broke into offices of the FBI in Media, Pennsylvania, and stole, published in a thrilling magazine, and disseminated to the media media 6000 documents relating the FBI’s domestic surveillance program, “Cointelpro.” KENNETH O’REILLY, HOOVER AND THE AMERICAN 217-18 (1985); Michael R. Belknap, Above the Law and Beyond its Reach: O’Reilly and Thefts on FBI Intelligence Operations, 1985 AM. B. FOUND. RES. J. 261, 292-293.

2005.\(^{17}\) See Michelle Zatco, Green Activists Act Like Vultures, WORLD NIZED at http://www.wired.com/news/politics/0,1285,41603,00.html (Feb. 5, 2005) (reporting that information such as credit card numbers, addresses, email addresses, home and cell phone numbers, and passport numbers had been stolen from the World Economic Forum’s computer system, but providing different accounts of how many individuals


E.g., Barciski v. Vopper, 532 U.S. 514, 121 S. Ct. 1703, 1754 n.19 (2001) ("Our holding (that the application of federal and state wiretapping acts on injured defendants First Amendment rights), of course, does not apply to punishing parties for obtaining the relevant information unlawfully."); Brandenburg v. Hayes, 440 U.S. 486, 491 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither report nor source is immune from criticism for such conduct, whatever the impact on the flow of the news.").

associated with the information and the degree of innocence of third-party intermediaries, risk-averse content-providers may well engage in self-censorship as a way of avoiding litigation. On the other hand, more confrontational websites may welcome the opportunity to tweak the establishment in court. And if the point of the exercise is to gain attention, the very efforts to suppress the stolen information may generate the attention insurgents seek.

C. "The Whole World Is Watching": The Vows of Visiblity

Those of us who are old enough to remember the movement against the Vietnam War will recall that one of the chants that demonstrators at the Chicago Democratic Convention in 1968 directed against police asserted that "the whole world is watching." Leaving aside its self-promoting aspects, the burden of the chant was a hope that the possibility of being widely observed would limit the willingness of police to subject themselves to possible discipline and ignominy presumed to accompany brutality before the whole world. In the 1960s, these hopes were realized only sporadically. Yet at the turn of the twenty-first century, the problem posed by the Internet for insurgent social movements can be summed up in the same slogan: once an insurgent movement takes to the Net "the whole world is watching"—and will be for the foreseeable future. For an insurgent social movement, transparency is not an unmixed blessing. Precisely the qualities of the Internet which enable insurgents to reach previously uninhabited constituencies allow opponents to track and counter insurgent activities.

Thus, in one recent case in which I was consulted, an ACLU attorney sought access to a public venue on behalf of an insurgent group for a 24-hour vigil. He was met with the argument from the city solicitor that the group actually planned to camp out in the venue rather than engaging in political protest. The reason? The city solici-
tor had gone to the group’s website and downloaded an exhortation that protesters should “bring their sleeping bags.”

Visibility entails vulnerability. Activities that might escape notice of opponents on the ground become the potential subjects of countermeasures once they take to the Internet. Take, as another example, the organization of demonstrations and civil disobedience directed at the Republican National Convention in Philadelphia, where use of the Internet as a means of organizing protests allowed police to monitor decentralized preparations for civil disobedience. In and of itself, this monitoring can probably not, under current doctrine be the subject of federal constitutional challenge. However, in Philadelphia, the capacity to identify potential protest leaders apparently tempted the police into engaging in illegal preemptive arrests as a means of squelching protests, as well as protections based on the theory that ownership of a cell phone which could be used to organize


106 See Laid v. Tamon, 498 U.S. 1 (1972) (holding that mere existence of a data-gathering spigot could not be challenged as chilling the respondents’ First Amendment rights, based on a record that did not show objective harm or threat or specific future harm). However, other courts have indicated that surveillance may constitute a constitutional violation. See White v. Lee, 277 F.3d 1214 (9th Cir. 2000) (holding intrusive surveillance based on an effort to secure for constitutionally protected activities violated the plaintiff’s rights); Anderson v. Davila, 125 F.3d 148 (9th Cir. 1997) (noting that the plaintiff’s claim of violations of surveillance in violation of his First Amendment rights was likely to succeed on the merits); Phila. Yearly Meeting of Religious Soc’y of Friends v. Tate, 599 F.2d 1555, 1557-58 (3d Cir. 1979) (stating that surveillance combined with dissemination of the information may constitute a constitutional violation).
civil disobedience was criminally punishable as "possession of the instrument of a crime." Such overreaching emphasizes the importance of a careful application of prior restraint doctrine and the First Amendment limits to conspiracy and other vicarious liability prosecutions in the age of the Internet.19

Once participants in dissident movements are identified, they become the potential subjects of a variety of retaliatory prosecutions. With the determinedness that Napster is barred by federal copyright laws, the federal courts have created a class of several tens of millions of potentially liable copyright infringers. If members of insurgent political groups are less than scrupulous about complying with intellectual property laws, hostile authorities can invoke intellectual property prosecutions selectively against dissidents,20 in the same way that ubiquitously violated traffic regulations are invoked against suspected drug couriers. The law of selective prosecution is likely to take on increased importance as online activism increases.21

19 See Sarah Ferguson, National Cell Phone Offenders, VILLAGE VOICE (New York), Dec. 3, 2000, at 35 (reporting recent prosecutions of actors who were assumed to have copyrighted proteins on cell phones); Gwen Shuffer, Wong Nader, PHILA. CONSUMER, Apr. 29, 2001, at http://www.philagoner.com/articles/041501/1-christy-paak-web-sh.html (May 15, 2001) (quoting); see also Global Views, The Long Road Home: Legal Questions Continue to Hind our Freedom of Panoply, LEGAL INTELLIGENCE, Aug. 16, 2000, at 83 (denouncing the arrest of activists, thereby making targets for the denunciations of the Republican National Convention, during a raid of a West Philadelphia warehouse).

20 C.J. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (upholding right of protesters to boycott white merchants and holding that the organization planning the boycott could not be held liable for damages); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Action, 244 F.3d 1007 (9th Cir. 2001) (upholding right to publish names and addresses of abortion providers, where serious threat could be proven, in general speech); Burns v. Quranic Literacy Inc., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (holding that the duration of money and resources to a foreign terrorist group does not constitute actionable "intentional tort" without a showing of direct and intentional frustration and specific intent to further wronged aims).


22 Cooper v. United States, 450 U.S. 546, 559 (1985) ("The decision to prosecute may not be 'deliberately based upon an unobjectionable standard such as race, religion, or other arbitrary classification,' including the exercise of protected political and constitutional rights," (citations omitted)); , united States v. Armstrong, 515 U.S. 456 (1996) (denying discovery on racially selective prosecution claim), and Rizzo
Web-based activism likewise has the capacity to trigger non-criminal sanctions from potentially hostile regulatory institutions, since web-based organizing spotlights activities that might have gone unnoticed in the past. It is difficult to believe that participants in tax exempt organizations did not discuss politics in the past around the water cooler, but there is new concern about diversion of non-profit resources in bulletin boards that engage in "lobbying" or "electioneering" on the Internet. The recent initiative by the IRS to question the tax exemptions of 501(c)(3) organizations on the basis of web-based activism, is in part a function of the differentially conspicuous nature of activities on the Internet.10

Visibility is likely, as well, to precipitate demands for even more information by governmental opponents. In one recent example, when a stolen police crowd-control document was posted on an IMC newswire in Quebec, the FBI obtained an order seeking to search the computer log of all of the visits to the Seattle IMC website over a two-day period, and barring the Seattle group from revealing the existence of the search order.15 Likewise, web-based activism may put at

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15 Being noticed by authorities may also generate extralegal sanctions. See, e.g., Steve Kettmann, German Pol Backtracks on Hack, WIRE News, at http://www.wired.com/news/politics/0,1285,12990,00.html (Apr. 16, 2001) (representing that prior statements had been misinterpreted, but that German government will continue to work ways to prevent extraterritorial neo-Nazi websites); Steve Kettmann, German Threat Raises Internet Fear, WIRE News, at http://www.wired.com/news/politics/0,1285,12991,00.html (Apr. 9, 2001) (describing how Otwo Schily, German Interior Minister, publicly considered plans to launch "official" denial of service attacks on foreign websites that are deemed to violate applicable German law).


risk a wide array of other governmental benefits where administrators exercise some level of discretion.\(^{116}\)

The Web makes activists visible as well to nongovernmental opponents, who can use the information to plan and mobilize counterattacks or retaliate unconstrained by the rules that cabin official power. It is standard advice from "public affairs" specialists that corporations that find themselves the subject of social protest should monitor potential opponents and seek to undercut their messages; the Internet can facilitate these efforts.\(^{117}\) Nor do corporations act alone; for opposing social movements can mobilize by the Internet as effectively as insurgents. Confrontation between abortion and anti-abortion is an obvious feature of the contemporary political scene but similar online mobilization is carried out in the competition between gun control and anti-gun control advocates, advocates of minority sexual orientations and advocates of traditional sexual mores, environmental activism and "wise use" property rights extremism.\(^{118}\)

Once mobilized, opponents are not limited to moral suasion and political petition.\(^{119}\) In addition to economic and physical retaliation,\(^{120}\)
the transparency of the Internet permits opponents to invoke the threat of ruinous litigation (ruinous even if unsuccessful) based on libel, intellectual property, and communicative torts.125 A couple of years ago, I was approached by a nonprofit organization in Philadel-
phia that wanted to put up a website seeking to expose connections among right-wing candidates and organizations. I applauded the ef-
fort, but warned them that if they in fact undertook the project, de-
pending on the structure of the site, they might find themselves sub-
ject to libel suits in Utah and Idaho. The group decided that the risk of litigation outweighed potential political gains. One suspects this will be a not uncommon reaction, and even if insurgents are them-
selves willing to brave the possibility of lawsuits from the opposition, the threat of such litigation may evince self-censorship on the part of ISPs or potential linking partners.126

125 For a discussion of such litigation generally, see GEORGE W. PENC & PENNOPI, CANAN, SLAPP'S: GETTING SUED FOR SPEAKING OUT (1996). For examples of libel ac-
tion; and Metro v. Doe 49 Pa. D. & C. 3d 649, 490 A.2d 6 (Pa. C.P. Allegheny 2000), denying First Amendment protection to anonymous publisher of statements on a web-
site that allegedly defamed a judge. For invasion of privacy actions, see, for example, American Federation of State, County and Municipal Employees, Council 2, AFL-CIO v. Com-
rulings/kirk-.sharan.htm, enjoining a website critical of police from posting Social Security numbers of the police. For intellectual property actions, see, for example, Frezol.listserv Co. v. Lane 67 F. Supp. 2d 745, 754 (E.D. Mich. 1999), denying a prelimi-
nary injunction against a site critical of Ford, Religious Technology Center v. Nation On-
line Communication Services, Inc., 923 F. Supp. 1251, 1285 (N.D. Cal. 1996), granting an in-
junction to the Church of Scientology against online critics who posted the Church's copyrighted works; and Religious Technology Center v. Haven, No. 97-16106, 1999 U.S. App. LEXIS 11828, at *4-5 (9th Cir. June 4, 1999), affirming a $75,000 copyright ver-
dict against a Scientology critic who posted Scientology documents to the Web. For actions claiming threat, see Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Armies, 244 F.3d 1007, 1013 (9th Cir. 2001), upholding right to pub-
lish the names and addresses of abortion providers. Other possibilities for such suits include intentional interference with business relations, incitement, and harassment. And one can only imagine what a strategically minded opponent might do with the notice and take-down provisions of the DMCA.

126 Federal law currently immunizes ISPs from liability for defamation and cognate actions. See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 527, 531 (4th Cir. 1997) (holding text claims against ISPs were barred by the Communications Decency Act); Does v. Frisco Prod., No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645, at *11-16 (N.D. R. June 21,
A First Amendment jurisprudence aimed at facilitating the potential of the Internet for "the poorly financed causes of little people" will be sensitive to its effect in enhancing the vulnerability of "little people" when they choose to advance their causes online. At a minimum, the shields extended to the media against defamation actions should be available to Internet posters, and notions of "public concern" that trigger First Amendment protections should be construed literally. Opinion privilege should likewise be administered with due regard to the context of cyberspace. Vicarious liability should be tightly constrained, as should other tort actions that are prone to use as realia- tion devices.

To be sure, a sufficiently powerful encryption technique (or perhaps password protection) would blunt some of these threats. But this tactic raises other issues. First, opponents who would deploy legal causes of action against insurgent groups may be equally ready to invoke discovery to pierce the veil of anonymity. The case reports are beginning to fill with litigation regarding libel actions filed as the predicates for subpoena seeking to uncover the identity of critics. 29


30 This is not a stretch of a trench from current doctrine. See Burtnick v. Vappert, 532 U.S. 514, 121 S. Ct. 1755, 150 L.Ed.2d (2001) creating that no distinction exists between media and nonmedia defendants); id. at 1765 ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.") (citations omitted).

31 This suggestion is "the advance of an excellent extention of the problem of libel actions directed against individual participants in Internet discourse in Virgil Barnes Lohrky, Minning John Doe--Delegation and Discourse in Cyberspace, 49 PEDAL L.J. 903, 919, 952-44 (2000)."

32 E.g., Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1068 (W.D. Wash. 2001) (seeking discovery to obtain the identity of individuals posting on an anonymous bulletin board: Columbia Int'l Co. v. Sears, Roebuck, Co., 185 F.R.D. 573, 576 (N.D. Cal. 1999) (seeking discovery of defendant's identity so that plaintiff may properly serve);
AOL recently reported receiving 475 such subpoenas last year. Many of the opinions in these cases recognize the potential for chill or suppression accompanying the efforts of targets of criticism to use litigation to strip away shields of anonymity, and require showings both of legal merit in the lawsuits and necessity before allowing discovery. But insurgents are not known for careful calibration of their speech.

and the possibility that a hater attack will span over the line to color- able libel or threat leaves insurgents potentially exposed. A shield of anonymity, whether legally rooted or technically provided, could benefit insurgent movements who are willing to live within its shadow. But a system of hidden identities brings its own difficulties for the organization of social movements; the unique power of the Internet as an organizing technique is precisely its openness. If there exists an individual who can participate in web-based activism are those who know the password or decryption key, the movement is locked within the borders of the current true believers. If involvement is limited to anonymous digital exchanges, the capacity for the development of empathetic identities may be stunted. This may be adequate to the needs of a revolutionary or terrorist, who needs only to communicate with an established network of operatives, but for movements that aspire to a political base in a democracy, it is potentially crippling.

**CONCLUSION**

In an evocative recent empirical analysis of the impact of interconnected communications on democracy around the world, Christopher Keddie concluded that "new technologies, which combine for the first time both autonomy and influence in the same medium couple decentralization of political power indivisibly with economic growth."

There is much more to be said, but it should be clear from this survey that in America, the Internet has in fact developed the potential of significantly facilitating the emergence of insurgent social movements, a potential that has been seized by aspiring movements across the political spectrum. The Internet is in the process of being incorporated into American social movements' repertoires of collective action.

The potential for ultimate democratization, however, is only a potential. I have, I hope, demonstrated that the Internet bears risks as well as rewards for insurgents, and in this area as in others there is at most a "soft technological determinism" at work. "Insurgent social movements can benefit from the Internet only if the legal doctrines

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that develop along with the medium attend both to the scarcity of attention and the vulnerabilities to surveillance which shadow the prospects of online activism. In this context, adoption or rejection of the strand of concern for the "poorly financed causes of little people" will crucially determine the prospects of those causes in the twenty-first century.