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Internet-Based Insurgent Citizenship and the Struggle Over Free Speech in "Established" Democracies

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Summary

Internet-based movements of "insurgent citizenship" engaging in forms of political participation are redefining freedom of expression. The Internet has since its inception been perceived and experienced as a space of free communication and democratic experiments outside of the control of state sovereignty and the sanction of the law. These founding utopias are still alive today in the practices of citizen groups who undertake some of the public sphere's critical functions while at the same time operating at boundaries of legality, specifically in terms of communications law (e.g. press law, copyright). In doing so, these movements challenge the existing, legally enforced power balance between civil society and the state within the public sphere. To repress these movements, states are making use of legal and extra-legal tools. In an analysis of the ongoing conflict over the limits of free speech, this paper suggests that "established" democracies will not be able to accommodate these new modes of political participation without expanding the legal right to freedom of expression.

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Introduction

The Internet is bringing about a new era for freedom of expression and association, as we move toward a more horizontal, diverse and citizen-centric public sphere. The Arab Spring uprisings of 2011, for example, provided a stark illustration of how the ongoing structural transformation of communications infrastructure can help citizens unsettle authoritarian regimes and empower civil society in relation to the state. But the advent of genuine democracy is also often hampered by the political establishment, which deploys systems of mass surveillance and online censorship to control the public sphere, compress freedom of communication, and enforce social control.[1] Again and again, we see the political hopes of social movements clash with the power elite's authoritarian tendencies. Such trends are not limited to undemocratic or democratizing countries but are still ongoing in Europe's supposedly "democratic" regimes. There too, citizenship and political militancy are being transformed by the subversive potential of the Internet, which leads online citizen groups and state apparatuses to clash over the limits of free speech.

The Internet and the Project of Re-appropriating the Public Sphere

Ever since the idea of a computer communications network emerged in the aftermath of World War II, the idea that the free flow of information would serve political emancipation has been a guiding principle. This philosophy, coined as "informational liberalism," was core to early computer scientists and subsequent hacker communities, and it led to the founding utopias of "cyberspace."[2] The Internet was perceived as a space of free communication, a

realm that belonged to civil society rather than the decaying world of ruling technocracies. It was to serve democratic experimentation, outside of the control of state sovereignty and the sanction of the law. John Perry Barlow – an American essayist, former lyricist for the famous rock band The Grateful Dead, and a pioneer of early online communities – famously expressed this in 1996, in a text he entitled "Declaration of the Independence of Cyberspace." This now iconic document addressed the world political elite and opened with the following lines:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. . . . We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.[3]

These utopias, merging with so-called "mediactivist" movements critical of the traditional media, whose influence on democratic processes they perceived as harmful, paved the way for a project of re-appropriating the public sphere in the 1990s, first through the global justice movement. Informational liberalism has thus inspired social movements to subvert the public sphere's long-established legal principles and try to broaden the extent of freedom of speech against the legal provisions that, for instance, ban specific opinions or certain forms of criticism of the established order from being expressed in the public sphere.

This is the case, for example, of movements such as WikiLeaks or blogs that fight police abuse but it also applies to file-sharing websites and other forms of engagement in the "online public sphere." All these movements aim to use the Internet to alter the power balance within the public sphere by using the Internet's decentralized architecture. In that respect, they embody instances of "insurgent citizenship," using the new capacities brought about by the Internet to engage in political practices operating at the boundary of legality and challenging established notions of citizenship, claiming new and fuller conceptions of the latter.[4]

The subversive potential of online insurgent citizenship movements comes from the way they revisit the public sphere's traditional functions (e.g. circulating ideas and opinions within civil society, criticizing power, etc.) and bring to bear the radical legacy of informational liberalism. For instance, the *Copwatch* website in France documents events of police abuse through videos, photos, and texts. The editors say they seek to "provide critical tools to deconstruct the myth of a police force serving the People." In this respect, they undertake a traditional function of the public sphere, one usually performed by journalists or sociologists working on police violence. However, the project also radically differs from these more traditional and well-resourced modes in that the activists engaged in "copwatching" sometimes resort to immoderate or aggressive expressions against the police. In fact, the members of *Copwatch* make a point of not abiding by any "official" deontology or code of conduct. Even though most of the texts they publish are written in analytical, if at times satirical, style, some posts make no attempt to disguise plain rage:

> "We will not hesitate to use harsh terms against the police, because we think of this institution as the common tomb of mankind, the mass grave of evolution, the daily killing of both deontology and ethics. We will be unequivocal [in denouncing it]."[5]

WikiLeaks is another example of an insurgent citizen movement. In late 2006, while working on the launch of WikiLeaks, founder Julian Assange published an essay in which he theorized about such an organization's role in the public sphere.[6] An organization like WikiLeaks, he wrote, should allow any person with access to confidential information a state tries to conceal from its citizenry to decide in good faith that its release is of public interest and to anonymously leak it. Making known secret information of public interest is undoubtedly an important function of the traditional media. For this very reason, the European Court of Human Rights even elevated the protection of sources as the "cornerstone" of freedom of expression in the landmark 1996 case *Goodwin vs. United Kingdom.* But by systematizing this activity through Internet technologies and encryption techniques, WikiLeaks (and the many other similar

organizations) extends the modern public sphere into uncharted territories, beyond the current legal limits.

The State Strikes Back

Insurgent citizenship unsettles the traditional legal and social balance of the public sphere. Because of this, representative governments in Europe usually react with segregation and violence. In this conflict, two diverging understandings of politics collide. Faced with grassroots forms of political participation, states aim to reassert the supremacy of "institutional politics," resisting the "organic" counter-powers coming from civil society. In the public sphere, traditional media are recognized by the state as a component of the institutional order as long as journalists conform to established legal rules and respect journalistic ethics. But the more irreverent, radical, and subversive democratic practices of insurgent movements are denied and repressed.

For example when *Copwatch* first went online in September 2011, French police unions immediately denounced it as an "anti-cop" website that damaged the reputation of police forces. The minister of the interior decided to bring charges against it, and after a fast-track procedure, a Paris court ordered that the website be blocked by French Internet access providers. The authors of *Copwatch* were deemed to engage in slander because of the aforementioned quote comparing the police to the "common tomb of mankind." They were also found guilty of defamation for a text saying that the border police in the northern city of Calais are "trained to hunt migrants, to humiliate them and torture them psychologically." Before, during, and after the trial, *Copwatch*'s authors managed to remain anonymous. Later, the minister defended the prosecution saying that, "to ensure police deontology, there is the judiciary, the hierarchy, the national commission for police deontology." By doing so, he was explicitly denying "ordinary" citizens the right to also play that role from outside the institutional arenas through copwatching and passing vitriolic judgments against the police.

The political maneuvers against WikiLeaks in the aftermath of the "Cablegate" – when WikiLeaks started releasing dozens of thousands of US diplomatic cables in late 2010 – provide another example of the repression of insurgent citizenship. After US Vice President Joe Biden said Assange was a "high-tech terrorist," WikiLeaks' hosting provider, Amazon, its domain name provider EveryDNS, and finally its payment system providers Paypal, Visa, and Mastercard all unliterary severed their business relationships with the organization. The organization's very survival was at risk in the country of the First Amendment. In response, Assange and his team strove to ensure that WikiLeaks would remain accessible via other domain names and sought a new hosting provider. The website finally landed in Roubaix, France, in one of the data centers of the hosting company OVH. In France, however, the political elite was quick to follow the American example. One member of the then-ruling party at the Assemblée nationale denounced the "despicable methods" of WikiLeaks, a website which she said had "no place in the civilized Internet we ought to build." In a letter he made public, Éric Besson, the minister of the digital economy, threatened OVH with legal action. Considering that French law already provides a basic procedure for removing allegedly illegal content from online servers, such a move had one clear purpose: pressuring OVH into following Amazon's example, taking the WikiLeaks site down in response to the government's extra-judicial demands. Luckily for WikiLeaks, OVH did not yield to Besson's pressure and, in the absence of a judicial decision to the contrary, said that it would continue to host WikiLeaks. After its failed censorship attempt, the French government nevertheless continued to resist WikiLeaks' growing influence in the public sphere. Asked by two parliamentarians about the content of US diplomatic cables mentioning a potential case of corruption of foreign officials by a French company in Turkmenistan, the ministry of foreign affairs stated that it would not "comment on the content of the website WikiLeaks, nor to any press article referring to it," a posture seeking to exclude WikiLeaks from even the classical channels of democratic control.

Even in "established" democracies like France, we therefore see a strong push-back by governments and the power elite to reject the forms of counter-powers emerging among the citizenry. These measures have been denounced by international organizations defending human rights, such as the United Nations, the Council of Europe or the OSCE, which have stressed that the current approaches to regulating the online speech fail to respect the standards of the rule of law. So far, however, the judicial authority – and constitutional courts in particular – have not been willing or able to reconsider the current notions underlying freedom of expression so as to legalize insurgent democratic practices. And unfortunately, the influence of international organizations on powerful "established" democracies is usually quite low.

Reforming the Law of the Public Sphere

This antagonism between insurgent practices and state repression essentially amounts to a conflict over the redefinition of freedom of expression and, as such, goes to the core of the "political status" of human rights advocacy. In his 1981 book *The Democratic Invention*, The French philosopher Claude Lefort rightly observed that a polity abiding by the rule of law is necessarily exposed to the "indeterminate nature of human rights" and confronted "with rights which are yet to be incorporated," as new citizen groups use existing formulations of rights (e.g. those of the French 1789 *Declaration of the Rights of Man and of the Citizen*) to advance new claims.[7] He called such a process an "opposition of right." Internet-based movement of insurgent citizenship, by exerting their freedom of expression to enact citizenship in a way that subverts its legal boundaries, have been waging an opposition of right.

For all the actions of "electronic civil disobedience" undertaken by cyberactivists (many of whom were also involved in anti-censorship effort during the Arab uprisings) to take advantage of the Internet's specific features and defeat censorship, at the end of the day, it is the current legal doctrine of freedom of expression that needs to be reformed if the public sphere is to be enlarged. At a

time when representative governments face a crisis of legitimacy, states should grant civil society more leeway in the public sphere by recognizing insurgent democratic practices as legitimate acts of citizenship. The current doctrine of freedom of expression, which in its philosophy dates back to the bourgeois democracies of the nineteenth century, should be updated through a meaningful legal reform. Many advocacy groups and even political parties are now working to achieve precisely this. The outcome of this conflict between the Internet's insurgent citizens and states will determine no less than the future of democracy, in Europe and beyond.

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Notes

[1] Here the term "public sphere" is broadly understood as the conceptual space of public debate geared toward the criticism of the powers that be. It is derived from the work of German philosopher Jürgen Habermas, who outlined the term his groundbreaking1962 study. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, Mass., 1991).

[2] Benjamin Loveluck, *Freedom Through Information: A Political Genealogy of Informational Liberalism and Self-Organization on the Internet* (PhD diss., EHESS Paris, 2012).

[3] John Perry Barlow, "A Cyberspace Independence Declaration," 1996, https://projects.eff.org/~barlow/Declaration-Final.html (accessed October 13, 2014).

[4] I borrow the term "insurgent citizenship" from the works of socio-anthropologist James Holston. James Holston, *Insurgent Citizenship: Disjunctions of Democracy and Modernity in Brazil* (Princeton, 2008).

[5] Quoted in Cordélia Bonal, "Les flics refusent d'être fliqués," *Libération,* September 30, 2011 http://www.liberation.fr,. http://www.liberation.fr/societe/2011/09/30/les-flics-refusent-d-etre-fliques_764877 (accessed October 13, 2014).

[6] Julian Assange, "State and Terrorist Conspiracies," November 10, 2006, *Archives IQ.org,* http://cryptome.org/0002/ja-conspiracies.pdf ` (accessed October 13, 2014).

[7] Claude Lefort, *L'invention démocratique: les limites de la domination totalitaire* (Paris, 1994).