University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2001

Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet

Seth F. Kreimer

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Computer Law Commons](#), [Constitutional Law Commons](#), [Ethics and Political Philosophy Commons](#), [First Amendment Commons](#), [Internet Law Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Mass Communication Commons](#), [Politics and Social Change Commons](#), [Science and Technology Law Commons](#), and the [Social Influence and Political Communication Commons](#)

Repository Citation

Kreimer, Seth F., "Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet" (2001). *Faculty Scholarship at Penn Law*. 1175.

https://scholarship.law.upenn.edu/faculty_scholarship/1175

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

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

SETH F. KREIMER¹

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,¹ but specific technological developments—and here I

¹ Professor of Law, University of Pennsylvania Law School. This Article has benefited from the comments of my friends and colleagues Matt Adler, Stuart Benjamin, Nancy Chang, Peter Huang, David Kairys, Scott Kieff, Robin Leidner, John Rothchild, Kim Scheppele, and Polk Wagner, as well as the superb research assistance of Jordan Barnett. My grateful acknowledgment of their generous help should subject them to no blame for any mistakes, omissions, or misperceptions that remain.

¹ The role of repertoires of collective action and the evolution of these repertoires in particular periods was first analyzed extensively in CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION* 151-59 (1978) [hereinafter *FROM MOBILIZATION*]. In a later analysis, Tilly noted:

Any population has a limited repertoire of collective action: alternative means of acting together on shared interests These varieties of action constitute a repertoire in something like the theatrical or musical sense of the word; [as in jazz] people know the general rules of performance more or less well and vary the performance to meet the purpose at hand.

CHARLES TILLY, *THE CONTENTIOUS FRENCH* 390 (1986). It has since become a staple of the social movement literature. *E.g.*, DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 15, 165-88 (1999) (devoting a chapter to the “forms and repertoires of protest”); SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 29-42, 91-105 (2d ed. 1998) (describing “repertoires of contention” in France and Yugoslavia).

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.² The portable phonograph made possible the Jehovah's Witness campaigns of the 1930s;³ the radio underlay Father Coughlin's contemporaneous success in building a mass movement.⁴ National television networks gave force to the use of civil disobedience by the Civil Rights movement.⁵ In the last generation, the availability of photocopying and desktop publishing allowed the development of alternative "zines" and the associated "Riot Grrrl" movement,⁶ 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.⁷ The elimination of the Fairness Doc-

² See ROBERT A. GOLDBERG, *GRASSROOTS RESISTANCE: SOCIAL MOVEMENT IN TWENTIETH CENTURY AMERICA* 67 (1991) (describing the commission marketing scheme of the Southern Publicity Association's contract with the Ku Klux Klan).

³ See *Douglas v. City of Jeanette*, 319 U.S. 157, 167, 169 (1943) ("Each home was visited, 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."); *Murdoch v. Pennsylvania*, 319 U.S. 105, 106 (1943) ("In connection with [their door-to-door solicitation], petitioners used a phonograph on which they played a record expounding certain of their views on religion."); *Jones v. Opelika*, 316 U.S. 584, 591 (1942) (describing the activity of a Jehovah's Witness who went door to door attempting to sell literature and "play a portable phonograph"); *Cantwell v. Connecticut*, 310 U.S. 296, 301 (1940) ("[The Jehovah's Witnesses] were individually equipped with . . . a portable phonograph and a set of records.").

⁴ See WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* 147 (2d ed. 1990) (citing Father Coughlin, "the radio priest," as "demonstrat[ing] the potential of electronic media by mobilizing a following for the National Union for Social Justice").

⁵ See *id.* at 157 ("However well overt repression may have worked before 1945, the interaction of challenger strategy and media coverage made it ineffective against the civil rights movement . . .").

⁶ See Jessica Rosenberg & Gitana Garofalo, *Riot Grrrl: Revolutions from Within*, 23 *SIGNS* 809, 811 (1998) ("[Z]ines have created a network of Riot Grrrls . . ."); Judy Isaksen, *Identity and Agency: Riot Grrrls' Jouissance*, *ENCULTURATION*, Spring 1999, at http://www.uta.edu/huma/enculturation/2_2/isaksen ("[Z]ines are the fibers that mesh the Riot Grrrl movement together, for all members can write about their emotions, experiences, and critical social issues with a backdrop of safety and acceptance.").

⁷ See JEAN HARDISTY, *MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS* 43-45 (1999) (describing the effect of technology in developing direct-mail funding for right-wing mobilization); Pamela E. Oliver & Gerald Marwell, *Mobilizing Technologies for Collective Action*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 251, 261 (Aldon D. Morris & Carol McLurg Mueller 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

trine in 1987 allowed the evolution of politicized "talk radio" that has served as a network of right-wing mobilization.⁸

Few prior elements of the American repertoire of protest have faded away (though liberty poles are rarely seen),⁹ but 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 organizations); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civil Life*, in *CIVIC 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].").

⁸ See WAYNE MUNSON, *ALL TALK: THE TALKSHOW IN MEDIA CULTURE* 93-98 (1993) (discussing the development of radio activism in the years following the 1987 repeal of the Fairness Doctrine); GINI GRAHAM SCOTT, *CAN WE TALK? THE POWER AND INFLUENCE OF TALK SHOWS* 128 (1996) (noting the support of the public, the Clinton administration, and Congress for reimposing the Fairness Doctrine to combat conservative talk radio programming); Thomas W. Hazlett & David W. Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, MICH. TELECOMM. & TECH. L. REV. 35, ¶ 1 (Sept. 25, 1997), at <http://www.mtlr.org/volfour/Hazlettfr.html> (reporting a dramatic increase in the amount of news/talk radio since the demise of the Fairness Doctrine).

⁹ Liberty poles originated as large wooden columns—often fashioned out of ship masts—erected in public squares as part of the "rites of resistance" to British authority during the American Revolution. SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* 25-29 (1997). After the revolution, they were used as symbols of resistance during the Whiskey Rebellion. *Id.* at 172-73; see *In re Fries*, 9 F. Cas. 826, 862, 864, 870 (C.C.D. Pa. 1799) (No. 5,126) (describing the erection of a liberty pole during the Whiskey Rebellion); *Respublica v. Montgomery*, 1 Yeates 419, 421 (Pa. 1795) (referring to liberty poles as one of the "avowed standards of rebellion"). They were also adopted by Jeffersonian Republicans as "prominent and easily recognizable symbols of liberty, equality, and republicanism," and as symbols of opposition to the Federalist government and to the Sedition Act. NEWMAN, *supra* at 80, 97, 170-76. By the middle of the nineteenth century, the erection of liberty poles "on highways and public squares" by "each political party of the country to express its greater devotion to the rights of the people" had come to be viewed as "a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people." *City of Allegheny v. Zimmerman*, 95 Pa. 287, 294 (1880). The custom apparently disappeared at the end of the nineteenth century.

one."¹⁰ 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 repertoires 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 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."¹¹ 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,¹² the right to picket,¹³ the right of access

¹⁰ A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed. 1975).

¹¹ See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (upholding the right to distribute leaflets door to door).

¹² See *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (upholding the right to solicit house to house). In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), 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 in our own history abundantly attest." *Id.* at 452; see also *Lowe v. SEC*, 472 U.S. 181, 205 (1985) (quoting *Lovell* in support of the exclusion of a newsletter from statutory limitations); *Jamison v. Texas*, 318 U.S. 413 (1943) (striking down a law prohibiting the distribution of leaflets containing an advertisement for religious books); *Schneider v. New Jersey*, 308 U.S. 147, 155-65 (1939) (citing *Lovell* 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:

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

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

to public property for rallies and demonstrations,¹⁴ the right to engage in politically based boycotts,¹⁵ the right to post signs on one's own property,¹⁶ and the right to distribute anonymous literature.¹⁷

¹³ See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (striking down a prohibition on picketing near a place of business, which eliminated the only "practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute").

¹⁴ See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.").

¹⁵ See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (upholding the right to boycott and patrol outside merchants' stores against a Sherman Act challenge).

¹⁶ See *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (protecting residential signs, which are "an unusually cheap and convenient form of communication[, e]specially for persons of modest means or limited mobility").

¹⁷ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (holding that the First Amendment protects the right to distribute campaign literature anonymously); *Talley v. California*, 362 U.S. 60, 62 (1960) (quoting *Lovell's* language describing pamphlets and leaflets as being "historic weapons in the defense of liberty" in support of right to distribute anonymous pamphlets). The most recent account of this strand of First Amendment values is Justice Kennedy's dissent in *Hill v. Colorado*, 530 U.S. 703 (2000). Justice Kennedy quoted from *Lovell*, *Schneider*, *Thornhill*, and *Carlson v. California*, 310 U.S. 106 (1940), to support his contention that the court has a long history of supporting "peaceful and vital" methods of protest, such as handing out pamphlets, picketing, displaying residential signs, distributing books, and engaging in verbal communications like those prohibited by Colorado's statute. *Hill*, 530 U.S. at 781-87.

Unfortunately, the refrain seems in recent years to have occurred quite often in dissent. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 451 (1990) (Brennan, J., dissenting) ("[E]xpressive boycotts are irreplaceable as a means of communication [because] they are essential to the 'poorly financed causes of little people.' It is no accident that boycotts have been used by the American colonists to throw off the British yoke and by the oppressed to assert their civil rights." (citation omitted)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) ("Access to government property permits the use of the less costly means of communication so 'essential to the poorly financed causes of little people.'" (citation omitted)); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 314 n.14 (1984) (Marshall, J., dissenting) (noting that "[r]espondents lack the financial means necessary to buy access to more conventional modes of persuasion," and commenting that the outcome "lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas"); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) ("[S]igns posted on public property are doubtless 'essential to the poorly financed causes of little people' and their prohibition constitutes a total ban on an important medium of communication." (citation omitted)); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 144 (1981) (Marshall, J., dissenting) ("By traveling 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 "vast democratic forums of the Internet," "[i]t provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that '[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.'"¹⁸ 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."¹⁹

pellees employ the method of written expression most accessible to those who are not powerful, established, or well financed.").

¹⁸ 521 U.S. 844, 868, 870 (1997) (citation omitted). In fact, the Internet has grown even beyond those projections. In January 2001, a reported 168 million Americans (three of every five) logged on to the Internet. At-work web access accounted for fourteen percent of all web connections (used by 41 million office workers), while home Internet access comprised fifty-eight percent. *75% of Americans Go Surfing on Internet*, BIRMINGHAM POST, Feb. 20, 2001, at 24; see also Nielsen Net Ratings, Average Web Usage, at <http://209.249.142.27/nrpn/owa/NRpublicreports.usagemonthly> (last visited Aug. 24, 2001) (giving current monthly estimates of web usage). It is estimated that 407 million people worldwide had Internet access by the end of 2000. *How Many Online?*, NUA: 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).

¹⁹ *Reno*, 521 U.S. at 870 (citation omitted). Judge Dalzell 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 plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to 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.

ACLU v. Reno, 929 F. Supp. 824, 881-83 (E.D. Pa. 1996).

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.²⁰ This global access in turn facilitates challenges to the status quo.

A. "Direct Access"

In the past, intermediary institutions stood astride access to the mass public. Those who controlled newspaper chains or political parties could filter or block insurgent messages. During the 1930s, both Father Coughlin on the Right and Franklin Roosevelt on the Left used direct radio broadcasts as pathways to the public that avoided the interposition of hostile newspaper chains.²¹ So, today, insurgent web-

Indeed, the perception of the openness of the Internet fuels the sense in *ACLU v. Reno* that regulations that differentially increase the costs of using the Internet for some types of content are particularly suspect.

²⁰ Cf. GARY W. SELNOW, *ELECTRONIC WHISTLE-STOP: THE IMPACT OF THE INTERNET ON AMERICAN POLITICS* 107-13 (1998) (discussing the proliferation of cause-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 Scheeres, *Who'll Watch the Haters Now?*, WIRED NEWS, at <http://www.wired.com/news/culture/0,1284,41263,00.html> (Jan. 18, 2001) (describing the neo-Nazi website Stormfront, with a mailing list, chatrooms, and multimedia libraries, that log 4000 to 6000 hits per day, and quoting Rabbi Abraham Cooper of the Simon Wiesenthal Center as having identified over 2500 "problematic" extremist sites), with Carrie Kirby, *Out There with Online Media; Gays and Lesbians Gain Individual and Collective Strength from the Internet*, S.F. CHRON., June 23, 2000, at 10 ("PlanetOut was visited by 369,000 unique users in April, according to Media Metrix. Rival portal Gay.com, also based in San Francisco, had 499,000 visitors in the same month."), Planet Out, at <http://www.planetout.com> (last visited Sept. 2, 2001) (dedicating itself to the issues affecting gays and lesbians), and Search the Queer Internet, at <http://www.rainbowquery.com> (last visited May 10, 2000) (eliciting 128,657 entries in query for "gay" sites).

For a list of several hundred dissident websites from around the world from Abkhazia to Zimbabwe, see Separatist, Para-military, Military, Intelligence, and Aid Organizations, at <http://www.cromwell-intl.com/security/netusers.html> (last updated Oct. 4, 2001).

²¹ See GAMSON, *supra* note 4, at 147-48 (discussing Roosevelt's and Coughlin's contemporaneous use of radio). Similarly, Richard Viguerie, a conservative activist, has characterized direct mail during the 1980s as "the advertising medium of the underdog. It allows organizations or causes not part of the mainstream or not popular to get

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.²²

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.²³ 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

funded." GOLDBERG, *supra* note 2, at 224 (quoting RICHARD A. VIGUERIE, *THE NEW RIGHT: WE'RE READY TO LEAD* 124 (1980)).

²² Defend the RNC 420, at <http://www.r2kphilly.org> (last visited Sept. 2, 2001); see also, e.g., Independent Media Center, at <http://www.indymedia.org> (last visited July 16, 2001) (covering social protests and left-of-center movements and listing 60 other Independent Media Center (IMC) sites); *IMC FTA Coverage*, Independent Media Center, at <http://www.indymedia.org/ftaa> (last visited Sept. 2, 2001) (providing up-to-date coverage of the protests in Quebec).

²³ Free Republic.com—The Premier Conservative News Forum, at <http://www.freerepublic.com>.

this point, the organization logs over 270,000 user sessions monthly.²⁴ Similarly, the Environmental Defense's website allows visitors to punch in their zip codes and discover the status of air and water pollution in their areas, along with the prevalence of lead contamination, waste disposal, and toxic waste sites, as well as the identity of local polluters and officials;²⁵ and the Home School Legal Defense Association provides state-by-state updates of proposed and pending legislation affecting home schooling.²⁶

Not only does the Internet allow insurgents to bypass the "soft" 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,²⁷ by Vietnamese dissidents to post

²⁴ TOM PRICE, CYBER ACTIVISM: ADVOCACY GROUPS AND THE INTERNET 11 (2000). For other examples, see the Environmental Working Group's Chemical Industry Archives, at <http://www.chemicalindustryarchives.com> (last visited Sept. 2, 2001), a searchable database of documents discovered by freedom of information requests and litigation discovery, and The Right-to-Know Network, at <http://www.rtk.net> (last updated May 8, 2001), operated by OMB Watch and the Center for Public Data Access, where visitors can search a variety of EPA toxic release inventories.

²⁵ Scorecard, at <http://www.scorecard.org> (last visited Sept. 2, 2001).

²⁶ Home School Legal Defense Association, at <http://www.hsllda.org> (last visited Sept. 2, 2001).

²⁷ See DAVID RONFELDT ET AL., THE ZAPATISTA "SOCIAL NETWORK" IN MEXICO 52-53, 69-73 (1998) (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.rand.org/publications/MR/MR994>; Markus S. Schulz, *Collective Action Across Borders*, 41 SOC. PERSP. 587, 603 (1998) ("The Zapatistas' proposal for an intercontinental communication and resistance network was subsequently distributed by e-mail . . . and posted on the world wide web . . ."); Harry Cleaver, *The Zapatistas and the Electronic Fabric of Struggle*, at <http://www.eco.utexas.edu/faculty/Cleaver/zaps.html> (Nov. 1995) ("[T]hrough [the Zapatistas'] ability to extend their political reach via modern computer networks the Zapatistas have woven a new electronic fabric of struggle to carry their revolution throughout Mexico and around the world."); *Zapatistas in Cyberspace: A Guide to Analysis & Resources*, at <http://www.eco.utexas.edu/Hompages/Faculty/Cleaver/zapsincyber.html> (last visited Sept. 2, 2001) ("The international circulation through the Net of the struggles of the Zapatistas in Chiapas, Mexico has become one of the most successful examples of the use of computer communications by grassroots social movements."); see also Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in the Movement Society*, in THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 227 (David S. Meyer & Sidney Tarrow eds., 1998) [hereinafter SOCIAL MOVEMENT SOCIETY] ("A dense web of north-south exchange, aided by computer and fax communication means that governments can no longer monopolize information flows . . .").

banned novels,²⁸ and by Serbian Radio Station B-92 to substitute Web broadcasting for the radio reception that had been jammed by the Milosevic government.²⁹

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).³⁰ 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.³¹ The magazine complied, but proceeded to post a link to the Disney search engine

²⁸ *Banned Vietnamese Book Goes Online*, Digital Freedom Network, at <http://www.dfn.org/focus/vietnam/buingoctan.htm> (Feb. 8, 2001). For a report of the banning and a reproduction of extracts from the book, see Bui Tin, *A Novel Which Scares, Reporters Sans Frontières*, at <http://www.rsfr.fr/uk/html/censorship/vietnam.html> (Feb. 6, 2001).

²⁹ 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 51 hours, primarily because we resorted to the Internet.

. . . [W]e 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.

Foreign Relations Authorization for Fiscal Year 2000-2001: Public Diplomacy Programs: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 106th Cong. 59 (1999) (statement of Carl Gershman, President, National Endowment for Democracy); see also Matthew McAllester, *Web Spreads News of Serb Conflict*, *NEWSDAY*, Dec. 28, 1996, at A6 (describing how, after being blocked by the Serbian government, the Belgrade radio station B-92 continued its reporting on the Web).

³⁰ Gallery of CSS Descramblers, at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/index.html> (last visited Oct. 10, 2001).

³¹ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 342 (S.D.N.Y. 2000). A California state court has also issued an injunction. *DVD Copy Control Ass'n v. McLaughlin*, No. CV 786804, 2000 WL 48512, at *1 (Cal. App. Dep't Super. Ct. Jan. 21, 2000). However, that court declined an application to enjoin linking. *Id.* at *4.

along with instructions on how to use Disney's facilities to search for the decryption program.³² 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.³³

The availability of insurgent websites, combined with the nature of

³² 2600 News, HACKER Q., at <http://www.2600.com/news/1999/1227-help.html> (last visited Oct. 12, 2001).

³³ A search on March 28, 2001, for "DeCSS" using the Disney search engine, www.go.com, uncovered three sites in the top ten results that contained or led 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. Sam Costello, *MPAA Pursues DeCSS Posters over Links*, IDG.NET, at http://www.idg.net/ic_240108_1794_9-10000.html (Sept. 6, 2000); e.g. Letters from Hemanshu Nigam, Director, Worldwide Internet Enforcement, Motion Picture Association of America, to dst@cs.cmu.edu and host-master@ANDREW.cmu.edu (Feb. 5, 2001), available at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/mpaa-threat-feb2001.txt>.

Some sites have removed the program. See MP3.com, at http://artists.mp3s.com/artists/169/shane_killian.html (last visited Oct. 12, 2001) (reporting removal of "The Computer Code Hoedown," a square-dance calling version of DeCSS). Others have retained the offending material. See Response to MPAA Threat Letter from Dr. David S. Touretzky, Principal Scientist, Computer Science Department, Carnegie Mellon University, to Hemanshu Nigam, Director, Worldwide Internet Enforcement, Motion Picture Association of America (Feb. 6, 2001) (requesting more specific allegations in response to the MPAA's request that Touretzky remove the "illegal" descrambling codes), available at <http://www.cs.cmu.edu/~dst/DeCSS/Gallery/mpaa-reply-feb2001.html>; Email from Parker Thompson, Computing & Communications Information, University of Washington, to arobs@u.washington.edu (May 23, 2001) (addressing a student who was contacted by the MPAA for displaying descramblers, the University of Washington responded by telling the student that no immediate action was necessary), available at <ftp://ftp.u.washington.edu/public/arobs/css/okay>; see also Gallery of CSS Descramblers, at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery> (last visited Apr. 30, 2001) (displaying the descrambler code in a number of forms). More recently, other programmers have generated other, shorter descrambling programs—seven lines and fewer—which continue to circulate widely. See Declan McCullagh, *A Thorn in Hollywood's Side*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42475,00.html> (Mar. 20, 2001) (interviewing the creator of the Gallery of CSS Descramblers website, Dave Touretzky).

A similar dance recently occurred in the efforts of the Church of Scientology to block access to one of its documents. The Scientologists threatened Slashdot.org, a news site, with action under the Digital Millennium Copyright Act (DMCA) for allowing the posting of a document called "OT III." Slashdot.org responded by taking down the material in question and replacing it with an essay on free speech, combined with links and methods of searching for "OT III" from off-shore sites. Roger Parloff, *Threat of Scientologists' Legal Wrath Prompts Slashdot to Censor a Posting*, INDUSTRY STANDARD.COM, Mar. 16, 2001, available at LEXIS; Cmdr Taco, *Scientologists Force Comment Off Slashdot*, Slashdot, at <http://slashdot.org/article.pl?sid=01/03/16/1256226&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 dalliance, publications on Matt Drudge's website detailing the Lewinsky allegations made a concerted effort to suppress the information futile. Conversely, the seamy quality of the Starr Report became impossible to disguise when the text of the report became available online.³⁴

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.³⁵

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 grassroots activists to post words, sounds, or images from any source on topics relevant to a variety of left-wing activism.³⁶

³⁴ See DANIEL BENNETT & PAM FIELDING, *THE NET EFFECT* 20-24 (1999) (describing the effect of the Drudge Report and the release on the Internet of the Starr Report, including 800,000 downloads of the Starr 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 entrants into the arena of public discourse made possible by the Internet has similarly multiplied the competitive pressures that militate against suppression of information.

³⁵ DOUGLAS RUSHKOFF, *COERCION* 173 (1999).

³⁶ Free Republic.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 on May 20, 2001); see Marcella Bombardieri, *Wary of Traditional Press, Many Take to the Web; 'Media Activists' Using Medium to Air Own News*, BOSTON GLOBE, Oct. 10, 2000, at B1 (describing the

B. Webs and Nets: Recruitment and Internal Organization

Interactivity also allows information to blend into recruitment and mobilization; any visitor to a website or bulletin board who is sympathetically 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.³⁷ 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 themselves with the movement. The traditional social science finding that even a single ally measurably strengthens the capacity to withstand social pressure³⁸ is borne out in the observed importance of email and the

Boston IMC); Michelle Delio, *Fodors for Free Speechers*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,38636,00.html> (Sept. 28, 2000) (describing the New York IMC); Stewart Taggart, *The Other Side from Down Under*, WIRED NEWS, at <http://www.wired.com/news/culture/0,1284,38847,00.html> (Sept. 19, 2000) (describing the Sydney, Australia IMC).

Analogous uses of the Internet to gather information without formal organization have begun to appear in a variety of other political venues. See Kathi Black, *Just One Question: John Aravosis*, INDUS. STANDARD, Apr. 10, 2000 ("I put up an appeal for phone numbers for Paramount execs. Within days, someone sent the entire internal phone list. The Net gives you a million inside sources for free." (quoting John Aravosis, the activist who established www.stopdrlaura.com)), available at LEXIS; Henry Jenkins, *The Director Next Door*, 104 TECH. REV. 97, 97 (2001) (describing Boston's Big Media Collective Big Noise and the Seattle IMC's distribution of camcorders to 100 activists at the Seattle WTO protests, from which they produced a protest film available over the Internet); Julia Scheeres, *The Net as Corruption Disruption*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42608,00.html> (Mar. 26, 2001) (describing the use of private Internet disclosure as means of disciplining official corruption in Latin America).

³⁷ See GOLDBERG, *supra* note 2, at 218-19 (listing a number of movements "created by men and women who mobilized resources from established groups, authorities, challengers, and the rank and file"); FROM MOBILIZATION, *supra* note 1, at 81-83 (noting dense networks are preconditions to mobilization); Jo Freeman, *On the Origin of Social Movements*, in WAVES OF PROTEST 7-8 (Jo Freeman & Victoria Johnson eds., 1999) (recounting the finding that social movements are predicated on the availability of a co-optable preexisting communications network); Doug McAdam & Dieter Rucht, *The Cross-National Diffusion of Movement Ideas*, 528 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 61 nn.11, 12 (1993) (collecting sources for the same proposition).

³⁸ See Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31, 34-35 (noting that the strength of majority pressure diminishes greatly when a supporting

Web for the capacity of gay, lesbian, and bisexual teenagers to develop a sense of their sexual identities.³⁹ And, as one set of commentators observed, when "ordinary citizens see others like themselves" involved in contentious politics, "demonstrations have a demonstration effect."⁴⁰ 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.⁴¹

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 Consensus—Breaking and Consensus—Preempting Partners on Reduction of Conformity*, 11 J. EXP. SOC. PSYCHOL. 215, 215 (1975) (describing and testing Solomon Asch's finding that having a partner "liberates" a person from the pressure to conform on the basis that the partner breaks consensus with the majority group).

³⁹ See, e.g., GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, ACCESS DENIED: THE IMPACT OF INTERNET FILTERING SOFTWARE ON THE LESBIAN AND GAY COMMUNITY 17-19, 46-50 (1997) [hereinafter ACCESS DENIED] (giving first-hand accounts of the sense of community experienced by gay youths on the Internet), available at http://www.glaad.org/binary-data/GLAAD_PDF/pdf_file/12.pdf; Jennifer Egan, *Lonely Gay Teen Seeking Same*, N.Y. TIMES, Dec. 10, 2000, §6 (Magazine), at 110 (describing how gay youths find "friendship, sex, heartache—and [themselves]—online"); Kirby, *supra* note 20 (explaining how the Internet has "contributed to the strength and visibility of the gay and lesbian community").

⁴⁰ David S. Meyer & Sidney Tarrow, *A Movement Society: Contentious Politics for a New Century*, in THE SOCIAL MOVEMENT SOCIETY, *supra* note 27 at 1, 13; see also Daniel J. Myers, *Social Activism Through Computer Networks*, at <http://www.nd.edu/~dmyers/cbsm/vol1/myers2.html> (last visited Aug. 24, 2001) (arguing that online contact can generate an "artificial density of an aggrieved population" necessary to precipitate a social movement).

⁴¹ See, e.g., *Hate on the Internet: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 24-50 (2001) (statement of Howard Berkowitz, National Chairman, Anti-Defamation League) (noting that while "deeply disturbing," the increase of hate and extremist views on the Internet reflect 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: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 50-55 (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 propagandizing for hate groups); Les Back, *White Fortresses in Cyberspace*, UNESCO COURIER, Jan. 2001, at 44 (describing how through the Internet, individual "white power" supporters have come together as a community); Ann Hodges, *Logging on to Hate*, HOUSTON CHRON., Oct. 19, 2000, at 4D (discussing how hate websites are marketing themselves to children and teenagers); Lakshmi Chaudhry, *Hate Sites Bad Recruiting Tools*, WIRED NEWS, at <http://www.wired.com/news/culture/0,1284,36478,00.html> (May 23, 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.⁴² The Rainforest Action Network⁴³ 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,⁴⁴ while the National Abortion and Reproductive Rights Action League (NARAL) offered the opportunity to email Senators 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;⁴⁵ 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;⁴⁶ and the Rockefeller Foundation-funded "Ourforests.org" claims to have generated over 700,000 public comments in support of designation of "heritage for-

⁴² See BENNETT & FIELDING, *supra* note 34, at 64 (describing "CapitolWiz," 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 Center, at <http://www.saveourevironment.org> (last visited Aug. 18, 2001), and Action Network, at <http://www.actionnetwork.org> (last visited Aug. 23, 2001).

⁴³ The Rainforest Action Network, at <http://www.ran.org> (last visited Sept. 17, 2001).

⁴⁴ For an early move in this direction, see LAURA J. GURAK, *PERSUASION AND PRIVACY IN CYBERSPACE: THE ONLINE PROTESTS OVER LOTUS MARKETPLACE AND THE CLIPPER CHIP* 77-79 (1997) (recounting how protestors against the Lotus MarketPlace database publicized online the email address of the chief executive of Lotus Corporation and encouraged fellow protestors to email their opinions). I suspect that such efforts are becoming less effective as executives install automated filters on their email.

⁴⁵ Editorial, *Deluge*, ROLL CALL, Mar. 22, 2001 ("[D]uring the confirmation fight over Attorney General John Ashcroft, Senate e-mail servers started resembling the California electrical system, suffering the electronic equivalent of brownouts for hours—in some cases, even days."); Anna Quindlen, *Singing Praise to the Crazy*, NEWSWEEK, Jan. 29, 2001, at 68; see also Donna Ladd, *Click for Choice*, VILLAGE VOICE (New York), Feb. 6, 2001, at 37 ("Through NARAL's 'Ten Minute Activist' page, you can write Congress, check congressional voting records, e-mail reports to friends, sign up for e-mail action alerts, and donate to the group's pro-choice efforts.").

⁴⁶ See BENNETT & FIELDING, *supra* note 34, at 88-94 (discussing the course of the cybercampaign waged against the FDIC); Eve Gerber, *Account Overrun*, SLATE, at <http://slate.msn.com/HeyWait/99-05-12/HeyWait.asp> (May 12, 1999) (noting that the Libertarian Party's protest website, www.defendyourprivacy.com, steered 171,268 email complaints to FDIC).

ests" by the Department of the Interior.⁴⁷ 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 deluged Paramount and advertisers with telephone calls and emails;⁴⁸ "censure-andmoveon.com" generated over a half-million messages to Con-

⁴⁷ Press Release, TechRocks, OurForests.org Succeeds (Dec. 12, 2000), available at <http://www.techrocks.org/oldnews.lasso?-database=news&-sortField=Dateentered&-sortOrder=descending&-op=bw&Public=Yes&-op=bw&Source=techrocks.org&-maxRecords=1&-skipRecords=12&-search&-response=newsdetail.LASSO>; see also Action Network, at <http://www.actionnetwork.org> (last visited Aug. 23, 2001) (claiming 642,534 "email activists" have been notified of current legislative and social concerns by email with sample letters automatically forwarded to policymakers).

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 save rate subsidies 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 clocking 55,000. Associated Press, *Congress Struggles with Flood of E-Mail*, N.Y. TIMES, Mar. 19, 2001, at A16 (quoting the Congressional Management Foundation); see also *Defenders of Wildlife: Petition to Save Arctic Refuge Overwhelms White House E-Mail System*, U.S. NEWSWIRE, Feb. 23, 2001 (reporting that 650,000 emails from visitors to www.SaveArcticRefuge.org overloaded the White House email servers, which returned thousands of emails unread); Kathy Goldschmidt, *E-mail Overload in Congress*, Congress Online Project, at <http://www.congressonlineproject.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 the problem of "digital attention deficit" referred to below may begin to affect lobbying as well. A great deal will turn on the way in which policymakers choose to cull their email. A sophisticated artificial intelligence system could allow widely supported insurgent 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 electronically sophisticated or well-financed lobbyists.

⁴⁸ David France, *Tuning Out Dr. Laura*, NEWSWEEK, Sept. 18, 2000, at 80 (noting that website identified advertisers on talk show, "publicizing the personal telephone numbers, email addresses and fax numbers of key executives—and telling followers to flood them with complaints" regarding their sponsorship); Adam Pitluk, *The Doctor is Out: A Dallas Activist Helps Lead the Charge Against Dr. Laura*, DALLAS OBSERVER, Sept. 21, 2000 (describing a website organized by six activists from around the country that listed the advertisers on a talk show with an anti-homosexual host, organized 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 protests. See, e.g., Brian Lowry, *'Dr. Laura' Was Sunk by More Than Just Protests*, 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).

gress.⁴⁹

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.⁵⁰

Ease of communication and internal organization allows groups with relatively small organizational infrastructures to mobilize a dispersed constituency. In the spring of 2000, if reports are to be believed, Donna Dees-Thomases in New Jersey used a website operated out of her home to organize the Million Mom March, an event that

⁴⁹ BENNETT & FIELDING, *supra* note 34, at 27-36 (describing the "censureand.moveon.com" website which used a "flash campaign" and a "snowball effect" to generate 500,000 messages to Congress around the Clinton impeachment controversy); cf. MoveOn.org: Citizens Making a Difference, at <http://www.moveon.org/documentation.htm> (last visited Aug. 23, 2001) (claiming two million emails sent to Congress); see also Jim Buie, *How the Internet Is Changing Advocacy—Examples of Citizen Activism Via Computer*, Cybersavvy Citizen: Using the Internet to Change the World, at <http://www.cybersavvycitizen.com/activism.htm> (last visited Aug. 23, 2001) (describing demonstrations organized by countercoup.org against George W. Bush and by Freerepublic.com for George W. Bush, as well as a campaign by social worker Irene Weiser, who set up www.stopfamilyviolence.org and generated 160,000 emails in support of reauthorization of the Violence Against Women Act). For a discussion of the interplay between informal individual interactions and the development of social movements, see Pamela E. Oliver, *Bringing the Crowd Back In: The Non-organizational Elements of Social Movements*, 11 RES. SOC. MOVEMENTS CONFLICT & CHANGE 1 (1989).

⁵⁰ See Kenneth Anderson, *The Ottawa Convention Banning Landmines: The Role of International NGOs and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000) (discussing and criticizing the characterization of the process leading up to the Ottawa Convention Banning Landmines as a democratic process); Ken Rutherford, *The Landmine Ban and NGOs: The Role of Communications Technologies*, INTERNET AND INTERNATIONAL SYSTEMS: INFORMATION TECHNOLOGY AND AMERICAN FOREIGN POLICY DECISIONMAKING WORKSHOP, at <http://www.nautilus.org/info-policy/workshop/papers/rutherford.html> (last visited Sept. 6, 2001) ("By 1999, the ICBL website provided registration materials to members and visitors for more than five separate email list groups ranging from media landmine news updates to campaign news, including the differing ICBL task force."). See generally PRICE, *supra* note 24, at 24-25 (discussing Internet organizations made up of several like-minded organizations in order to better target supporters).

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.⁵¹ 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.⁵² In a more conventional venue, 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 emails" on an hour-by-hour basis during debate and Senate maneuvering.⁵³

⁵¹ PRICE, *supra* note 24, at 5, 7-9. A precursor to this effort was the web-based organization of a 150,000 person anti-cancer march in 1998. See BENNETT & FIELDING, *supra* note 34, at 84-88 (detailing the "e-organizing" that led to the success of "The March: Coming Together to Conquer Cancer").

⁵² See, e.g., David Bowen, *Out of Website, Out of Mind*, FIN. 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 leaflets, posters, and word of mouth anything on this scale could possibly have been organized"); *Creating a Dot-commotion*, FOREIGN POL'Y, 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'Hehir, *How to Plan Chaos*, N.Y. TIMES, Apr. 15, 2001, § 6 (Magazine), at 16 (noting 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 Booth, *Protest Movement Loses Its Steam in Heat of L.A.*, WASH. POST, Aug. 20, 2000, at A3 ("Most of the demonstrations [at the 2000 Democratic National Convention] were organized by small leaderless groups on shoestring budgets, spreading the word of their causes largely through the Internet."); Uli Schmetzer, *World Trade Targeted Down Under*, CHI. TRIB., Sept. 12, 2000, at 1 (discussing the use of websites to organize protests against globalization in Australia); Diane Vari, *Case Study: How Activists Used the Internet to Organize Protests 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://camden-www.rutgers.edu/~wood/445/vari.htm> (Apr. 25, 2000) ("The Internet not only permitted the wide disbursement of information it did so inexpensively."); Aaron Pressman, *Civil Disobedience on the Web*, SLATE, at http://slate.msn.com/netelection/entries/00-07-28_87215.asp (July 28, 2000) ("[T]he website set up by activists planning to disrupt the Republican National Convention in Philadelphia with acts of civil disobedience will be a busy hub spreading word of impending protests and directing them."); cf. Kilian Doyle, *Fight the Power Online*, IRISH TIMES, Mar. 26, 2001, at 12 (recounting the use of a Serbian protest site, www.otpor.net, to "motivate protestors toward civil disobedience" against the Milosevic regime).

⁵³ Nancy Gibbs & Karen Tumulty, *A New Day Dawning*, TIME, Apr. 9, 2001, at 40, 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 inflexible. 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"⁵⁴ match earlier accounts of women who participated in the anti-abortion movement and the so-called "wise use" movement.⁵⁵ 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.⁵⁶ In

Sept. 15, 2001) (presenting information on Senator McCain's crusade for campaign finance reform); see also BENNETT & FIELDING, *supra* note 34, at 79-80 (describing a similar account of an ACLU "action alert" list of 30,000).

⁵⁴ PRICE, *supra* note 24, at 8.

⁵⁵ Jacqueline Vaughn Switzer, Women and Wise Use: The Other Side of Environmental Activism, Address to the 1995 Annual Meeting of the Western Political Science Association (Mar. 14-15, 1996), available at <http://www.cdfc.org/women.html>; cf. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 219-223 (1984) (describing how "sophisticated use of technology has allowed the pro-life movement to convert the spare time of a largely housewife membership, a relatively far-flung grassroots organization and small but regular donations into effective and reliable political resources"); Jim Nicholson, *The Rise of the "E-Precinct"*, 5 HARV. INT'L J. PRESS/POL., Winter 2000, at 78, 81 ("With the introduction of the e-precinct, a campaign volunteer in California can share her support for her candidate of choice with everyone in her email address book and can recruit volunteers all around the country from the comfort of her own home.").

⁵⁶ The sociological literature, surveyed in Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001), identifies "New Social Movements" as movements keyed to non-material goals. But there is nothing "new" about such movements in American society, where broad religion-based movements, from revivals to abolition to temperance, have characterized the political and social practice since the early nineteenth century. Sidney Tarrow, "The Very Excess of Democracy": *State Building and Contentious Politics in America*, in SOCIAL MOVEMENT AND AMERICAN POLITICAL INSTITUTIONS 20, 26-35 (Anne N. Costain & Andrew S. McFarland eds., 1998) ("Throughout American history, the same habits of association, pressure tactics, and coalition formation successfully developed by business and civic associations were used by combinations of church militants for moral purposes.").

However, the emergence of "decentralized, segmented and reticulated" movements, characteristic of the late twentieth century, is likely to be accentuated by the Internet. TARROW, *supra* note 1, at 129; see Jeffery M. Ayres, *From the Streets to the Internet: The Cyber-Diffusion of Contention*, 566 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 135, 141 (1999) (predicting the prominence of "global electronic riots"); Bowen, *supra* note 52 (arguing that Internet organization allows agglomeration of groups that would have difficulty cooperating in a more integrated venture); Luther P. Gerlach, *The Structure of Social Movements: Environmental Activism and Its Opponents*, in WAVES OF PROTEST, *supra* note 37, at 85, 90-91 ("With the advent of the Internet, movement participants are now exchanging information and ideas through email and websites."); Margaret E. Keck &

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.⁵⁷ On the Left, "www.rmark.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.⁵⁸ Likewise, in recent months, websites frequented by mechan-

Kathryn Sikkink, *Transnational Advocacy Networks in the Movement Society*, in *THE SOCIAL MOVEMENT SOCIETY*, *supra* note 27, at 217, 236 (arguing that the emergence of networks more "ephemeral and mobile" than social movements, whose key resource is information, characterizes modern transnational human rights advocacy); Doug Beazley, *The Changing Face of Environmental Activism*, EDMONTON SUN, May 15, 2000, at 7 ("[N]arrow-focus lobby groups . . . found [a] common cause against the WTO through the grapevine of the World Wide Web [and] a whole new level of cooperation between these groups."); Margie Wylie, *Technology Shapes New Generation of Activism*, NEWHOUSE NEWS SERVICE, Oct. 9, 2000 (describing decentralized organization of protests against the World Bank, IMF, and Democratic and Republican Parties using the Internet and email).

⁵⁷ Bill Berkowitz, *Invitation To Terrorism: A New Anti-Choice Web Site Targets RU-486 Providers*, IN THESE TIMES, Feb. 19, 2001, at 8. The website is still available at <http://www.ru486registry.com/atrocities/aborts.html>. See generally *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999) (imposing liability and enjoining website), *vacated by*, 244 F.3d 1007 (9th Cir. 2001), *reh'g en banc granted*, No. 99-35320, No. 99-35325, No. 99-35327, No. 99-35331, No. 99-35333, No. 99-35405, 2001 U.S. App. LEXIS 21414 (9th Cir. Oct. 3, 2001).

For what it is worth, the author of the Nuremberg files website has filed a libel action against Planned Parenthood and the National Organization for Women claiming that Gloria Feldt and Kim Gandy falsely accused him of being a conspirator in the murder of an abortion provider. *Horsley v. Feldt*, 128 F. Supp. 2d 1374 (N.D. Ga. 2000). On the other hand, a New Jersey man recently pleaded guilty to a federal intimidation charge in connection with his offer on his website of a \$1.5 million reward to anyone who killed a designated abortion provider. Mitchel Maddux, *Man Admits Internet Offer for Killing of Abortionist*, RECORD (Bergen County, N.J.), Mar. 10, 2001 at A4; *New Jersey Man Admits Offering "Reward" for Killing of Abortion Providers and to Possessing Child Pornography*, at http://www.njusao.org/files/mo0309_r.htm (Mar. 9, 2001).

A similar approach denoted "leaderless resistance" has been adopted by neo-Nazis. See, e.g., Julia Scheeres, *Will the Hatemongers Survive?*, WIRED NEWS, at <http://www.wired.com/news/culture/0,1284,41460,00.html> (Jan. 30, 2001) (describing the strategy of encouraging individual right-wing extremists, or "lone wolves," to act independent of the organization).

⁵⁸ The satirical website, www.voteauction.com, at <http://62.116.31.68>, claims to be a platform to channel soft money from corporations directly to the consumer. The strong impression left by www.rmark.com is that it is largely devoted to cultural provo-

ics for United Airlines and pilots for Delta have provided the locus for the organization of extra-legal job slowdowns without formal union organization.⁵⁹ 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.⁶⁰

cation, but at least some corporate counsel take the possibilities articulated by the site seriously. See, e.g., Bruce Braun et al., *Model Statute: www.commercial_terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. LEGIS. 159 (2000) (proposing a model statute making it a crime to solicit "commercial terrorism" online).

A similar mechanism is up and running in an effort to mobilize searches for prior art in contested patents. One site offers bounties for individuals who can provide information on prior research that will defeat patent claims. Bountyquest, at <http://www.bountyquest.com/bounties/displayBounty.php?bountyName=1026> (last visited Sept. 6, 2001).

⁵⁹ See Nancy Fonti, *Delta, Pilots Return to Court*, ATLANTA J. & CONST., Jan. 11, 2001, at 1G (reporting the use of emails as evidence that Delta pilots mounted an organized campaign to decline voluntary overtime); Heather Draper, *United Mechanic Feels Heat: Airline Says Web Site He Operates Violates Restraining Order*, ROCKY MTN. NEWS (Denver), Nov. 29, 2000, at 4B (reporting the alleged use of a website to organize work slowdowns at United Airlines).

Likewise, the IMC network, a series of 62 "open-source journalism" sites, founded in the organization of the anti-WTO protests in Seattle has organized itself in decentralized modules as both a medium for conveying information and the backbone for the coordination of a series of anti-globalization protests. *About Indymedia*, Independent Media Center, at <http://www.indymedia.org/about.php3>; see Doyle, *supra* note 52 (describing the role of IMC in Prague protests); Stewart Taggart, *The Other Side from Down Under*, WIRED NEWS, at <http://www.wired.com/news/culture/0,1284,38847,00.html> (Sept. 19, 2000) (describing the role of IMC in Australian protests). See also the linked site, Protest Net: A Calendar of Protest, Meetings, and Conferences, at <http://www.protest.net>.

Different members of the IMC network have adopted different approaches to "editing" the material posted to the sites' newswires. *Compare* Independent Media Center of Philadelphia, at <http://www.phillyimc.org/faq.pl> (last visited Sept. 6, 2001) (describing their editorial collective, open to anyone who wants to sign on, makes continuous rating decisions of submitted material), *with* Independent Media Center, at <http://www.indymedia.org/publish.php3> (last visited Sept. 6, 2001) (describing its policy of editing by list administrators, with access to "hidden articles" page of omitted posts), *and* Seattle Independent Media Center, at <http://seattle.indymedia.org/newswire-hide.php3> (last visited Sept. 6, 2001) (outlining their "hidden articles" procedure, publishing standards and procedures for the "editorial collective").

⁶⁰ Napster claimed a membership of seventy-two million in spring 2001. Although it used its website successfully to persuade its members to email members of Congress in support of efforts to alter the copyright laws to protect its music-sharing enterprise, efforts to generate physical presence have not met with notable success. *Compare* Paul Kane, *Napster Beefs Up Lobbying Team on Eve of Hearing*, ROLL CALL, Apr. 2, 2001 ("Nap-

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,

ster is using its Web site, still visited by 10 million users a day, to promote the Napster Action Network, which has helped bombard Congressional offices with about 600,000 emails since last July."), and Declan McCullagh, *Napster's Million Download March*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42676,00.html> (Mar. 28, 2001) (reporting efforts by website to generate demonstrations in Washington, D.C.), with John Balz, *Napster's Pleas Hit Congress*, ST. PETERSBURG TIMES, Apr. 4, 2001, at 1E (reporting the actual turnout at the Congressional hearing to be small).

For discussion of the "open source" movement and the development of Linux software see RANDOLPH BENTSON, *INSIDE LINUX: A LOOK AT OPERATING SYSTEM DEVELOPMENT* (1996); Peter Kollock, *The Economics of Online Cooperation: Gifts and Public Goods in Cyberspace*, in COMMUNITIES IN CYBERSPACE 220 (Marc A. Smith & Peter Kollock eds., 1999); Marcus Maher, *Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 619, 620-25 (2000); Richard Stallman, *The GNU Operating System and the Free Software Movement*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 53, 65-66 (Chris DiBona et al. eds., 1999) [hereinafter OPEN SOURCES]; Rod Dixon, *When Efforts to Conceal May Actually Reveal: Whether First Amendment Protection Of Encryption Source Code and the Open Source Movement Support Re-Drawing the Constitutional Line Between the First Amendment and Copyright*, 1 COLUM. SCI. & TECH. L. REV. 3, 27-32 (Sept. 28, 2000), at <http://www.stlr.org/cite.cgi?volume=1&article=3>. See also Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI-KENT. L. REV. 1405, 1410-15 (1999) (narrating Linus Torvalds' development of Linux and describing it as "Marx applied to code"); Linus Torvalds, *The Linux Edge*, in OPEN SOURCES, *supra*, at 101, 109 ("The power of Linux is as much about the community of cooperation behind it as the code itself. . . . [I]f someone attempted to make and distribute a proprietary version—the appeal of Linux, which is essentially the open-source development model, would be lost for that proprietary version.").

The earliest case of large-scale decentralized Internet protest is documented in GURAK, *supra* note 44, at 19-31, 41, 66-79, 116-17 (describing decentralized Internet-based protests in 1990 which persuaded Lotus Corp. not to release a database of household characteristics cross-referencing names, addresses, incomes, and buying habits).

None of this, of course, is entirely unprecedented. Leaflets and literacy allow some decentralization of insurgent activities. In eighteenth-century England, literate coffee house clientele, graffiti, and calls for boycotts were perceived as frightening facilitators of sedition. DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 144-46 (1998); cf. TARROW, *supra* note 1, at 43-51 (explaining that popular literacy and non-traditional associations facilitated the development of social movements in the eighteenth century).

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 evenly 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 1955,⁶¹ 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.⁶²

⁶¹ See Stacy Lawrence, *Internet in Media Time*, INDUS. STANDARD, May 1, 2000, at <http://thestandard.net/article/0,1902,14571,00.html> (noting that 50% of American households will have Internet access by the end of 2000, and comparing that number to the 65% of Americans with TV in 1955 and 45% of Americans with radio in 1930).

⁶² Kate Miller, *Digital Divide Now Has 2 Spans*, INDUSTRY STANDARD.COM, Feb. 22, 2001, available at LEXIS; see also 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 (2001) (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 online access by all kinds of Americans highlight[s] the fact that the Internet population looks more and more like the overall population of the United States.

. . . 58% of American men have Internet access now and 54% of women have access.

. . . 45% of black women had Internet access by year's end [2000], compared to just 34% at mid-year.

LEE RAINIE & DAN PACKEL, PEW INTERNET AND AMERICAN LIFE PROJECT, MORE ONLINE, DOING MORE (2001), <http://www.pewinternet.org/reports/toc.asp?Report=30>. Further, the Pew Research Center reports:

There is gender parity in the Internet population—50% of those online are women and 50% 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.

54% of women do not have Internet access; 49% of men do not have access.

50% of whites have access; 36% 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 similar economic circumstances are online; and 69% 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.⁶³ The open question is whether this differential will be greater than the existing inequalities in political and associational participation.⁶⁴

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

68% 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.

AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, WHO'S NOT ONLINE: 57% OF THOSE WITHOUT INTERNET ACCESS SAY THEY DO NOT PLAN TO LOG ON (2001), <http://www.pewinternet.org/reports/toc.asp?Report=21>.

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 Pastore, *Minority, Low-Income Internet Use Increases, The Big Picture Demographics*, at http://cyberatlas.internet.com/big_picture/demographics/article/0,,5901_768141,00.html (May 17, 2001) (reporting 51% of African-American households online, as compared with 60% of Caucasian households).

In addition, in terms of mechanical ability to access the Internet, access at schools and libraries, combined with inexpensive access from Internet cafes, dilutes the class bias of technology. See, e.g., David Colker, *Stirring a Virtual Melting Pot*, L.A. TIMES, Feb. 20, 2001, at A1 (noting use of Internet cafes as a lifeline for immigrants, tourists, and the poor).

⁶³ See Gretchen K. Berland et al., *Health Information on the Internet*, 285 JAMA 2612 (May 23/30, 2001), at <http://jama.ama-assn.org/issues/v285n20/rfull/joc02274.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).

⁶⁴ Cf. Kay Lehman Scholzman et al., *Civic Participation and the Equality Problem*, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, *supra* note 7, at 427, 450 (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 none; 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 Disney group cannot be used to peruse the Rainforest Action Network.⁶⁵ 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 critique 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 stock 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 substantial 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 recognizable amid the clamor for attention.⁶⁶

⁶⁵ See *U.S. Top 50 Web and Digital Media Properties*, Jupiter Media Metrix, at <http://www.jmm.com/xp/jmm/press/mediaMetrixTop50.xml> (last visited Aug. 27, 2001) (listing the top sites updated each month).

⁶⁶ See, e.g., DAVIS, *supra* note 42, at 42-43, 64-65, 82-84, 119-20 (1999) (describing the advantages that “resource-rich groups” still hold on the Internet); Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 322-25 (1997) (arguing for existence of corporate domination of the World Wide Web based on surveys of users’ website visits and Internet links); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1180 (1999) (arguing that the “impact of a message on the World Wide Web has already 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. SELNOW, *supra* note 20, at 83-84 (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 movement to organize for sustained or targeted campaigns. See BENNETT & FIELDING, *supra* note 34, at 82-83 (finding that the efficacy of the ACLU’s online organizing is the result of the expenditure of substantial resources).

While search engines may ameliorate the advantage that attaches to economic resources in the battle for attention, there are indications that the capacity to obtain attention among sites returned by search engines will be responsive both to the sophistication of the site’s efforts to game the search engine system—which will often correlate

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-to-one organizing, door-to-door canvassing, leafletting, and mass mailings all seek to persuade recipients to attend to a movement's message voluntarily. So, too, in the online world, organizers may seek to interest listserv or chatroom participants in their message, or in visiting the movement's website to encounter the message,⁶⁷ or to induce supporters to notify friends and acquaintances digitally of such opportunities. These efforts raise no legal issues directly, but the on-going efforts to induce or enable web-users, 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.⁶⁸ Such fil-

with economic resources—and to the capacity to buy placements directly. See, e.g., Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matter*, 16 INFO. SOC'Y 169, 174-75 (2000) (discussing the importance and challenges of indexing and ranking to the success of a website); Danny Sullivan, *Buying Your Way In To Search Engines*, Search Engine Watch, at <http://www.searchenginewatch.com/webmasters/paid.html> (last modified May 2, 2001) (listing the current paid placement policies of major search engines).

⁶⁷ See, e.g., BENNETT & FIELDING, *supra* note 34, at 82 (recounting the ACLU's efforts to visit online chatrooms and listservs in order to organize online); PRICE, *supra* note 24, at 9-10 (same).

⁶⁸ For a fine account of the difficulties associated with Internet filters, see R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 757 (1999). For a recent compilation of overzealous filtering, see Alan Brown, *Winners of the Foil the Filters Contest*, Digital Freedom Network, at <http://dfn.org/focus/censor/contest.htm> (Sept. 28, 2000). More seriously, see Bennett Haselton, *Amnesty Intercepted: Global Human Rights Groups Blocked by Web Censoring Software*, Peacefire.org, at <http://www.peacefire.org/amnesty-intercepted> (Dec. 12, 2000), listing blocked social activism sites, including www.parish-without-borders.net, "[a] global network of Catholic communities focusing on outreach in developing nations," containing a section for action alerts pertaining to human rights abuses in different countries, blocked by one such filter, www1.surfwatch.com, in the 'Violence/Hate Speech' category; and Bennett Haselton & Jamie McCarthy, *Blind Ballots: Web Sites of U.S. Political Candidates Censored by Censorware*, Peacefire.org, at <http://www.peacefire.org/blind-ballots> (Nov. 7, 2000), listing sites of political candidates blocked by filtering.

ters, even without overt ideological censorship, are likely to have a differential impact on insurgent websites, which are more prone to express cultural values regarded as deviant by the mainstream 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 less 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 website.⁶⁹ 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.⁷⁰

More intrusively, an organizer may adopt the digital version of door-to-door canvassing or direct mail; having gathered Internet addresses 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 constitutionally protected in the absence of some objection from recipients.⁷¹

⁶⁹ See ACCESS DENIED, *supra* note 39, at 23 (discussing library software blocks); GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, ACCESS DENIED 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 effects of over-general filtering in relation to gay themes), available at http://www.glaad.org/binary-data/GLAAD_PDF/pdf_file/2.pdf.

⁷⁰ Cf. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (striking down a statute that allowed the post office to detain "communist propaganda" until the intended recipient returned a reply card to the post office indicating a desire to receive the mail); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (striking down a Rhode Island resolution that created the "Commission to Encourage Morality in Youth," whose powers included the public identification of "corrupting" publications). Conversely, to enable insurgent information to penetrate filters would be hostile to efforts to preclude development of technical measures. Plaintiffs have challenged a federal statute requiring the installation of filtering software as a condition of access to federal subsidies for Internet access in schools and libraries as a violation of the First Amendment. Complaint for Declaratory and Injunctive Relief, *Multnomah Cty. Pub. Library v. United States*, No. 01-1322 (E.D. Pa. filed Mar. 20, 2001), available at <http://www.aclu.org/court/multnomah.pdf>; see also *Multnomah Cty. Pub. Library v. United States*, No. 01-1322 (E.D. Pa. July 26, 2001) (order denying motion to dismiss).

⁷¹ *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking down an ordinance that banned door-to-door canvassing); cf. *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 75 (1983) (striking down a federal law that prohibited the mailing of information concerning contraceptives); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 740 (1970) (upholding a statute which permits an addressee to give notice to the post office that he no longer wants delivery of certain communications). But cf. *Kovacs 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.⁷² 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) ("That more people may be more easily and cheaply reached . . . is not enough to call forth 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 telephone and fax advertisements. *See Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995) (upholding FCC regulation prohibiting prerecorded telephone calls); *Destination Ventures v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995) (upholding statute banning unsolicited fax advertisements); *Texas v. American Blastfax*, 121 F. Supp. 2d 1085, 1091-92 (W.D. Tex. 2000) (same); *Kenro 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).

⁷² *See, e.g., Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 248-53 (S.D.N.Y. 2000) (involving trespass and computer abuse causes of action to prevent "harvesting" of names for spam); *America Online, Inc. v. Nat. Health Care Discount, Inc.*, 121 F. Supp. 2d 1255, 1276-77 (N.D. Iowa 2000) (involving trespass and computer abuse actions against senders of unsolicited bulk email to subscribers); *eBay, Inc. v. Bidders Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-72 (N.D. Cal. 2000) (involving trespass action to prevent automated search engines from gathering information about bids for competing auction site); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va. 1998) (involving trespass action against sender of unsolicited bulk email to subscribers); *CompuServe Inc v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (same); *Intel Corp. v. Hamidi*, No. 98-AS05067, 1999 WL 450944 (Cal. App. Dep't Super. Ct. Apr. 28, 1999) (involving trespass action against former employee who sent bulk email to company's employees); *see also* Martin Malin, *National Labor Relations Act in Cyberspace: Union Organizing in an Electronic Workplace*, 49 KAN. L. REV. 1, 38 (2000) (discussing the application of the National Labor Relations Act to electronic organizing efforts); Kathryn Balint, *S.D. Men Face Felony Counts, a Rarity, in E-mail 'Spamming'*, SAN DIEGO UNION-TRIB., Mar. 13, 2001, at A1 (describing the first cases of felony charges for spamming in San Diego and the second case nationally). *See generally* *State v. Heckel*, 24 P.3d 404, 413 (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 J. Goldstone, *A Funny Thing Happened on the Way to the CyberForum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 23-27, 35-40 (1998) (discussing state constitutional law and antitrust theories that could protect appropriate access to subscribers); Sabra-Anne Kelin, *State Regulation of Unsolicited 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 ‘reach the minds of willing listeners and to do so there must be the opportunity to win their attention.’”⁷³

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-

⁷³ *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)); cf. *id.* at 780 (Kennedy, J., dissenting) (arguing that the absence of an opportunity to engage in personalized conversation deprived anti-abortion protestors of the “ample alternatives” necessary to pass First Amendment scrutiny).

An instructive recent bit of analysis occurred in *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2480 (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 that retailer to propose an instant transaction.” *Lorillard*, 121 S. Ct. at 2427. 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.

Compare *Bolger*, 463 U.S. at 72 (“But we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.”), *Rowan*, 397 U.S. at 736-37 (“Weighing the highly important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.”), *Marsh v. Alabama*, 326 U.S. 501, 507 (1946) (“Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”), and *Martin*, 319 U.S. at 146-47 (“[D]oor to door campaigning is one of the most accepted techniques of seeking popular support Door to door distribution of circulars is essential to the poorly financed causes of little people. Freedom to distribute information to every citizen . . . is . . . vital to the preservation of a free society”), with *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns* 453 U.S. 114, 128 (1981) (“There is neither historical nor constitutional support for the characterization of a letterbox as a public forum.”), *Hudgens v. NLRB*, 424 U.S. 507, 508, 521-23 (1976) (upholding the right of a shopping center owner to prohibit pickets from publicizing their strike on the property), and *Breard v. City of Alexandria*, 341 U.S. 622, 645 (1951) (“It would be . . . a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.”).

visibility sites, protestors immediately step into the spotlight.⁷⁴

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;⁷⁵ civil rights movements demonstrated around discriminatory places of public accommodation;⁷⁶ proponents of Soviet Jews took to the pavement around the Soviet embassy;⁷⁷ and opponents of abortion have sought out the sidewalks surrounding abortion clinics.⁷⁸

On the Internet, there are neither 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-

⁷⁴ See, e.g., Pamela E. Oliver & Daniel J. Myers, *How Events Enter the Public Sphere: Conflict Location and Sponsorship in Local Newspaper Coverage of Public Events*, 105 AM J. SOC. 38, 62-64 (1999) (observing that certain physical locations, such as universities and government buildings, tend to attract automatic media attention). This is true, of course, only *ceteris paribus*. As John Rothchild put the point in comments to this paper, "a demonstration of 25 picketers on the [National M]all probably wouldn't garner much attention; 100,000 people marching in Lubbock, Texas, probably would."

⁷⁵ See *Thornhill v. Alabama*, 310 U.S. 88, 101-06 (1940) (striking down Alabama statute banning picketing).

⁷⁶ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-34 (1982) (holding the First Amendment protected "patrolling" and boycotts of certain merchants); *Police Dep't v. Mosely*, 408 U.S. 92, 95-98 (1972) (striking down ordinance banning picketing around schools); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (striking down an Illinois court injunction enjoining distribution of pamphlets about "blockbusting"); see also *Carey v. Brown*, 447 U.S. 455, 471 (1980) (striking down a statute prohibiting picketing of residents or dwellings and protecting civil rights march to mayor's home); *Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969) (same).

⁷⁷ See *Boos v. Barry*, 485 U.S. 312, 334 (1988) (finding a District of Columbia code provision banning picketing around a foreign embassy unconstitutional).

⁷⁸ *Schenck v. Pro-Choice Network*, 519 U.S. 357, 383-85 (1997) (holding "fixed buffer zones" around abortion clinics do not violate the First Amendment, but "floating buffer zones" do); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776 (1994) (striking down parts of a court order as overbroad); cf. *Hill*, 530 U.S. at 734-35 (upholding a "bubble ordinance" that allowed picketing near abortion clinics); *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding an ordinance prohibiting "targeted" picketing of home in the case of protests outside of the home of a doctor who performed abortions).

est to surfers, and the emerging convention of posting links to web-sites regarding reported events⁷⁹ combine to allow a substantial amount of insurgent material to filter through high-traffic portals.⁸⁰ Links to insurgent sites are almost costless 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.⁸¹

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 "boycott RIAA" site at a third level of inquiry.⁸² Importantly,

⁷⁹ E.g., BENNETT & FIELDING, *supra* note 34, at 110-118 (providing an account of the use of email and the Internet to disseminate the Matthew Shepard story nationally and the creation of an interactive press release in the form of the "Matthew Shepard Online Resources Web site," established by a gay rights activist, to provide both information and a place for group solace); Larry Neumeister, *Hollywood Takes on Hackers*, at <http://abcnews.go.com/sections/tech/DailyNews/dvd000719.html> (July 19, 2001) (news item in Disney-owned ABC news site that provides links to hacker website, www.2600.com, in a reporting on the DeCSS controversy).

⁸⁰ In addition, some insurgents purchase space. See, e.g., *Union Uses Internet to Distribute 'Virtual Leaflets'*, AIRPORTS, Jan. 25, 2000, at 5 (describing banner ads bought by a union which appeared when certain keywords were inputted), available at 2000 WL 7391292.

⁸¹ 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. Cf. I.U. Annenkov, *Remembrances of Lenin*, *Novyi Zhurnal/New Review*, Sept. 1961, at 147, reprinted in RESPECTFULLY QUOTED 51 (Suzy Platt ed., 1992) (reporting V.I. Lenin, as stating: "[capitalists] will furnish credits which will serve us for the support of the Communist Party in their countries and . . . will restore our military industry necessary for our future attacks against our own suppliers. To put it in other words, they will work on the preparation for their own suicide").

⁸² Yahoo! News, Technology Full Coverage, at http://dailynews.yahoo.com/fc/tech/digital_music (last visited May 1, 2001) (containing a link to Boycott the RIAA, at <http://boycott-riaa.com> and Yahoo! News, Technology Full Coverage, at http://dailynews.yahoo.com/full_coverage/tech/digital_copyright_law, which links to Gallery of CSS Descramblers, at <http://www.cs.cmu.edu/~dst/DeCSS/Gallery> (last vis-

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 may alienate 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, but ongoing 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.⁸³

The difficulty will intensify if widely used filters begin to block access to websites with links to insurgent materials.⁸⁴ If the cost of unimpeded access to broad markets becomes the exile 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

ited Oct. 10, 2001), showcasing an array of DeCSS descramblers); Yahoo! News, World Full Coverage, at <http://dailynews.yahoo.com/fc/world/Mexico> (last visited May 1, 2001) (containing links to Ejército Zapatista de Liberación Nacional, at <http://www.ezln.org> and the Washington Office on Latin America, at <http://www.wola.org/index.htm>).

Querying "Protest" on Disney's search engine, www.go.com, responded with links to: "Iranian student protests, 1999 World Trade Organization meeting protests, Kurdish liberation movement, Ocala, Abdullah, Political activism, U.S. gasoline prices" and the first choice returned on a "protest" search was www.protest.net. The search engine also helpfully suggested links to "IMF protest, Levi protest, Olympic protest, Seattle protest and war protest." Go.com, at <http://www.go.com> (last visited May 1, 2001).

⁸³ Alec Klein, *AOL Restrictions Alleged*, WASH. POST, Oct. 10, 2000, at E1 (reporting America Online executive's statement that it is common business practice for AOL to prohibit AOL partners from linking to sites that compete with AOL or other AOL partners).

⁸⁴ See, e.g., Drew Cullen, *CyberPatrol Unblocks The Register*, REGISTER, at <http://www.theregister.co.uk/content/archive/17465.html> (Sept. 3, 2001) (recounting that Cyberpatrol banned 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 litigation, 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) trafficking provisions,⁸⁵ the DMCA's "notice and takedown" provisions,⁸⁶ common law informational torts, or other regulatory measures that discourage linking.⁸⁷

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

⁸⁵ See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219-26 (S.D.N.Y. 2000) (granting a preliminary injunction against the dissemination of software for decrypting DVDs).

⁸⁶ 17 U.S.C. § 512(f) (Supp. IV 1998). Compare *Third-Party Complaint Against Third-Party Defendants Time Warner Corp. and America Online, Inc., Arista v. MP3Board*, No. 00 Civ. 4660 (SHS) (S.D.N.Y. Aug. 21, 2000) (arguing claim against RIAA for temporarily shutting down search engine's website by demand letter on ISP), <http://www.techlawjournal.com/courts/mp3board/20000821.asp>, Gwendolyn Mariano, *Judge Waves MP3Board Suit into Court*, CNet News.com: Tech News First, at <http://news.cnet.com/news/0-1005-200-5184296.html> (Mar. 19, 2001) (discussing such a claim), and *MP3Board Announces That Federal Court Denies the RIAA's Motion to Dismiss: MP3Board's Claims for Damages to Move Forward*, BUS. WIRE, Mar. 19, 2001, with *Cmdr Taco*, *supra* note 33 (noting removal of material from site after Scientologists invoked the DMCA).

Compare *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (enjoining defendant from providing links on its site to copyrighted materials of plaintiff, who was found likely to succeed on the merits of its claim of contributory infringement where defendant posted messages suggesting users access the copyrighted materials via defendant's links), with *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999) (finding fair use by visual search engine and no violation of the DMCA).

⁸⁷ See, e.g., Rebecca Fairley Raney, *Charities Find a Gray Area on the Net*, N.Y. TIMES, Feb. 12, 2001, at C4 ("The most crucial question [the IRS is considering] is whether charities may link to the Web sites of political campaigns without the links being construed as endorsements."); Amy Keller, *Tax-Exempt Groups Urge IRS to Go Easy on Internet Regulation*, ROLL CALL, Feb. 26, 2001, at 10 ("[Tax-exempt organizations] are urging the IRS to allow non-profits to maintain links to the Web sites of candidates, parties or PACs under the condition that they are part of unbiased voter education sites."). For full discussion of the issue, see *Request for Comments Regarding Need for Guidance Clarifying Application of the Internal Revenue Code to Use of the Internet by Exempt Organizations*, Announcement 2000-84, 2000-42 I.R.B. 385, available at <http://ftp.fedworld.gov/pub/irs-irbs/irb00-42.pdf>; and Alliance for Justice, *Draft Alliance for Justice Comments on Internet Activity by Nonprofits*, Jan. 17, 2001, available at <http://www.afj.org/fai/irs>.

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.⁸⁸

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 situate itself "near" a popular opponent in terms of search proximity, can potentially borrow attention like a leafletter who is stationed in a geographical neighborhood.⁸⁹ 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 swirls around "sucks" sites; businesses have claimed regularly that the use of their names in the domain names of websites critical of them are violations of their intellectual property rights. In 1998, a court rejected a claim by the Bally Exercise chain that the site name, "Bally Sucks," 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 and critical of the trademark holder.⁹⁰ Similar results have followed with

⁸⁸ Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000). But see Cahill v. Tex. Workforce Comm., 121 F. Supp. 2d 1022 (E.D. Tex. 2000) (finding no right of access to job referral website for critics of employers).

⁸⁹ See Oscar S. Cisneros, *Legal Tips for Your 'Sucks' Site*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,38056,00.html> (Aug. 14, 2000). For a political version of the game, see Sarah Left & Julian Glover, *Plaid Angered by Lib Dem Attack Website*, Guardian Unlimited, at <http://politics.guardian.co.uk/election2001/story/0,9029,490763,00.html> (May 14, 2001) (covering controversy over Liberal Democratic Party advertisements at www.not-plaid-cymru.co.uk and www.plaid-cymru.co.uk).

⁹⁰ Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161, 1164 (C.D. Cal. 1998). The analysis in *Playboy Enterprises v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal. 1999), is also instructive:

PEI is seeking to leverage its trademarks "Playboy®" and "Playmate®" (which cannot be searched on the Internet) into a monopoly on the words "playboy" and "playmate." Indeed, by seeking a prohibition on all advertisements that appear in response to the search words "playboy" and "playmate," PEI would effectively monopolize the use of these words on the Internet. This violates the First Amendment rights of (a) Excite and Netscape; (b) other trademark holders of "playboy" and "playmate"; as well as (c) members of the public who conduct Internet searches.

respect to "LucentSucks.com" under both federal trademark and "anti-cybersquatting" statutes.⁹¹ On the other hand, courts have found efforts by an anti-abortion activist to use "plannedparenthood.org,"⁹² an admittedly "bogus" "Jews for Jesus" site operated by an opponent of Christian evangelism,⁹³ 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.⁹⁴ 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—unbound by the First Amendment. Panels have involuntarily transferred rights to "wal-martsucks.com," "guinnessucks.com," and "directlinesucks.com" to the targets of those sites.⁹⁵ Other WIPO panels, more cognizant of free

55 F. Supp. 2d at 1085.

⁹¹ *Lucent Techs., Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000); see also *Northland Ins. Co. v. Blaylock*, 115 F. Supp. 2d 1108 (D. Minn. 2000) (finding that the "northlandinsurance.com" complaint site does not violate anti-cybersquatting statute).

⁹² *Planned Parenthood Fed'n of Am., Inc. v. Bucci*, No. 97 Civ. 0629 (KMW), 1997 U.S. Dist. LEXIS 3338, at *36-37 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 152 F.3d 920 (2d Cir. 1998) (unpublished table decision).

⁹³ *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 286 (D.N.J.), *aff'd*, 159 F.3d 1351 (3d Cir. 1998) (unpublished table decision).

⁹⁴ *People for the Ethical Treatment of Animals v. Doughney*, No. 00-1918, No. 00-2289, 2001 U.S. App. LEXIS 19028 (4th Cir. Aug. 23, 2001) (finding use of www.peta.com infringed the rights of plaintiffs under trademark and cybersquatting statutes); see also *E. & J. Gallo v. Spider Webs Ltd.*, 129 F. Supp. 2d 1033 (S.D. Tex. 2001) (granting injunction and ordering damages in cybersquatting and trademark action against owners of "erestandjulio.gallo.com," which set up anti-corporate and anti-winery commentary after being sued). The *PETA* case relied in large part on the fact that the domain name was identical to the trademark at issue; it acknowledged that a domain name which conveys a message "that it is a parody" would be protected. *PETA*, 2001 U.S. App. LEXIS 19028. Under this analysis, "sucks" sites would not be subject to liability.

More than 700 cybersquatting suits were filed in a recent six-month period. Darryl Van Duch, *Cybersquatter Litigation Boom*, NAT'L L.J., Feb. 26, 2001, at B1.

⁹⁵ *Diageo PLC v. Zuccarini*, No. D2000-0996 (WIPO Oct. 22, 2000) (*guinnessucks.com*, *guinness-really-sucks.com*, and others), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0996.html>; *Direct Line Group Ltd. v. Purge I.T.*, No. D2000-0583 (WIPO Aug. 13, 2000) (*directlinesucks.com*), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0583.html>; *Dixons Group PLC v. Purge I.T.*, No. D2000-0584 (WIPO Aug. 13, 2000) (*dixonssucks.com*), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0584.html>; *Freerise PLC v. Purge I.T.*, No. D2000-0585 (WIPO Aug. 13, 2000) (*freerisesucks.com*), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0585.html>; *Wal-Mart Stores, Inc. v. MacLeod*, No. D2000-0662 (WIPO Sept. 19, 2000) (*wal-martsucks.com*),

speech values and/or confronted with sites which seem more honestly to engage in critique, refused to transfer rights to "lockheed-sucks.com," "mclanenortheastssucks.com," and "walmart-canadasucks.com."⁹⁶

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 *Bihari v. Gross*, 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 "designscam" site criticizing the plain-

at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0662.html>; see also *Cabela's Inc. v. Cupcake Patrol*, No. FA0006000095080 (Nat'l Arb. F. Aug. 29, 2000) (cabelassucks.com), at <http://www.arbforum.com/domains/decisions/95080.htm>; *Reg Vardy Plc v. David Wilkinson*, No. D2001-0593 (WIPO July 3, 2001) (reg-vardy.com, reg-vardy.net, and reg-vardy.org), at <http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0593.html>.

⁹⁶ *Lockheed Martin Corp. v. Parisi*, No. D2000-1015 (WIPO Jan. 26, 2001) (lockheedsucks.com and lockheedmartinsucks.com), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1015.html>; *Wal-Mart Stores, Inc. v. walmartcanadasucks.com*, No. D2000-1104 (WIPO Nov. 23, 2000), at <http://arbiter.wipo.int/domains/decisions/html/d2000-1104.html>; *McLane Co. v. Craig*, No. D2000-1455 (WIPO Jan. 11, 2001) (mclanenortheastssucks.com), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1455.html>; cf. *Quirk v. Maccini*, No. FA006000094964 (Nat'l Arb. F. filed July 11, 2001) (refusing to transfer mclanenortheastssucks.com in part because of lack of probability of confusion), at <http://www.arbforum.com/domains/decisions/94964.htm>; *Wal-Mart Stores, Inc. v. Walsucks*, No. D2000-0477 (WIPO July 20, 2000) (relying on "extortion" in use of walmartcanadasucks.com and other domains to require transfer), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html>.

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 critical sites.

For other critical domain-name cognates, see, for example, Leander Kahney, *Hacker Site Raises GM's Hackles*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,39585,00.html> (Oct. 21, 2000), reporting the sending of cease and desist letters following the registration of "fuckgeneralmotors.com" by a hacker magazine. See generally *Fuckmicrosoft.com*, at <http://www.fuckMicrosoft.com> (announcing 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 DeCSS. The site was located at www.fuckmpaa.com and offered links to DeCSS. David McGuire, *Hacker Group Launches Anti-MPAA Web Site*, NEWSBYTES, at <http://www.newsbytes.com/news/01/165347.html> (May 4, 2001). In addition, www.sucks500.com provides an omnibus site for criticism of several hundred companies.

tiff.⁹⁷ And in Canada, the Supreme Court of British Columbia—relying in part on *Bally Total Fitness*—upheld the use by a union “cyber-picket” site of meta tags which came close to mirroring the tags for the union employer’s site.⁹⁸

Although trademark holders have obtained injunctions against the use of trademarks by competitors,⁹⁹ the meta tag suits have generally been unsuccessful in obtaining legal relief against critical websites. But this lack of success has not deterred attorneys for the targets of online criticism from sending demand letters that often intimidate either site owners or ISPs whose interest in hosting insurgent sites may be easily discouraged.¹⁰⁰

⁹⁷ 119 F. Supp. 2d 309 (S.D.N.Y. 2000). The court relied on both the non-commercial nature of the site and First Amendment proscriptions of prior restraint. *Id.*; see also *BigStar Ent., Inc. v. Next Big Star, Inc.*, 105 F. Supp. 2d 185 (S.D.N.Y. 2000) (finding no trademark violation given the commonness of the words used and the dissimilarity between the parties’ products); *Playboy Enters. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal. 1999) (finding no trademark violation in use of “Playboy” as keyword in search engine; relying in part on First Amendment concerns).

⁹⁸ *B.C. Auto Ass’n v. Office & Prof’l Employees’ Int’l Union*, 2001 B.C.D. Civ. J. 1931 (B.C. Sup. Ct. 2001) (rejecting employer’s claim that union passed its sites off as employer’s by copying meta tags).

⁹⁹ See, e.g., *Brookfield Communications, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999) (enjoining the use of “moviebuff.com” in either domain name or meta tag); *Florists’ Transworld Delivery, Inc. v. Originals Florist & Gifts, Inc.*, No. 00 C 4458, 2000 U.S. Dist. LEXIS 16869 (N.D. Ill. Nov. 9, 2000) (enjoining use of the FTDI trademarks on defendant’s website); *PACCAR, Inc. v. TeleScan Techs., L.L.C.*, 115 F. Supp. 2d 772 (E.D. Mich. 2000) (enjoining a company with truck locator websites from using trademarked meta tags); *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 834 (S.D. Ind. 2000) (enjoining temporarily herbal supplement manufacturer from using “Herbrozac” in its Internet advertising and “Prozac” in its meta tags); *N.Y. State Soc’y v. Eric Louis Assocs.*, 79 F. Supp. 2d 331, 341 (S.D.N.Y. 1999) (finding that the defendant’s website infringed upon the plaintiff’s trademark).

¹⁰⁰ See Kahney, *supra* note 96 (recounting how 2600 received demand letters from GM, NBC, and Verizon on “fuckgeneralmotors.com”); John Hawkins, *The Lawsuit That Wasn’t*, BRASS KNUCKLES WEBZINE, at <http://www.brassknuckles.net/features/free/revlon.php> (last visited May 1, 2001) (describing a Revlon demand letter to a high school flexible scheduling website demanding the cessation of the use of www.flex.org); Farhad Manjoo, *A Meta Tag Nintendo Didn’t Like*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,41247,00.html> (Jan. 22, 2001) (describing a demand letter to “crackerjap” site, which included “pokemon” in a former meta tag). For a thoughtful discussion of trademark issues, differentiating among “pagejacking,” in which meta tags counterfeit the information of target sites and redirect searches to the “pagejacker”; “spamdexing” in which meta tags include peripherally relevant information in an effort to garner the attention of searchers uninterested in the real subject of the site; and “editorial” meta tags, which seek to comment upon the target site, see F. Gregory Lastowka, Note, *Search Engines, HTML, and Trademarks: What’s the Meta For?*, 86 VA. L. REV. 835 (2000).

Of particular concern in this context is the analysis in *OBH, Inc. v. Spotlight Maga-*

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.¹⁰¹

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 300 web addresses.¹⁰² The Kosovo conflict sparked re-

zine, Inc., 86 F. Supp. 2d 176, 197-98 (W.D.N.Y. 2000), and *Planned Parenthood Fed'n of Am., Inc. v. Bucci*, No. 97 Civ. 0629 (KMW), 1997 U.S. Dist. LEXIS 3338, at *36-37 (S.D.N.Y. Mar. 24, 1997), suggesting that domain names or meta tags are not protected First Amendment speech. In light of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (holding unanimously that the choice of participants in a St. Patrick's Day parade was constitutionally protected expression and observing that "a narrow, succinctly articulable message is not a condition of constitutional protection which if confined to expressions conveying a 'particularized message' . . . would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll"), the suggestion that functionality precludes protection is profoundly misdirected. See, e.g., *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000) (affording First Amendment protection to computer source code); *Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132, 1141 (9th Cir.) (finding encryption software to be protected expression under the First Amendment), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999). It also seems to be a misconstruction of the discussion in *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000) (relying on the fact that top-level domain names are limited to three letters to conclude they were not expressive).

¹⁰¹ See, e.g., John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, in *SOCIAL MOVEMENT SOCIETY*, *supra* note 27, at 83 (comparing the Chicago Democratic Conventions of 1986 and 1996); Oliver & Myers, *supra* note 74, at 43 (analogizing police and protest organizers to "members of an improvisational troupe").

¹⁰² See Dorothy E. Denning, *Activism, Hacktivism, and Cyberterrorism: The Internet as a Tool for Influencing Foreign Policy*, *INTERNET AND INTERNATIONAL SYSTEMS: INFORMATION TECHNOLOGY AND AMERICAN FOREIGN POLICY DECISIONMAKING*

ciprocal defacements among Albanian and Serbian websites.¹⁰³ 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.¹⁰⁴ The tensions over the downing of an American spy plane in China have produced politically based electronic graffiti on American sites.¹⁰⁵

WORKSHOP, at <http://www.nautilus.org/info-policy/workshop/papers/denning.html> (last visited Sept. 1, 2001) (comparing Portuguese hackers' modification of forty Indonesian websites to display "Free East Timor" and another groups' attack, affecting more than 300 websites, in protest of the nuclear arms race); Donna Ladd, *Hactivism Must Stop*, COLORADO SPRINGS INDEP., Sept. 9, 1999 (reporting the redirection of visitors from www.kkk.com to hatewatch.org), available at <http://www.csindy.com/csindy/1999-09-09/siliconlounge.html>; see also K.C. Swanson, *Just Sue It*, ZIFF DAVIS SMART BUSINESS FOR THE NEW ECONOMY, Jan. 2001, at 38 (reporting the re-routing of traffic from the Nike website to an Australian anti-corporate website, www.sl.org).

¹⁰³ Denning, *supra* note 102; see Richard Rogers, "Internet & Society" in *Armenia and Azerbaijan? Web Games and a Chronicle of an Infowar*, FIRST MONDAY: PEER-REVIEWED JOURNAL ON THE INTERNET (Sept. 4, 2000), at http://www.firstmonday.dk/issues/issue5_9/rogers/index.html (describing "infowar" between Armenian and Azeri groups on the internet between 1999 and 2000).

¹⁰⁴ See John C. Daly, *Analysis: The Virtual Intifada*, UNITED PRESS INT'L, Apr. 24, 2001 (reporting various attacks on Palestinian and Israeli websites); John Galvin, *Radar: The Real Online Battleground*, ZIFF DAVIS SMART BUSINESS FOR THE NEW ECONOMY, Mar. 2001, at 30 (reporting on the range of recent Palestinian and Israeli Internet attacks, including the dissemination of credit card numbers stolen from the American-Israeli Public Affairs Committee website); Reuters, *Hackers Hit Hamas Below the Belt: Web-site Seekers Get Menu of Porn*, SEATTLE TIMES, Mar. 7, 2001, at A7 (reporting the re-routing of a Hamas website to a pornography site after Hamas claimed responsibility for a suicide bombing that killed three Israelis); Reuters, *Hackers Put Pornography on Hamas Web Site*, Siliconvalley.com: Inside the Tech Economy, at http://www.siliconvalley.com/docs/news/reuters_wire/9273821.htm (Mar. 6, 2001) (same); Carmen J. Gentile, *Palestinian Crackers Share Bugs*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,40449,00.html> (Dec. 2, 2000) (reporting Palestinian use of "hacking tools and viruses" to destroy Israeli sites); Carmen J. Gentile, *Israeli Hackers Vow to Defend*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,40187,00.html> (Nov. 15, 2000) (reporting the efforts of the Israeli Internet Underground, a "coalition of anonymous online activists from various Israeli technology companies . . . set up . . . to disseminate information concerning the ongoing battle in cyberspace"); Robert Lemos, *New Virus Packs a Political Punch*, ZDNet News: Technology News Now, at <http://www.zdnet.com/zdnn/stories/news/0,4586,5079783,00.html> (Mar. 19, 2001) (reporting the dissemination of a computer virus that "causes a victim's computer to send pro-Palestinian messages to 25 Israeli organizations and government agencies").

¹⁰⁵ Compare Michelle Delio, *FBI Warns of Chinese Hack Threat*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,43417,00.html> (Apr. 27, 2001) (describing the U.S. government's response to threatened attacks by Chinese hackers), with Michelle Delio, *Cyberwar? More Like Hot Air*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,43520,00.html> (May 4, 2001) ("[T]he

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 laws;¹⁰⁶ each differs from the hacks that are perpetrated against websites daily,¹⁰⁷ and the viruses that float through the Internet only in the message conveyed and the sustained hostility that the attacks often embody. Because of the dislike that such tactics evoke, 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 mine-run hackers, political hackers have imposed relatively little incremental 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 querying targeted websites until the websites overload.

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 Zapatista rebels in Mexico. Claiming 10,000 participants who purportedly were able to deliver 600,000 hits per minute, the demonstrations clearly

much-discussed cyberwar seems to have now devolved into nothing more than an electronic spray paint duel between U.S. and Chinese hackers.”).

¹⁰⁶ See, e.g., Eric J. Sinrod & William P. Reilly, *Cyber-Crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 177 (2000) (analyzing application of federal criminal statutes to hacking and denial of service attacks). See generally Computer Crime and Intellectual Property Section of the Criminal Division of the U.S. Department of Justice, at <http://www.cybercrime.gov> (last visited Sept. 4, 2001) (providing information and resources regarding computer crime and legal issues arising in the context of computer technology).

In addition to federal limits, states generally have their own criminal prohibitions. See, e.g., *Two Hackers First to Be Charged Under Michigan Felony Statute*: People v. Salcedo, 18 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 9 (2000), WL 18 No. 1 ANCOILR 9 (reporting that a high school student was charged with a felony for hacking the Dearborn public school computer system and “placing a pornographic image on the site and programming it to alternate with a photo of the school superintendent”).

¹⁰⁷ See AntiOnline.com, at <http://www.antonline.com> (last visited Sept. 7, 2001) (providing news and information relating to computer security); Attrition: Evolution, at <http://www.attrition.org/mirror/attrition> (May 21, 2001) (providing accounts of recent hacking).

garnered attention.¹⁰⁸ 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 doubtful that a properly drawn statute could not limit the repeated barrage of electronic communication any more than it would be unable to prevent repeated chanting of slogans at such a level as to make communication impossible)¹⁰⁹ the long-run impact of the "sit-ins" has been relatively limited. The Pentagon—no slouches at information warfare—responded to the pro-Zapatista attack by sending back malicious programs that caused the attacking computers to crash.¹¹⁰ The Frankfurt Stock Exchange—subject to an electronic sit-in in late 1998—reported that the protestors were lost among the six million queries the site received daily.¹¹¹ More recently, in 1999, a group going by the name "Electrohippies" organized a "WTO virtual sit-in" which, they claim, reduced the WTO's website's speed by half for four to five hours.¹¹²

¹⁰⁸ See Sarah Ferguson, *Peked to Death by a Duck*, VILLAGE VOICE (New York), Oct. 24, 2000, at 50 (reporting the online attacks on the website of the IMF and World Bank during their annual meeting in Prague); Carrie Kirby, *Hacking with a Conscience is a New Trend*, S.F. CHRON., Nov. 20, 2000 (reporting incidents of "hacktivism": computer hacking by political activists), available at LEXIS; see also Elinor Abreu, *Business Under Attack*, INDUS. STANDARD, Apr. 10, 2000 (reporting one company's fundraising efforts in support of the attacks on the government websites), available at LEXIS. For accounts by the protagonists, see Electronic Civil Disobedience, at <http://www.nyu.edu/projects/wray/ecd.html> (last visited Oct. 9, 2001), archiving the publications of the *Electronic Disturbance Theatre*; Electronic Civil Disobedience, at <http://www.thing.net/~rdm/ecd/ecd.html> (last visited Oct. 9, 2001), describing the activities of the *Electronic Disturbance Theatre* and Stephen Wray; and *Electronic Civil Disobedience and the World Wide Web of Hacktivism: A Mapping of Extraparlamentarian Direct Action Net Politics*, Electronic Civil Disobedience, at <http://www.nyu.edu/projects/wray/wwwhack.html> (Nov. 1998).

¹⁰⁹ See *Kovacs v. Cooper*, 336 U.S. 77, 78-79, 87 (1949) (upholding an ordinance forbidding the use of an instrument that emits "loud and raucous noises").

¹¹⁰ See William Jackson, *DOD Bites Back at Hackers Preying on Its Web Servers*, GOV'T COMPUTER NEWS, at <http://www.gcn.com/archives/gcn/1998/September21/1c.htm> (Sept. 21, 1998) (describing the Pentagon's response to attacks on its Defense Link website); Winn Schwartau, *Cyber-civil Disobedience: Inside the Electronic Disturbance Theater's Battle with the Pentagon*, NETWORK WORLD, at <http://www.thing.net/~rdm/ecd/inside.html> (Jan. 11, 1999) (reporting the Pentagon's counterattacks on the *Electronic Disturbance Theater*).

¹¹¹ Denning, *supra* note 102.

¹¹² David Cassel, *Hacktivism in the Cyberstreets*, ALTERNET, at <http://www.alternet.org/story.html?StoryID=9223> (May 30, 2000). The Electrohippies group claims that its "on line direct actions" in connection with the protests in Quebec were engineered not to overload the target networks. Electrohippies Collective, *The FTAA Action and May Day "Cyber Hysteria"*, Electrohippies Collective-Communiqué, at <http://www.google.com/search?q=cache:70JmUm1xOL8:www.fraw.org.uk/ehippies/archive/communiques/communique-2001-05-1.html+ftaa+electrohippies&hl=en> (May

And the "Federation of Random Action" claims to have slowed the IMF and World Bank servers coincidentally with the anti-WTO demonstrations in Prague.¹¹³ 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.¹¹⁴

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,¹¹⁵ 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 protestors, a group of hackers calling themselves "Virtual Monkeywrench" 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.¹¹⁶ Like-

2001).

¹¹³ 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 words such as "poverty," "finance," "investment," and "financial power" in an online chat room); Federation of Random Action, at <http://this.is/etoytech/fra> (last visited Sept. 7, 2001) (promoting the anticipated attacks on the World Bank, IMF, and WTO websites and emphasizing the importance of online demonstration).

¹¹⁴ See David Moore et al., *Inferring Internet Denial-of-Service Activity*, CAIDA, at <http://www.caida.org/outreach/papers/backscatter> (last visited Aug. 24, 2001) (analyzing the prevalence of worldwide denial of service attacks, and estimating 12,000 attacks on 5000 distinct targets during the study, which used three week-long data sets).

¹¹⁵ In early 1971, anti-war activists illegally copied and disseminated to the press the "Pentagon Papers," chronicling American involvement in the war in Vietnam; governmental efforts to suppress the dissemination were unavailing. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting the government's request to enjoin certain newspapers from publishing the "Pentagon Papers"). Similarly, in March 1971, a self-styled "Citizens' Commission to Investigate the FBI" broke into offices of the FBI in Media, Pennsylvania, and stole, published in a left-wing magazine, and disseminated to the news media 1000 documents tracing the FBI's domestic surveillance program, "COINTELPRO." KENNETH O'REILLY, *HOOVER AND THE UN-AMERICANS* 217-18 (1983); Michal R. Belknap, *Above the Law and Beyond Its Reach: O'Reilly and Theoharis on FBI Intelligence Operations*, 1985 AM. B. FOUND. RES. J. 201, 202-203.

¹¹⁶ See Michelle Delio, *Davos Attendees' Info Stolen*, WIRED NEWS at <http://www.wired.com/news/politics/0,1283,41603,00.html> (Feb. 5, 2001) (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

wise, in the course of the antiglobalization demonstrations in Quebec, a document describing police tactics to counter demonstrators was apparently stolen and posted to the demonstrators' website.¹¹⁷ The initial acquisition of such information would often be unprotected under current doctrine; the courts have generally rejected a First Amendment privilege to obtain information in violation of laws protecting property.¹¹⁸ The capacity of targets to limit dissemination of information once obtained, however, will turn on the construction of prior restraint doctrine¹¹⁹ and the willingness of courts after *Bartnicki v. Vopper* to impose damages for the dissemination by third parties of illegally obtained information. Since *Bartnicki* seems to have adopted a multifactor test giving weight to both the degree of "public concern"

were affected); Michelle Delio, *Davos Hack: 'Good' Sabotage*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,41760,00.html> (Feb. 12, 2001) (reporting the ease with which crackers stole information from the World Economic Forum's computer system); Steve Gold, *Swiss Hacker Arrested After World Economic Forum Attack*, NEWSBYTES, at <http://www.newsbytes.com/news/01/162466.html> (Feb. 27, 2001) (reporting the arrest of a man in connection with the breach of the World Economic Forum's computer system).

¹¹⁷ *Revealed! Secret Tactics of the Quebec Police*, Independent Media Centre, at http://montreal.indymedia.org/front.php3?article_id=514 (Apr. 21, 2001) (posting a document in translation on Quebec's IMC website). The posting apparently caught the authorities' attention; the Quebec police obtained the cooperation of American authorities in seeking to sort through website traffic. See *infra* note 129 and accompanying text.

¹¹⁸ E.g., *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 1764 n.19 (2001) ("Our holding [that the application of federal and state wiretapping acts violated defendants First Amendment rights], of course, does not apply to punishing parties for obtaining the relevant information unlawfully."); *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of the news.").

¹¹⁹ Compare *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308 (1977) (holding that the court could not prohibit publication of a press-obtained name and photo of a juvenile charged with murder), *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (striking down an order prohibiting publication of inculpatory statements and facts obtained by press), *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government could not enjoin publication of press-obtained secret documents allegedly imperiling national security), and *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999) (refusing to enjoin publication of purloined trade secrets on website), with *Am. Fed'n State, County and Mun. Employees, Council 13, AFL-CIO v. Commonwealth*, No. 149 MD 2001 (Pa. Commw. Ct. 2001) (enjoining publication of the names and locations of correctional officers by a prisoner's rights website, www.prisoners.com), and *City of Kirkland v. Sheehan*, No. 01-209513-7 SEA, slip. op. at 10 (Wash. Super. Ct. May 10, 2001) (enjoining web publication of Social Security numbers of police, while acknowledging the right to publish names addresses and phone numbers), at http://www.metrokc.gov/kcsc/rulings/kirk_v_sheehan.htm (last visited Sept. 17, 2001).

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.¹²⁰ 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 Vices of Visibility*

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. But at the turn of the twenty-first century, the final 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.¹²¹ For an insurgent social movement, transparency is not an unmixed blessing. Precisely the qualities of the Internet which enable insurgents to reach previously unaffiliated 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-

¹²⁰ Cf. Declan McCullagh's Politech, at <http://www.politechbot.com/p-02008.html> (last visited Aug. 24, 2001) (publishing Social Security numbers enjoined in the *Sheehan* case and inviting the City of Kirkland to respond).

¹²¹ Amitaf Etzioni and Oren Etzioni argue in *Communities: Virtual vs. Real*, 277 SCIENCE 295 (1997) that the memory effect of online communications is helpful in generating a sense of community. It is also helpful to those who seek to suppress members of that community today or ten years hence. Cf. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 28-29, 115 (1991) (discussing the chilling effect of possible future disclosures of dissident activities).

tor had gone to the group's website and downloaded an exhortation that protestors 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.¹²² In and of itself, this monitoring can probably not, under current doctrine be the subject of federal constitutional challenge.¹²³ 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 prosecutions based on the theory that ownership of a cell phone which could be used to organize

¹²² E.g., Toby Eckert, *Security Is Tight as Philadelphia Braces for Worst*, SAN DIEGO UNION-TRIB., July 31, 2000, at A1 (citing Philadelphia police spokesman as "unapologetic" for monitoring websites of protest organizers); Jim Galloway & Rob O'Dell, *An Ugly Day in the City of Brotherhood*, ATLANTA J. & CONST., Aug. 2, 2000, at A9 (quoting Philadelphia Police Commissioner John Timoney as attributing disruptive intentions to "'black bloc' anarchists, who have had a large presence in Internet discussion groups planning for the convention"); Abby Scher, *The Crackdown on Dissent*, NATION, Feb. 5, 2001, at 23-24 (discussing how state police monitored Internet organizing); Interview with Daniel Flaumenhaft, Philadelphia Independent Media Center, in Philadelphia, Pa. (Apr. 23, 2001) (notes on file with author) (stating that it was "generally acknowledged" that police monitored preparations for the Philadelphia protests on the Internet); see also Tim McGlone, *Experts Say Surveillance of Local Group Walks the Line*, VIRGINIAN-PILOT, Feb. 28, 2001, at A1 (reporting police infiltration of a local animal rights group "after detectives learned in August—in part through the Web site run by People for the Ethical Treatment of Animals—that three internationally known animal rights activists would be involved in local protests against the dolphin tank."); David Montgomery & Arthur Santana, *Rally Web Site Also Interests the Uninvited: D.C. Police Are Monitoring Information Posted Online*, WASH. POST, Apr. 2, 2000, at A14 (reporting monitoring by D.C. police of websites used to organize the protest against the World Bank and the IMF).

¹²³ See *Laird v. Tatum*, 408 U.S. 1 (1972) (holding that mere existence of a data-gathering system 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*, 227 F.3d 1214 (9th Cir. 2000) (holding intrusive surveillance based on an effort to retaliate for constitutionally protected activities violated the plaintiff's rights); *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) (stating that the plaintiff's claim of retaliatory 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*, 519 F.2d 1335, 1337-38 (3d Cir. 1975) (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."¹²⁴ 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.¹²⁵

Once participants in dissident movements are identified, they become the potential subjects of a variety of retaliatory prosecutions. With the determination 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,¹²⁶ 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.¹²⁷

¹²⁴ See Sarah Ferguson, *Habitual Cell Phone Offenders*, VILLAGE VOICE (New York), Dec. 5, 2000, at 35 (reporting recent prosecutions of activists who were assumed to have organized protests on cell phones); Gwen Shaffer, *Wrong Number*, PHILA. CITYPAPER.NET, at <http://www.citypaper.net/articles/031501/cb.citybeat.protest.shtml> (Mar. 15-22, 2001) (same); see also Gloria Hayes, *The Long Road Home: Legal Questions Continue to Swirl over Treatment of Protesters*, LEGAL INTELLIGENCER, Aug. 16, 2000, at S3 (discussing the arrest of activists, busy making puppets for the demonstrations of the Republican National Convention, during a raid of a West Philadelphia warehouse).

¹²⁵ Cf. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (upholding the right of protesters to boycott white merchants and holding that the organization planning the boycotts could not be held liable for damages); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001) (upholding right to publish names and addresses of abortion providers, where no direct threat could be proven, as protected speech); Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (holding that the donation of money and resources to a foreign terrorist group does not constitute actionable "international terrorism" without a showing of knowing and intentional association and specific intent to further terrorist aims).

¹²⁶ See generally 17 U.S.C. § 506 (1994 & Supp. V 1999) (establishing criminal penalties for willful copyright violation of \$1000 worth of copies); Janelle Brown, *Who Is Spying on Your Downloads*, SALON, at http://www.salon.com/tech/feature/2001/03/27/media_tracker/index.html (Mar. 27, 2001) (providing account of recording industry use of new software to track trading of copyrighted materials on the Internet); *First Guilty Verdict Under NET Act Draws Praise*, Business Software Alliance, at <http://www.bsa.org/usa/press/newsreleases/2001-05-15.553.shtml> (May 15, 2000) (providing information on the prosecution of non-commercial software infringers).

¹²⁷ Compare *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights." (citations omitted)), with *United States v. Armstrong*, 517 U.S. 456 (1996) (denying discovery on racially selective prosecution claim), and *Reno*

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.¹²⁸

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 news-wire 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.¹²⁹ Likewise, web-based activism may put at

v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (rejecting First Amendment selective prosecution claim, noting that "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*"). For a narrow reading of *Reno*, see Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 314-15 (2000).

Being noticed by authorities may also generate extralegal sanctions. See, e.g., Steve Kettmann, *German Pol Backtracks on Hack*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42961,00.html> (Apr. 10, 2001) (representing that prior statements had been misinterpreted, but that German government will continue to seek ways to prevent extraterritorial neo-Nazi websites); Steve Kettmann, *German Threat Raises Infowar Fear*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42921,00.html> (Apr. 9, 2001) (describing how Otto 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).

¹²⁸ See Announcement 2000-84, 2000-42 I.R.B. 385 (soliciting public comment concerning application of Code provisions to certain groups on the Internet), available at <http://ftp.fedworld.gov/pub/irs-irbs/irb00-42.pdf> (last visited Sept. 5, 2001). A similar issue arose in *McVeigh v. Cohen*, 983 F. Supp. 215, 222 (D.D.C. 1998), where Naval investigators noticed gay-oriented comments in an AOL member profile, and tracked down the offending service member. The sailor's discharge was preliminarily enjoined because the Navy's actions violated online privacy laws. *Id.*

¹²⁹ Paul Shukovsky, *Media Center Fighting FBI over Web Data*, SEATTLE POST INTELLIGENCER, May 9, 2001, at B1; Declan McCullagh, *Journalists Protest Gag Order*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,43339,00.html> (Apr. 25, 2001). For the IMC account of the incident, see J.L., *Gag Order Lifted; IMC in Free Speech Battle Following FBI/Secret Service Visit*, Independent Media Center, at http://seattle.indymedia.org/display.php3?article_id=3013 (Apr. 27, 2001). Apparently, the Seattle IMC shares some electronic facilities with the Quebec IMC.

risk a wide array of other governmental benefits where administrators exercise some level of discretion.¹³⁰

The Web makes activists visible as well to nongovernmental opponents, who can use the information to plan and mobilize countervailing responses and retaliation 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.¹³¹ Nor do corporations act alone, for opposing social movements can mobilize by the Internet as effectively as insurgents. Contention between abortion and anti-abortion is an obvious feature of the contemporary political scene but similar on-line 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 activists and "Wise Use" property rights enthusiasts.¹³²

Once mobilized, opponents are not limited to moral suasion and political petition.¹³³ In addition to economic and physical retaliation,

¹³⁰ For one recent example, see *Shelton Police Union v. Voccola*, 125 F. Supp. 2d 604, 634 (D. Conn. 2001), in which the court enjoined the employer's discipline of a union official for comments appearing on the union's website.

¹³¹ E.g., PRICE, *supra* note 24, at 30 (noting that corporations can track actions of both opponents and allies by monitoring websites and joining listservs); Blake A. Bell, *Dealing with False Internet Rumors: A Corporate Primer*, at <http://www.threadseek.com/falseinternetrumors.htm> (Dec. 1998) (suggesting corporations monitor references to and rumors about companies, and respond both by publicity and by identifying perpetrators and holding them accountable). Threadseek.com, is one such organization, offering to monitor "100,000+ newsgroups, 24,000 discussion lists, an estimated 33,000 Web-based discussion groups, 1000+ Online Services Forums, thousands of chat groups."

¹³² See generally, SELNOW, *supra* note 20, at 17 (1998) (arguing that ease of assembling groups in the age of the Internet implies an ease of assembling "anti-groups"); Gerlach, *supra* note 56, at 85, 91 (describing mutual mobilization of environmental and property rights activists); Jeffery Haydu, *Counter Action Frames: Employer Repertoires and the Union Menace in the Late Nineteenth Century*, 46 SOC. PROBLEMS 313, 322-25 (1999) (exploring U.S. employer mobilization against unions in the late nineteenth century to show the relationship between countermovements and insurgent movements); David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628 (1996) (discussing the conditions under which countermovements emerge, and arguing that countermovements tend to respond in kind to the repertoires of insurgent movements).

In the environmental area, there is even a "counter-counter movement." See Public Employees for Environmental Responsibility, at <http://www.peer.org> (seeking to protect federal officials against "Wise Use" activists).

¹³³ I have previously discussed at some length, both in the context of McCarthyism of the 1950s and more contemporary issues, the economic, physical, and social sanc-

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.¹³⁴ A couple of years ago, I was approached by a nonprofit organization in Philadelphia that wanted to put up a website seeking to expose connections among right-wing candidates and organizations. I applauded the effort, but warned them that if they in fact undertook the project, depending on the structure of the site, they might find themselves subject 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 themselves willing to brave the possibility of lawsuits from the opposition, the threat of such litigation may evoke self-censorship on the part of ISPs or potential linking partners.¹³⁵

tions that can be brought to bear against insurgents once their identities are disclosed. Kreimer, *supra* note 121, at 34-54.

¹³⁴ For a discussion of such litigation generally, see GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996). For examples of libel actions directed against online critics, see *U-Haul International, Inc. v. Osborne*, No. CIV. 98-0366, 1999 U.S. Dist. LEXIS 14466, at *12-13 (D. Ariz. Feb. 17, 1999), dismissing libel and Lanham Act suit against the "U-Hell Website" based on lack of personal jurisdiction; and *Melvin v. Doe*, 49 Pa. D. & C. 4th 449, 480-81 (Pa. C.P. Allegheny 2000), denying First Amendment protection to anonymous publisher of statements on a website that allegedly defamed a judge. For invasion of privacy actions, see, for example, *American Federation of State, County and Municipal Employees, Council 13, AFL-CIO v. Commonwealth*, No. 149 M.D. 2001, slip. op. at 17 (Pa. Commw. Ct. Apr. 6, 2001), issuing preliminary injunction against "www.prisoners.com" to prevent them from posting the names of prison guards; and *City of Kirkland v. Sheehan*, No. 01-2-09513-7 SEA, slip. op. at 10 (Wash. Super. Ct. May 10, 2001), available at http://www.metrokc.gov/kcsc/rulings/kirk_v_sheehan.htm, enjoining a website critical of police from posting Social Security numbers of the police. For intellectual property actions, see, for example, *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 754 (E.D. Mich. 1999), denying a preliminary injunction against a site critical of Ford; *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1265 (N.D. Cal. 1995), granting an injunction to the Church of Scientology against online critics who posted the Church's copyrighted works; and *Religious Technology Center v. Henson*, No. 97-16160, 1999 U.S. App. LEXIS 11828, at *4-5 (9th Cir. June 4, 1999), affirming a \$75,000 copyright verdict against a Scientology critic who posted Scientology documents to the Web. For actions claiming threats, see *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1013 (9th Cir. 2001), upholding rights to publish 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.

¹³⁵ Federal law currently immunizes ISPs from liability for defamation and cognate actions. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (holding that claims against ISPs were barred by the Communications Decency Act); *Does v. Franco Prods.*, No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645, at *11-16 (N.D. Ill. 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 liberally.¹³⁶ Opinion privilege should likewise be administered with due regard to the context of cyberspace.¹³⁷ Vicarious liability should be tightly constrained, as should other tort actions that are prone to use as retaliatory devices.

To be sure, a sufficiently powerful encryption technique (or perhaps password protection)¹³⁸ 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 subpoenas seeking to uncover the identity of critics;¹³⁹

2001) (same); *Marczeski v. Law*, 122 F. Supp. 2d 315, 327 (D. Conn. 2000) (same). But such immunities are not self-executing; the threat of litigation will bring with it the costs of legal fees. Federal law, moreover, provides no comparable immunity to websites that link to insurgent sites, and even ISPs may not be immune from actions for alleged invasions of intellectual property. See *Gucci America Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 412-15 (S.D.N.Y. 2001) (holding that the Communications Decency Act did not immunize an ISP from trademark infringement action).

¹³⁶ This is not much of a stretch from current doctrine. See *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 1760 n.8 (2001) (noting that no distinction exists between media and non-media 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)).

¹³⁷ This suggestion is ably advanced in the course of an excellent discussion of the problem of libel actions directed against individual participants in Internet discourse in Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 919, 932-44 (2000).

¹³⁸ Cf. *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035, 1048 (9th Cir. 2001) (holding that actions of an employer in viewing password-protected employee organizing website, using passwords distributed only to employees, violated federal wiretap statutes), *opinion withdrawn*, No. 99-55106, 2001 U.S. App. LEXIS 19206 (9th Cir. May 11, 2001); Brad King, *File Tracker May Go Too Far*, WIRED NEWS, at <http://www.wired.com/news/mp3/0,1285,43714,00.html> (May 11, 2001) (reporting that song-tracking software directed at Aimster may violate the DMCA).

¹³⁹ E.g., *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (seeking discovery to obtain the identity of individuals posting on an anonymous bulletin board); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 576 (N.D. Cal. 1999) (seeking discovery of defendant's identities so that plaintiff may properly serve);

AOL recently reported receiving 475 such subpoenas last year.¹⁴⁰ 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.¹⁴¹ But insurgents are not known for careful calibration of their speech,

Melvin, 49 Pa. D. & C. 4th at 480-81 (seeking discovery of anonymous publisher of statements on a website that allegedly defamed a judge); *In re Subpoena Duces Tecum* to Am. Online, Inc., 52 Va. Cir. 26 (2000) (seeking by subpoena to compel defendants to reveal the identity of anonymous Internet subscribers), *rev'd on other grounds, sub nom.* Am. Online, Inc. v. Anonymous Publicity Traded Co., 542 S.E.2d 377, 385 (Va. 2001); *Totalise plc v. Motley Fool Ltd.*, *TIMES* (London), Mar. 15, 2001, (Q.B. Feb. 19, 2001) (seeking disclosure of the identity of Z-Dust, a discussion board participant), available at <http://www.thetimes.co.uk>; *Complaint, Raytheon Co. v. Does 1-21*, No. 99-816 (Mass. Super. Ct. filed Feb. 1, 1999) (seeking the identity of employees allegedly releasing company secrets using aliases on the Internet), available at <http://www.netlitigation.com/netlitigation/pleadings/raycomp.html>. For more complete listings, see, for example, *Cyber Securities Law Case Digest*, at http://www.cybersecuritieslaw.com/lawsuits/cases_corporate_cybersmears.htm (last visited Aug. 24, 2001), listing over eighty "John Doe" defamation cases; John Does Anonymous Foundation, at <http://www.johndoes.org> (last visited Aug. 30, 2001), extolling the benefits of anonymous speech on the Internet and providing information and legal resources for "John Doe" posters named in lawsuits; and *EnforceNet.com: News Archives*, at http://www.enforcenet.com/EnforceNet/news_archive.htm#smear (last visited Aug. 30, 2001), discussing cyber smears and corporate responses. For discussion of the problems of anonymity in cyberspace, see Lidsky, *supra* note 137, at 866-87; David G. Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139, 152-69; and Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre and the Internet, 75 ORE. L. REV. 117 (1996).

¹⁴⁰ See Jeffery Benner, *Chat Room Rants Protected*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42039,00.html> (Feb. 27, 2001) (reporting a decision to dismiss a lawsuit against "John Does" who criticized a company on the Internet); Jeffery Terraciano, *Can John Doe Stay Anonymous?*, WIRED NEWS, at <http://www.wired.com/news/privacy/0,1848,41714,00.html> (Feb. 21, 2001) (reporting that ambulance and fire service company Rural/Metro dropped its suit against posters of allegedly libelous messages when the messages stopped).

¹⁴¹ See, e.g., *2TheMart.com, Inc.*, 140 F. Supp. 2d at 1088, 1097 (denying motion seeking third party discovery of anonymous bulletin board poster because "TMRT has failed to demonstrate their identities are directly and materially relevant to a core defense"); *Columbia Ins. Co.*, 185 F.R.D. at 578 (denying plaintiff's motion for a restraining order against anonymous online defendants absent knowledge of their names and setting limiting principles for allowing discovery of the identities of defendants); *Melvin*, 49 Pa. D. & C. 4th at 452-53 (denying First Amendment protection to anonymous publisher of statements on a website that allegedly defamed a judge subsequent to plaintiff's survival of defendant's motion for summary judgment); *Am. Online, Inc.*, 52 Va. Cir. at 15-26 (denying defendant's motion to quash subpoena sought by plaintiff to reveal the identity of anonymous Internet subscribers after inquiry as to whether the subpoena would unreasonably burden Does' First Amendment rights); see also *Global Telemedia Int'l, Inc. v. Does*, 132 F. Supp. 2d 1261, 1271 (C.D. Cal. 2001) (dismissing state law libel suit under California's anti-SLAPP statute).

and the possibility that a bitter attack will step over the line to colorable 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 the only individuals 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 evolution 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 Kedzie 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."¹⁴² 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.¹⁴³ Insurgent social movements can benefit from the Internet only if the legal doctrines

¹⁴² Christopher R. Kedzie, *Communication and Democracy: Coincident Revolutions and the Emergent Dictator's Dilemma* 81 (1997) (unpublished Ph.D. dissertation, RAND Graduate School), available at <http://www.rand.org/publications/RGSD/RGSD127/>.

¹⁴³ ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 5 (1983).

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.