Advocacy on the Electronic Frontier:
Vernacular Legal Expertise in the Discourse of Digital Rights

by

Olivia Conti

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This dissertation is approved by the following members of the Final Oral Committee:

Robert Glenn Howard; Professor; Communication Arts
Robert Asen; Professor; Communication Arts
Jenell Johnson; Assistant Professor; Communication Arts
Jeremy Wade Morris; Assistant Professor; Communication Arts
Kristin Eschenfelder; Professor, Director; School of Library and Information Studies

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Abstract

This dissertation is a rhetorical inquiry into digital rights advocacy. Digital rights—the set of rights and liberties that best ensure an individual's ability to access information and participate in online space—are of increasing importance as network technology spreads into more areas of modern life. A central contribution of this study is that there is a feedback loop between law, technology, and discourse that structures and informs advocacy. Another primary contribution is the concept of vernacular legal expertise, or legal knowledge acquired in the absence of official legal credentials that allows individuals to advocate for their rights. This study argues that without accounting for vernacular legal expertise, we risk not fully understanding the complex interactions of law, technology, and discourse in digital rights advocacy.

The three case studies comprising this study—net neutrality, the Digital Millennium Copyright Act Section 1201 rulemaking, and the debate over revenge porn (or non-consensual pornography) legislation—highlight different levels of vernacular intervention by documenting different ways that the feedback loop between law, discourse, and technology manifests itself. By examining the arguments made by everyday people and their advocates across these three diverse case studies, this research illustrates the role of vernacular legal expertise in digital rights advocacy by highlighting the fundamental assumptions, or topoi, in which groups base their arguments. These arguments are rooted in early-internet beliefs in the natural resistance of the internet to regulation, a sense of free speech absolutism, and a belief in tinkering as a right and a liberatory endeavor. This creates a tension in digital rights advocacy between government regulation and privatized governance (the governance decisions made by corporations), as well as between citizenship as tied to both the internet and the nation-state. While digital rights are

often grounded within a U.S. legal framework, the arguments made in their favor appeal to a more general sense of internet citizenship. This dissertation argues that the ways in which everyday people reconfigure law within their vernacular communities can affect legal norms and thus law itself.

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Introduction

Setting the Stage for Digital Rights Advocacy

In 2011, a pair of controversial bills were introduced in the United States House and Senate. The Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP, or PIPA) were designed, their proponents argued, to help close U.S. copyright loopholes regarding websites hosted overseas that peddled infringing content, thus protecting rights holders. What the bills allowed, in practice, was the removal of a website from the DNS system, a naming system that undergirds the public internet and allows users to easily find and access websites without knowing the site's IP address—effectively erasing the site from the internet. This concerned many groups interested in protecting free speech online, as well as user-generated content creators. They were concerned that the law was too broad and that the DNS-related provisions could irrevocably alter the internet, effectively allowing the government to "blacklist" particular websites and make it all but impossible for the average internet user to access them. This, to many, was an unconscionable threat to digital rights.

As the bills wended their way through the legislature, these groups launched advocacy efforts to raise awareness of the bills, including banner ads decrying internet censorship on prominent websites like Google and Wikipedia, blog posts dissecting the bills' potential repercussions, and e-mail newsletters that called upon readers to contact their representatives. One locus for this conversation was web forum site reddit, where representatives from groups such as the Center for Democracy and Technology and the Electronic Frontier Foundation

engaged with everyday individuals. In late 2011, one reddit user (unaffiliated with any advocacy group) suggested a boycott of domain name registrar GoDaddy, who had come out in support of SOPA. This protest, called Move Your Domain Day, resulted in significant shifts from GoDaddy to other registrars, including prominent websites like image-hosting platform imgur and the Wikimedia Foundation. As a result, GoDaddy withdrew their support of the bills.

Around this same time, momentum began to gather for a widespread protest. Internet civil liberties group Fight for the Future, helmed by late internet activist Aaron Swartz, began to recruit websites to participate. Wikipedia founder Jimmy Wales opened up the "SOPA Initiative" to discuss mass action, and the community voted to block all Wikipedia content through the main page for 24 hours. Reddit's owners announced an "internet blackout" for January 18, 2012. According to Fight for the Future, over 115,000 sites participated in this blackout, using methods like blocking all content for a day (as Wikipedia did), including prominent banner ads (Google changed their well-known interactive banner), or redesigning websites to reflect a future of internet censorship (Wired, for instance, "blacked out" portions of their articles on that day). Each of these acts of protest contained a link to information about SOPA/PIPA, as well as instructions for users to contact their representatives and register their disapproval. The blacking out of some of the most well-trafficked sites online made a significant impact, with Wikipedia reporting that 8 million users looked up their representatives' contact information through their form on January 18. The political impact of the protests was significant. On January 18, six of SOPA's supporters including Florida Senator Marco Rubio, who co-sponsored the bill, withdrew their support. By the following day, 18 of the bill's original 100 supporters had withdrawn their support. As support for the bill fell away, House Majority Leader Harry Reid announced that a scheduled vote on the bills would be postponed indefinitely.

The SOPA/PIPA blackouts were one of the most highly visible and successful online protests in recent memory—and, most notable, these acts of protest occurred largely online. While there were some small demonstrations in front of representatives' offices in some states, the blackout day represented an instance where vast swathes of the online public took action in support of digital rights. The protests were a certain success (one of the most successful internet-based protests to date), and they demonstrated several crucial facts about present-day digital rights advocacy. Primarily, the blackouts brought the importance of digital rights to the foreground—as citizens grasped the threat to free speech posed by SOPA/PIPA, they turned their attentions towards protecting their rights as internet users. Yet, perhaps most importantly, the SOPA/PIPA internet blackout day proved that online protests can have a significant effect on the law, as public action compelled legislators to withdraw support. Furthermore, facets of the protest such as the GoDaddy boycott, which originated with everyday people and compelled mass action and responses from those in power, illustrated that the internet has enabled people without institutional power or credentials to use their knowledge and the affordances of network technology to advocate for change and educate their peers, demonstrating a power that I have termed vernacular expertise. Vernacular expertise, most often exercised with regard to legal knowledge, is often gained through personal experiences and conflicts with law and policy, and develops as a body of expertise that an individual without official credentials or institutional sanction can recruit in their defense.

With an eye towards recent events like the SOPA/PIPA protests which highlighted the frictions between law and technology, this project examines legal debates in which everyday individuals (those without institutional expertise) have come together with advocates online to fight for legal changes that have a bearing on digital rights. Digital rights, broadly construed,

refers to the set of rights and liberties that best protect laypeople and ensure their participation in the online public sphere (things like privacy, freedom of expression, and the ownership of data and cultural artifacts). Because they often affect everyday user experience, these issues invite significant input from everyday individuals and grassroots collectives as well as more established institutions fighting on their behalf. The legal issues that I have chosen to examine span the intersecting areas of intellectual property, privacy, and internet access—essential digital rights that also bring together vastly different groups of impassioned actors and very different types of argument.

To understand how these arguments for digital rights function, it is important to recognize that there is a feedback loop between law, discourse, and technology. Network technology has made the flows of power that attend digital rights issues more visible, revealing the interplay between these three areas. Law—that is to say, top-down orders handed down by lawmaking bodies—have a profound effect on technology, and in turn technology innovates far more quickly than the law can. Each of these areas is in turn informed by discourse—both the vernacular discourse of the affected members of the public, but also the advocacy that arises from within civil society. Within their discourse, actors with different power positions are afforded different discursive resources. The chapters in my dissertation illustrate different ways in which this feedback loop functions, and in so doing highlight how the arguments for digital rights shift as people argue for broad regulatory change affecting internet architecture (in the case of net neutrality), legal change on a smaller scope that touches the lives of everyday individuals (the DMCA rulemaking), and very specific legal prohibitions that prevent harassment and personal injury (revenge porn legislation). As the case studies progress from most institutional to most vernacular, it is possible to see how the topoi—the foundational assumptions

underlying arguments—deployed by the everyday individuals and institutional actors are both influenced by and influence technology and law. Given the breadth of issues at stake in digital rights battles and the often muddy associations between the state, large tech companies, and advocacy groups, the broad concern that animates my research is how everyday individuals and organizations take online action to change laws about the internet, and what the effects of this online action are. My primary objects of study are the digital texts in which actors with different types and amounts of power advocate for the preservation of digital rights. The three case studies I present cover a range of the possible discursive formations in which the discussion of digital rights arises. While my cases are extremely diverse, they each illustrate a different interplay between law, technology, and discourse. So doing, they highlight the varying facets of vernacular legal expertise. Through looking at discourse emanating from expert, advocate, and grassroots positions, I will interrogate the assumptions that underlie these groups' discourse in order to call attention to the voices and subjectivities that may be silenced in the contemporary discourse of digital rights online. My hope is that a more inclusive and clear articulation of digital rights can lead to more effective advocacy and a broader set of rights that protect a variety of voices.

Network technology and rights

The internet has enabled everyday citizens to form large collectives around issues of common interest, and also to unite with empowered advocates—either within advocacy groups like NGOs, or within the government itself—to amplify their voices. The internet affords tremendous opportunities to not only engage in traditional forms of democratic activism like petitioning, but also affords many opportunities for new forms of activism like the creation of

websites, strategic "blacking out" as in the SOPA/PIPA protest, or forms of guerilla protest such as distributed denial-of-service (DDOS) attacks that can take down servers and prevent access entirely. In theory, the internet creates beneficial conditions of public debate whereby lawmakers can take the views of their constituency into account and achieve something closer to direct democracy. However, online advocacy and debate is still marked by the fragmentation of communities and so-called "filter bubbles," harassment and incivility, and corporate governance that restricts particular types of speech on many of the web's most widely-used platforms. These realities raise questions about how advocacy efforts are both enabled and constrained by these tensions. Exploring these tensions involves both looking into the past—seeing how organizations frame particular issues, identifying strategies and tactics employed by successful campaigns—and also looking towards the future, noting the stumbling blocks of contemporary digital rights discourse that may need to be overcome in order to increase the efficacy of digital advocacy.

Network technology has brought everyday individuals into conflict with law and policy in unexpected ways, from a DMCA takedown request that a user receives after uploading a remix video to YouTube to a woman who finds herself appealing to local authorities for protection in a case of cyber-harassment. These conflicts with policy make the structures of governance—the process of formal and informal decision making that has constitutive effect on online spaces—more visible to the average citizen. This visibility opens up possibilities for intervention, for as the structures of power become more transparent, so too do the means by which everyday people can disrupt these structures. In many instances, these individuals have been moved to work to change the law—both on the grassroots level and through appealing to empowered advocates. The online world, like the offline one, is wrought with complications and riven with the unequal distribution of justice and rights. This project examines how everyday

people seize the opportunities presented by technology to develop expertise, articulate rights, and intervene in previously impenetrable governing structures like law and policy.

My case, digital rights, both illustrates possibilities for governance and also the importance of preserving transparency online. Many battles for digital rights concern the ability of citizens to control the flow of information in order to protect their privacy, connect with likeminded individuals, and access information equally. The power flows at play in these situations would not be visible to citizens were it not for network technology and the increased transparency and connection it enables. Thus, by preserving digital rights we better enable citizens to use the affordances of network technology to liberatory ends. Through networked discourse, individuals develop and share vernacular legal expertise—an expertise in the absence of official credentials that allows them to make legal arguments pertaining to their everyday lives. This vernacular legal expertise can enable a tactical intervention into legal regimes that disempower everyday individuals. Fights for digital rights represent a clear intersection between law, technology, and everyday discourse.

Of course, these interventions rarely occur without friction. These frictions can be productive, highlighting inconsistencies or lacunae in particular arguments. For instance, the transparency enabled by the internet can also bring entrenched beliefs into conflict as groups more easily come into contact with one another. As groups interact online, their discourse and their cultural productions develop a vernacular character that bears out through advocacy, conversation, memes, images, shared videos, and more. As groups develop their vernacular ethos, they come to rely on a common set of assumptions (topoi) that underpin their understanding of their group and arguments for their group's rights. For instance, the notion of the lawless "electronic frontier" is a particularly salient feature of many rights arguments online.

Furthermore, the same network technology that enables increased levels of connectivity also sustains certain modes of argument that are particularly available to everyday people—the idea of free speech as a central value of the internet, for example. These arguments are often at odds with rights claims aimed at protecting vulnerable groups, changing the rules of conduct in online space, and limiting the role of corporations online. Groups advocating for digital rights employ certain modes of argument, among them a belief in rational-critical deliberation as an ideal, free speech absolutism, and a faith in the free market and the impossibility of internet regulation. These arguments, in turn, can infuse the law as everyday people and their advocates fight for legal changes, which is why it is essential to turn our attention to the frictions between different groups as they argue for digital rights.

Often, these topoi are deployed in the service of arguments for particular rights and liberties. As organizations and individuals gain more power, they may rely on some of the same standard topoi. Yet, when emanating from positions of power, these topoi may not be as effective or may work in different ways. For instance, the "electronic frontier" argument, when deployed by powerful actors as a way to argue against anti-revenge porn legislation, is no longer the rallying cry of the underdog but can instead function as an effort to silence victims of online harassment. Thus, these topoi are unstable—while within a certain group they may be taken for granted, they can function in an injurious way when deployed by another actor or in a different context. In legal discourse, these topoi may fundamentally influence the letter of the law, or the amount of support a particular law can gather. The friction between these claims and the areas where they blur together are two of my primary areas of analysis.

My research has shown that in current discussions of digital rights, there are three primary positions available to actors advocating for digital rights and these different discursive

positions affords individuals in the discourse significantly different rhetorical resources. The first–what I'm calling the expert position—is comprised of academic institutions like Harvard's Berkman Center for Internet and Society and MIT's Center for Civic Media. These organizations provide academic perspectives on digital rights issues, and often focus on either legal solutions or technological tools for researching digital rights and regulation—such as research tools like social network mapping. The second position—what I'm calling the advocate position—includes non-governmental organizations (NGOs) and advocacy organizations such as the Electronic Frontier Foundation (EFF) and the American Civil Liberties Union (ACLU). These organizations often focus on legal activism as well, but court grassroots involvement on a much broader level than the previously mentioned academic institutions–for instance by representing everyday individuals in legal cases, educating the public on digital rights, or developing public-facing tools such as privacy protection software. The third position is the grassroots position—where everyday actors without institutional credibility network amongst themselves. This group is composed of individuals who have formed informal collectives on social media sites like reddit and Twitter, and also the organizations that have formed from these grassroots efforts. Grassroots groups are focused on networking interested individuals and also on massive action campaigns like consumer boycotts. Vernacular legal expertise derives from the grassroots.

Each of these positions affords different rhetorical resources, which is important to consider because of the strong possibility that different rhetorical resources can lead to different levels of influence and empowerment across the issues in digital rights that I examine. For instance, an expert position conveys credibility, but also may not allow for the type of massive action that enables protests on the scale of SOPA-PIPA, due to the fact that expert organizations are more cloistered and may make more highly technical arguments than NGOs and grassroots

organizations. Conversely, grassroots organizations may suffer from a lack of credibility or a lack of a cohesive message, which can make it difficult to accomplish specific goals like passing legislation. In issues of digital rights, these positions exert force in different ways. Nonetheless, the discourse that emerges from these varied positions shares some common topoi that inform the larger discourse of digital rights.

The interaction of discourses and topoi

It is broadly true that when the change sought is particularly technical or dependent on institutional sanction, vernacular voices are not as easily recruited and vernacular arguments do not filter up through the legal discourse. Thus, in cases like net neutrality, vernacular narratives are not visible the advocacy efforts, despite massive public support for the policy. Yet, when the digital rights violation in question takes place on a more individual scale—as is the case in both the DMCA rulemaking and in the case of revenge porn—it's somewhat easier for vernacular narratives to filter up into the letter of the law. Yet, due to the deployment of unstable topoi in these discourses, it is difficult to divine a coherent digital rights agenda from the discourse of the multitudes of digital citizens calling for change. While network technology is liberatory in the sense that it allows massive public discussion as well as new forms of internet-based advocacy that can intervene in governance in tactical ways, the dark side of this is that as certain topoi dominate online advocacy, the arguments that they spark may be used to silence other voices.

Several topoi appear across nearly all of the arguments for digital rights in my case studies. The first of these topoi is a lingering belief that the internet is difficult or impossible to regulate. While early-internet utopians who believed the internet to be free from regulation by design have faced convincing evidence to the contrary, there is a certain degree of faith in the

architecture of the internet as that which invites hacking and circumvention and where freedom will win out in many instances. This assumption is not entirely without merit—hackers do often find ways to circumvent restrictive technology. However, this frontier ethos also has a dark side. For instance, many women who have experienced harassment online have run up against the difficulty of seeking material retribution for online actions, largely due to the diffusion and anonymity enabled by internet architecture. As Hector Postigo writes, technology is a linguistic resource that is imbued with "a participatory ethos."[1] This ethos empowers the user or consumer, even when their rights are being curtailed by tech companies or internet service providers, or when this empowerment is working against another user or class of users.

This assumption that the internet is fundamentally outside of law carries over into the second topos in digital rights discourse—the elevation of civil liberties over civil rights. This is to say that arguments in favor of digital rights are often focused on a specific action that is protected, rather than protecting individuals or subject positions. This has attracted criticism from groups who find themselves marginalized and abused online. Danielle Keats Citron, writing specifically about gender-based hate crimes in cyberspace, has made the observation that digital rights and digital rights advocates—for as much as they frame their cause as rights-based—tend to exclude certain groups.[2] Instead, the opposite often happens, with groups like the Electronic Frontier Foundation arguing against punishing users for harassing women online as, in their view, this constitutes a form of censorship. The deployment of rights discourse in this sense reveals an internal tension, as the actions that many groups seek to protect could more accurately

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[1] Hector Postigo, *The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright* (Cambridge: The MIT Press, 2012), 177.

[2] Danielle Keats Citron, *Hate Crimes in Cyberspace* (Cambridge: Harvard University Press, 2014).

be described as liberties. In this framework, certain actions are held up above others, and certain protections are considered more valuable than others. I believe that this framework persists beyond the discussions of online harassment into the discourses of "free culture," privacy, and intellectual property.

The third of these topoi is individualized action, and the process of translation that individual action frameworks require when it comes to advocating for legal change. Rainie and Wellman coined the term "networked individualism," claiming that it is the "new social operating system."[3] This concept is essential to contemporary studies of online publics, as making room for individuals to negotiate their relationship to politics from the comfort of their computer screens has become necessary in order to explain and allow for political action in a digital age.[4] However, as some have noted, networked individualism can often lead to so-called "slacktivism" or, more importantly for this study, a dilution of complex ideas into talking points that individuals can consume and respond to quickly and easily.[5] This is especially prevalent in legal advocacy, as the legal process is opaque to the average citizen, and it is important to translate the law into the vernacular, and also to point citizens in the direction of online actions that they can take.

This dilution of legal discourse combined with the open architecture of the internet leads to what I am calling vernacular legal expertise, a position from which everyday individuals, be

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[3] Lee Rainie and Barry Wellman, *Networked: The New Social Operating System* (Cambridge: The MIT Press, 2012).

[4] Zizi Papacharissi, *A Private Sphere: Democracy in a Digital Age* (Cambridge: Polity, 2010).

[5] Danny Kimball, "What We Talk about When We Talk about Net Neutrality," in *Regulating the Web: Network Neutrality and the Fate of the Open Internet*, ed. Zack Steigler (Lanham: Lexington Books, 2013).

they digital content creators or privacy activists, have an understanding of the law and an ability to advocate for particular legal changes and positions. This expertise has the potential to unsettle the high barriers to entry of the U.S. legal system, as everyday individuals engage in specifically legal activism online. This type of civic engagement online takes numerous forms and revolves around many issues, and the discourses created are a complex blending of legal expertise, grassroots irreverence, and the traditional language of protest and social movement that rhetorical scholarship has been concerned with for decades. In its ideal form, this vernacular legal expertise can also inform multi-stakeholder governance models, where many interested parties come together to decide the ideal form that regulation should take. However, as a strategy, networked individualism also has a strong neoliberal undercurrent that casts the improvement of individual conditions as good for society overall, which runs the risk of ignoring the different types of injustice faced by less privileged individuals.

Through a consideration of the voices present in discourses of digital rights, the topoi that appear most frequently in these discussions, and how these discourses are shaped both by vernacular and institutional expertise across the areas of law and technology, this project seeks to reveal how everyday people seize the opportunities presented by technology to develop expertise, articulate rights, and intervene in previously impenetrable governing structures like law and policy. With this in mind, I have developed a theoretical model with deep roots in rhetorical tradition and well as the fields of legal and internet studies, and have applied this to three case studies that illustrate different facets of digital rights discourse: net neutrality, the DMCA rulemaking, and non-consensual pornography or “revenge porn.”

Mapping future directions

I introduce the primary concepts of vernacular legal expertise and the feedback loop between law, technology, and discourse in Chapter one. There, I contextualize these ideas within theories from rhetoric, law, and internet studies. Network technology has brought everyday individuals into conflict with law and policy in unexpected ways, from DMCA takedowns to cyber-harassment. These conflicts with policy make the structures of governance—the process of formal and informal decision making that has constitutive effect on online spaces—more visible to the average citizen. This visibility invites intervention as the structures of power become more transparent. In many instances, these individuals have been moved to work to change the law—both on the grassroots level and through appealing to empowered advocates. The online world, like the offline one, is wrought with complications and unequal distribution of justice and rights. Vernacular legal expertise, a primary contribution of this study, serves to unsettle notions of legal expertise as a cloistered body of knowledge available only to those with proper training. While everyday individuals may not be able to work in an official legal capacity, they often understand the law well enough to make defensible legal arguments for themselves, arguments that can in turn affect legal code. In addition to excavating the vernacular processes that underlie the creation of discourse, I also look at how arguments circulate and interact with one another. This leads to another central contribution of this project, which is a feedback loop between law, discourse, and technology. Understanding the flow of influence between these three positions, and also between actors with varying degrees of institutional sanction and power, is essential to understanding how laws are made and reshaped online.

Chapter two concerns network neutrality, the principle of network design that claims there should be no discrimination between information as it travels through a network. This

means that, ideally, all internet traffic should be treated equally in terms of speed and access by internet service providers (ISPs). The principle of net neutrality, while it ostensibly underlies the internet, was developed and popularized as a policy platform by technologists and gained traction in the public sphere over time, largely due to work on the part of digital rights NGOs and high-profile technology activists. Thus, the debate about net neutrality has several movements that occurred over a fairly long period of time, and each of these movements call up many discursive themes and topoi from the birth of the internet. In this sense, net neutrality is a fertile ground in which to dig for the foundational assumptions that undergird much digital rights advocacy. The net neutrality debate showed that the biggest threat to "internet freedom" may not be the government or regulatory forces, but rather corporations that control access to the internet. As net neutrality gained traction in the public sphere, the concept was shaped through popular discourse into an issue of digital rights and internet openness as opposed to an obscure technical principle.

The net neutrality ruling in 2014 was an unequivocal success for digital rights activists, and the debate surrounding the ruling revealed common themes within digital rights discourse, among them a faith in the internet's natural resistance to regulation, the belief that all speech should be treated equally online, as well as a mistrust of corporations (though, in this case, primarily those corporations tasked with supplying access to the internet). These topoi manifested in discourse as responses and reactions to the link between corporations, the government, and the internet that the net neutrality debate laid bare. Furthermore, the net neutrality debate is unusual in that it involved a request on the part of the public for more regulation online. Generally speaking, digital rights gatekeepers advocate for an internet free from legal and regulatory intervention. Yet, in this case, digital rights groups called upon the

government to rein in corporations who they felt could limit free speech and irreparably harm the open network infrastructure that, in their view, is essential to breeding innovation and creativity. Simultaneously, these advocates called upon the public to recognize the flows of power attending the delivery and maintenance of internet service upon which so many individuals rely. Thus, much of the discourse of net neutrality also evinces an uneasy compromise between freedom and regulation, one that hinges on an understanding of the feedback loop between law, technology, and discourse.

In Chapter three, I turn an eye towards the Digital Millennium Copyright Act (DMCA) Section 1201 rulemaking. The DMCA rulemaking is a process that occurs every three years in which the U.S. Copyright Office considers exemptions to Section 1201 of the Digital Millennium Copyright Act, which prohibits the circumvention of DRM (digital rights management, or the "locks" on digital content). During this process, the copyright office invites industry groups, NGOs, and the public to argue for exemptions for legitimate non-infringing uses. Here, I look at the DMCA rulemaking as a venue for the development and exhibition of vernacular legal expertise as it pertains to intellectual property. For instance, video remixers and others who rely on transformative uses of copyrighted content have often found themselves at odds with copyright law not just when they share their work, but at the very beginning point of their creation—extracting clips from DRM-locked DVDs. Within communities like these, well-conceived notions of rights and arguments in defense of everyday activities have been developed and shared.

The 2015 rulemaking brought out members of the agricultural community as well as independent auto mechanics, who argued against restrictive DRM on automobiles and tractors that fundamentally contradicted the do-it-yourself ethos of these communities. Thus, while the

concerns of these groups may be different, what they have in common is a strongly-conceived sense of rights and liberties and the ability and drive to argue for them in processes like the Section 1201 rulemaking. Looking at these arguments, and the topoi deployed by different actors from the most to the least powerful, I argue that the DMCA rulemaking process is a venue for individuals to collaboratively share and shape their vision for a fairer intellectual property regime. However, the rulemaking process also reveals a complicated vision of digital citizenship, where individuals argue for rights within a U.S. framework while simultaneously envisioning themselves as sovereign digital citizens. Furthermore, the vernacular arguments made in the DMCA rulemaking require a certain amount of institutional recruitment and translation in order to be effective in the final ruling. Here, I explore both public comments and public hearings and uncover the ways in which those outside of the legal establishment persuade both rights holders and the U.S. Copyright Office that their exemptions are necessary and important.

Chapter four turns to perhaps the most contentious issue of this project, revenge porn (or non-consensual pornography) and the recent passage of criminal revenge porn legislation in several states. Importantly, anti-revenge porn laws and anti-harassment campaigns have been launched largely on the grassroots level, with affected individuals banding together for mass action and later gained support and advice from experts. As such, this is an area where vernacular legal expertise is especially prominent, as women have shared suggestions with one another about the best legal arguments to make when requesting that pictures be removed, or the best practices for handling online harassment. Yet, it's also a very successful example of civil society amplifying their concerns upwards to the level of the law through coalitions with experts. Still, online harassment—of which revenge porn is one of the most injurious types—is one of the most fraught areas of digital rights advocacy, as it pits grassroots organizations against more

established NGOs, and groups fighting for women's rights. This is because of concerns on the part of civil liberties organizations that revenge porn laws, which enable the criminal prosecution of those who share and distribute revenge porn, could be broadly construed and used to censor items of public interest. In this case, we see two groups with fundamentally different ideas about the value of free speech attempting to argue through the frictions created by their differences.

Revenge porn illustrates the uneasy interactions between law, technology, and the communities of users advocating for their interests. Technology has undoubtedly increased the ease with which malicious individuals can acquire and share intimate images, and online venues like the Google search engine have vastly increased the harm wrought by revenge porn, as intimate images and humiliating details become linked to a victim's name in perpetuity. For this reason, Google's 2015 decision to take down revenge porn search results at the request of victims has been monumental, and marked as a major victory for those advocating for harsher criminal penalties for non-consensual pornography. However, the celebration surrounding this decision calls up a number of attending tensions between law and privatized governance, wherein corporations like Google and Microsoft make executive decisions that have the potential to unbalance the feedback loop between law, discourse, and technology, giving corporations an unduly large spotlight at the expense of vernacular voices. In short, the fight for revenge porn legislation illustrates the range of problems that attend advocacy around divisive issues: it has filtered up from the bottom, it has wrought division among even the most progressive groups online, and in so doing has laid bare the libertarian ideology that underpins much contemporary discourse on digital rights.

The digital rights landscape

As the SOPA/PIPA protests illustrated, online action in all of its permutations—institutional or vernacular, behind-the-scenes or public, small-scale or massive—can have an effect on the law. While in some sense the organizing tactics on which activists have relied for years are at play online, with a larger and more dispersed public and an internet ecosystem that is increasingly threatened by regulation (both private and governmental), a new activist's toolkit is necessary. Thus, the notion of vernacular legal expertise becomes essential, as laypeople must in many instances develop fluency with law and policy in order to defend their rights, protect themselves from legal sanction, and ensure their ability to participate freely in online spaces. The goal of this project is to reveal how everyday people seize the opportunities presented by technology to develop expertise, articulate rights, and intervene in the structures that govern their actions both online and offline. As network technology pervades everyday life, from increasingly powerful mobile devices, to widely-adopted technologies like the internet of things that allow us to connect to the internet in ways both intimate and mundane, users must be increasingly vigilant about the ways in which our everyday technological interactions bring us into contact (and conflict) with law and policy. While the digital rights struggles that I articulate here are only a few examples, it is my belief that they represent an early stage of a movement that is gaining momentum with each high-profile hack, whistleblower revelation, and battle to change outdated law—a movement in which everyday internet users will play a substantial role.

Chapter 1

Law, the Flows of Power, and the Strength of Vernacular Voices

> "The people rose up, and they caused a sea change in Washington—not the press, which refused to cover the story—just coincidentally, their parent companies all happened to be lobbying for the bill; not the politicians, who were pretty much unanimously in favor of it; and not the companies, who had all but given up trying to stop it and decided it was inevitable. It was really stopped by the people, the people themselves."
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> – Aaron Swartz, "How We Stopped SOPA," Freedom to Connect keynote, May 21, 2012

At the Freedom to Connect conference in 2012, technologist and activist Aaron Swartz delivered the keynote address, a speech entitled "How We Stopped SOPA," where he reflected on the successful protests against SOPA and PIPA which occurred during the winter of 2011. The Stop Online Piracy Act (SOPA, as it was called in the House) and the Protect Intellectual Property Act (PIPA, as it was called in the Senate) would have enabled the government to shut down websites that allegedly infringed copyright, blocking them on the server level and rendering them inaccessible.[6] In his speech, Swartz tracks the progress of the SOPA-PIPA protests, which grew from a small group of internet activists catching wind of a piece of dangerous intellectual property legislation and expanded to a massive-scale protest that saw the most well-trafficked sites online blacked out for a day, large consumer boycotts, and millions of calls and e-mails flooding Capitol Hill. In this speech, Swartz emphasizes that the success of the SOPA-PIPA protests was due to the fact that everyday people—those outside of the legal

[6] Yochai Benkler, Hal Roberts, Robert Faris, Alicia Solow-Niederman, and Bruce Etling. "Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate," *SSRN Electronic Journal* (2013) http://papers.ssrn.com/abstract=2295953.

establishment, outside of Silicon Valley, outside of the small but fervent group of digital liberties activists, even—took up the cause and made it their own. His point is clear: it was an act of protest that succeeded because of individual action. Yet, at the close of the speech, Swartz cautioned the audience to be aware of how the story may be rewritten—as a victory helmed by large tech companies. The debates about SOPA-PIPA on a legislative level were shot through with a fear of the internet-using public, the notion that the internet was a lawless place populated largely by individuals looking to steal content and take advantage. Swartz quoted one legislator in his speech who angrily proclaimed "Those people on the Internet, they think they can get away with anything! They think they can just put anything up there, and there's nothing we can do to stop them!"[7] Seizing on this narrative, Swartz calls on his audience to recognize that the government's worst fears were correct—"the internet is out of control." Yet, Swartz saw this as an unequivocally positive trait, calling attention to the fact that the chaos of the individual actors that made up the online public became an unstoppable force when they all set their focus on a particular goal. To Swartz, this was the beauty of the SOPA-PIPA protests—that lawmakers and companies were swayed by public discourse, and that the public rallied and successfully orchestrated a massive protest through primarily digital means.

The SOPA-PIPA protests are just one example of the power that everyday online discourse has to affect the legal landscape—either through stopping laws that are working their way through Congress, having laws passed that protect particular segments of the internet-using population, or altering laws in ways that are more just. The central assumption that undergirds this study is that the ways in which people describe and advocate for their rights have the

[7] Aaron Swartz, "How We Stopped SOPA," (keynote, Freedom to Connect Conference, May 21 2012) https://www.democracynow.org/2013/1/14/freedom_to_connect_aaron_swartz_1986

potential to affect how those rights are encoded in law. My approach to the discourse of digital rights advocacy is grounded in rhetoric. As defined by Aristotle, rhetoric is an ability "in each [particular] case, to see the available means of persuasion."[8] Scholars like Kenneth Burke and David Zarefsky have refined this definition to encompass the study of how symbols influence people, inducing cooperation and changes of opinion.[9] This involves, primarily, the study of discourse—the words, images, symbols, and acts of protest that those fighting for digital rights use to make their case. Specifically, I look here to legal discourse, or arguments about rights that are based in both official and unofficial legal expertise. As Martin Medhurst argued, rhetoric scholars in the late 20th century became public affairs scholars with "a particular set of lenses."[10] Given its focus on persuasion and the ways that words constitute the world, the rhetorical lens can make significant interventions into the study of legal advocacy.

Furthermore, given the fact that digital rights advocacy like the SOPA/PIPA protests takes places largely online, it is essential to consider the interaction between technology, discourse, and law. Network technology has brought everyday individuals into conflict with law and policy in unexpected ways, from a DMCA takedown request that a user receives after uploading a remix video to YouTube to a woman who finds herself appealing to local authorities for protection in a case of cyber-harassment. These conflicts with policy make the structures of governance—the process of formal and informal decision-making that has constitutive effect on

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[8] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, 2nd ed., trans. George A. Kennedy (New York, Oxford: Oxford University Press, 2001), 1356a.

[9] Kenneth Burke, *A Rhetoric of Motives* (Berkeley: University of California Press, 1950), 43. David Zarefsky, *Public Speaking: Strategies for Success* 7th ed. (Pearson, 2014), 8.

[10] Martin J. Medhurst. "The Contemporary Study of Public Address: Renewal, Recovery, and Reconfiguration." *Rhetoric & Public Affairs* 4, no. 3 (2001): 496.

online spaces—more visible to the average citizen. This visibility opens up possibilities for intervention, for as the flows of power become more transparent, so too do the means by which everyday people can disrupt them. The online world, like the offline one, is wrought with complications and unequal distribution of justice and rights. This project examines how everyday people seize the opportunities presented by technology to develop expertise, articulate rights, and intervene in previously impenetrable governing structures like law and policy in tactical ways.

In this chapter, I will introduce the central theories that inform my examination of digital rights discourse and introduce the concepts that structure my analysis. First, I establish the rhetorical foundation of my inquiry, and then examine how discourse and power interact to produce subjects poised to intervene in the structures that govern them. Vernacular legal expertise, a primary contribution of this study, serves to unsettle notions of legal expertise as a cloistered body of knowledge available only to those with proper training. While everyday individuals may not possess legal credentials, they often understand the law well enough to construct arguments about their rights, arguments that can in turn affect legal code. In addition to excavating the vernacular processes that underlie the creation of discourse, I also look at how discourse circulates and interacts, and the fundamental assumptions (or topoi) undergirding different groups' arguments. This leads to another central contribution of this project, which is a feedback loop between law, discourse, and technology. As Aaron Swartz pointed out in his keynote address at the F2C conference, everyday discourse often has to contend not just with opposition from the legal establishment but also with changes in technology and, in many cases, legal arguments from technology companies themselves. This project examines the flow of power and persuasion across these three areas.

The rhetorical context

While a significant portion of humanities scholarship takes discourse as its object of study, what exactly the term "discourse" refers to is not consistent. It may refer to the printed text of a pamphlet, the words of a politician addressing a large audience, the everyday conversation among users on reddit, the images created by political artists, or the embodied demonstrations of protesters—among innumerable other possibilities. My concept of discourse derives from Michel Foucault's *Archaeology of Knowledge*, in which he describes discourse as an equivocal, often inexact term that refers to "groups of signs … a group of acts of formulation … constituted by a group of sequences of signs, in so far as they are statements, that is, in so far as they can be assigned particular modalities of existence."[11] Discourse is relational, the evidence of human communication, and worth studying because it articulates our view of the world. Through studying discourse we can trace ideas across utterances, uncover implicit assumptions, and make broader claims about how language affects and is affected by society. Theory and historical context add nuance and depth to discourse, and as such it is essential to study each alongside the other. As Michael McGee writes, a text is always fragmented, and in need of a deep understanding of its context to excavate its meaning. Thus, to McGee, the task of the rhetorical critic is to assemble a text worthy of criticism.[12] Practically, this takes the shape of a

[11] Michel Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith (New York: Pantheon Books, 1972): 107.

[12] Michael Calvin McGee "Text, Context, and the Fragmentation of Contemporary Culture" *Western Journal of Speech Communication* 54 (1990): 279.

"tacking" back and forth between a text or discourse and the concepts that the critic is investigating.[13]

In what follows, I take as my primary object of study what I will refer to as legal discourse. Given the importance of understanding the persuasive processes that inform law, as well as the ability of everyday individuals without legal expertise to reshape laws within their communities, I take legal discourse to include not just the text of laws themselves, but rather the law in concert with the discourse that surrounds them. This includes popular discourse about laws, of the sort that might take place on social media, on the websites of NGOs, or in other public and unofficial channels, as well as more formalized advocacy. What matters primarily to those looking at discourse through a rhetorical lens is that this discourse seeks to have some effect on the audience. Lloyd Bitzer wrote that rhetoric is "a mode of altering reality, not by the direct application of energy to objects, but by the creation of discourse which changes reality through the mediation of thought and action." The goal in this case is that one's discourse engages the audience to such an extent that they become compelled to mediate change.[14] In the case of legal discourse, the goal of the rhetor is to change law. However, the ways that this happens in actuality are often different than the regimented democratic processes that many of us in the United States have come to traditionally associate with lawmaking, such as votes, public hearings, and lobbying.

Scholars have long argued that the internet has fundamentally changed the way that discourse and deliberation functions, though there are a multitude of claims as to how and why

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[13] James Jasinski, "The Status of Theory and Method in Rhetorical Criticism," *Western Journal of Communication* 65, no. 3 (2001): 256.

[14] Lloyd Bitzer, "The Rhetorical Situation," *Philosophy and Rhetoric* 1, no. 1 (1968): 4.

this change has come about. Most notably, the increased ease of one-to-many and many-to-many communication has changed the face of deliberation, as has the ability to hold asynchronous conversations—dialogues can occur over a long period of time, with participants bringing in external pieces of evidence to support their arguments and referring back to earlier participants.[15] Furthermore, the low barriers to entry online mean that individuals without traditional journalistic or legal credentials can weigh in on ongoing issues. While often this may devolve into an exchange of anonymous barbs, the ability of diverse voices to reach out to audiences in a wide array of venues (social media sites like Twitter and Facebook, personal websites, and blogs being among only a few options) has changed the way that everyday people engage with politics and culture.[16] Damien Pfister argued that the blogosphere can serve as an inventional resource, citing an example where bloggers writing about a political scandal were able to "flood the zone" with new arguments, valuably expanding the arguments that were available to those discussing the same issue in the mainstream media.[17] In this way, the internet tips the balance of power in deliberation, allowing arguments that would not traditionally make it past gatekeepers in the broadcast and political spheres to receive wide public attention.

While there are many lenses a rhetorical critic can use to examine discourse, a particularly helpful one when examining such a wide variety of arguments emanating from such a wide variety of speakers is the notion of topoi. Topoi are inventional resources, templates that

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[15] Stephen Coleman and Jay G. Blumler. *The Internet and Democratic Citizenship: Theory, Practice and Policy* (New York: Cambridge University Press, 2009).

[16] For more detail on participatory culture and social media see Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2008).

[17] Damien Smith Pfister, *Networked Media, Networked Rhetorics* (College Park: Penn State University Press, 2014) 60.

can be used by those constructing arguments, and an examination of how these topoi appear, shift, change, agree, and disagree across discourses can shed light on the assumptions and worldviews that undergird arguments. Aristotle theorized two different types of topoi—the koinoi topoi, or common topics, and the specific topics that apply only when constructing arguments relating to particular subjects. To Aristotle, topoi could be isolated fairly specifically. For example, Aristotle proposes comparison as one type of common topic, which can be further divided into comparisons of the similarities and differences between two things, as well as the degree of similarity or difference.[18] Quintilian, examining Aristotle's classifications, found them unnecessarily taxonomical. Rather, Quintilian claimed, the majority of topoi emanated from such specific circumstances that it was impossible to categorize them—to do so is a futile exercise.[19] Rather, the topoi should be derived from specific instances rather than seen as a theory or template to apply to a pre-existing instance. Michael Leff argues that the topoi as Quintilian conceives of them are useful as training devices for rhetoricians, allowing them to respond nimbly to situations that demand different sorts of persuasive responses.[20] This conception of topoi is the one that is most useful to this study, as each digital rights group argues for its rights in a slightly different way and makes different assumptions about the nature of the internet. Thus, the topoi available to one group differ significantly from another, particularly in situations where there is a power differential.

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[18] Aristotle, *On Rhetoric,* 1392a.

[19] Quintilian *Institutio Oratoria* V. X. 103.

[20] Michael Leff, "Up from Theory: Or I Fought the Topoi and the Topoi Won," *Rhetoric Society Quarterly* 36, no. 2 (2006): 208.

Another alternate definition of topoi that is of theoretical use when examining a wide variety of discourses comes from Rachel Martin Harlow, who defines topoi as "widely recognized enthymemes shared by large numbers of people."[21] The enthymematic framework is useful in that it calls attention to the unstated assumptions that are at play in a particular argument. Combining the enthymematic nature of the topoi with an emic consideration of their function in discourse can help us to uncover deeper tensions at play when comparing arguments across groups. As Leff writes, "the ability to discover the proper materials and to use them properly cannot be reduced to a general method, but must be developed in relation to knowledge of the case and grounded judgment."[22] For instance, the foundational assumption from which many digital rights arguments derive is that the internet is an "electronic frontier" immune from regulation. Furthermore, in the discourse of digital rights, there are differences in the topoi used by different groups—laypeople and experts, for instance, have different topoi available to them. Similarly, groups with different ideological commitments will begin their arguments from a different basis. The tensions and friction between these topoi cause tension when groups negotiate their rights, especially as particular rights may have ripple effects that touch large swaths internet users (as in the case of something like net neutrality). Studying the topoi at play in rights discourse helps to shed light on how people and organizations are defining digital rights—and where these definitions differ across groups and power positions.

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[21] Rachel Martin Harlow, "Topoi and the Reconciliation of Expertise: A Model for the Development of Rhetorical Commonplaces in Public Policy," *Journal of Technical Writing and Communication* 45, no. 1 (2015): 58.

[22] Michael Leff, "Commonplaces and Argumentation in Cicero and Quintilian" *Argumentation* 10 (1996): 451.

I selected topoi above other organizing concepts due to the dual nature of topoi as generally understood or unstated assumptions, but also as argumentative foundations that derive from and apply to specific circumstances. This, in my view, most accurately captures what is analytically interesting in digital rights discourse: while arguments made for and against particular rights differ greatly across sites, issues, and actors, the assumptions that underlie these arguments share a commonality that makes them iterable to a wide variety of audiences across time and across issues. However, this same commonality also means that the power and weight of a particular argument can be compared and observed across a variety of discursive nodes. In this sense, topoi seemed a more descriptive and theoretically nimble concept than schema, theme, or frame – one that is able to capture the broad commonality of arguments, their histories, as well as the specific instances in which they are deployed. In my research on digital rights—which spanned three years and examined discourses as varied as reddit discussions to presidential speeches—I noticed several topoi repeating throughout arguments. These topoi are, broadly: the belief that the internet cannot be regulated by governments (and its companion, the belief that the internet *should not* be regulated by governments), the elevation of civil liberties online over civil rights (often focused on a specific action that is protected, rather than protecting individuals or subject positions), the conflation of corporate and government regulation, and the belief that individualized action rooted in vernacular frames of understanding is one of the best ways to engage in online advocacy. I have focused my analysis and inquiry primarily on these topoi, however there are no doubt other unique features of digital rights discourse worth studying.

Power, discourse, and the internet

In order to understand how everyday people can be both oppressed and empowered through technology, it is essential to understand how power flows through networks. As Raymie McKerrow writes, "discourse is the tactical dimension of the operation of power in its manifold relations at all levels of society, within and between its institutions, groups, and individuals."[23] Power is enacted through discourse in its many forms—and power can be subverted through these same means. While in a pre-network age, the flows of power as they manifested through discourse may have been observable primarily to those within the immediate audience for such discourse, network technology increases the visibility of discourse, which in turn increases the visibility of power. Because power is "distributed throughout the realm of human action," and network technology renders this distribution more visible, there are in turn more opportunities for individuals to connect with one another and find ways to use their collective power to tactically intervene in the structures that govern them.[24] Thus, it is essential to understand the relationship between power, visibility, and technology, and how this relation affects the ability of individuals to organize and intervene in the power structures to which they find themselves subject.

Writing in the 1920s, John Dewey noted that "an inchoate public is capable of organization only when indirect consequences are perceived, and when it is possible to project agencies which order their occurrence."[25] Dewey here delineates perceiving from feeling—

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[23] Raymie McKerrow "Critical Rhetoric: Theory and Praxis," *Communication Monographs* 56 (1989): 98.

[24] Manuel Castells, *Communication Power* (Oxford: Oxford University Press, 2009), 15.

[25] John Dewey, *The Public and its Problems* (Henry Bolt and Company, 1927; reprint, Athens: Swallow Press, Ohio University Press, 1991), 131.

everyday people may feel the consequences of decisions made on their behalf by public officials, but they cannot know the origin of these felt consequences, nor trace them to their origins. Here, Dewey points to the importance of visibility for understanding and empowerment. Power and visibility are innately linked. Similarly, Michel Foucault defines discipline as inducing "a sense of conscious and permanent visibility that assures the automatic functioning of power."[26] Modes of visibility change and shift according to modes of power. So, for example, as power structures moved from the disciplinary society to the panoptic society that is at the center of Foucault's Discipline and Punish, visibility (as a mode of power) became decentralized. When, previously, the state exerted a top-down power, discipline was configured in terms of the spectacle. In the panoptic society, however, discipline is decentralized and thus the exercise of power is more diffuse.

Power becomes further decentralized when moved online, to the rhizomatic structure of the internet. In the words of Alexander Galloway, the internet is organized by protocol, on both social and technological levels. Protocol is "a language that regulates flows, directs netspace, codes relationships, and connects life forms."[27] Power is embedded in protocol, just as power was embedded in the panopticon—but the way that power flows changes depending on the societal conditions in which it is manifested. Manuel Castells writes of the internet as a space of flows—the "technological and organizational possibility of practicing simultaneity without contiguity."[28] As Castells writes, power is exerted relationally—it concentrates among particular

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[26] Michel Foucault, *Discipline and Punish: The Birth of the Prison* 2nd ed. (New York: Random House, 1992), 201.

[27] Alexander R. Galloway, *Protocol: How Control Exists after Decentralization* (Cambridge: The MIT Press, 2004), 74.

[28] Castells 34.

nodes in a network. Domination, on the other hand, is institutional. What this means practically in a network society is that power manifests at particular nodes in the digital network, or through the structure of the network itself—the ability to connect or disconnect, the ability or inability to reach a particular point in the network. Furthermore, social protocols are enacted online. Power imbalances such as systemic racism and misogyny translate to our digital lives, meaning that those who choose to be embodied as women or people of color in online space often open themselves up to the same harassment and discrimination that they may face offline. However, scholars like Castells and Yochai Benkler have claimed that due to network architecture, it can be more challenging for dominant interests to take hold—while moneyed interests may use "influencers" to advance their interests, capitalism cannot necessarily reach every node in a network. This is important for, as Castells notes, "resistance to power programmed in the networks also takes place through and by networks."[29] In this sense, network technology serves to enhance both institutional and vernacular, or everyday, power.

Vernacular discourse was first described by anthropologist Margaret Lantis, who found that concepts such as folkways and mores failed to capture common understandings among everyday culture and speech. Lantis described these shared understandings as vernacular culture, which blends elements from mass culture with localized ways of speaking and understanding.[30] Adapting this term to communication scholarship, Kent Ono and John Sloop define vernacular discourse as speech that resonates within localized communities. This discourse incorporates bits of dominant or institutional discourse in the form of cultural syncretism (the incorporation of dominant culture for the purpose of resistance) and pastiche (the adoption of bits and pieces of

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[29] Castells 49.

[30] Margaret Lantis, "Vernacular Culture," *American Anthropologist* 60 (1962): 202.

dominant culture in vernacular contexts). This discourse affirms communities and resists dominant culture.[31] However, Ono and Sloop note that the way this discourse is constructed can often allow bits of hegemonic discourse to "tag along" into vernacular formations—thus, the vernacular is not always liberatory. Robert Glenn Howard also asserts a similar point in theorizing a discourse that incorporates bits of both the vernacular and the institutional, oscillating between the two, a term that he calls the "dialectical vernacular."[32] All three authors argue that vernacular discourse is not just an alternative to the status quo, but an altogether third, hybrid form.

Applying this notion of hybridity in vernacular discourse to the internet, Howard also proposes the idea of a "vernacular web," in which the "dialectical vernacular" helps to account for "hybrid agencies."[33] These hybrid agencies are produced when agents invoke their alterity, constructing an opposition to institutional power while at the same time relocating that institutional discourse to a vernacular location (a blog, a message board) in order to engage in critique. Howard notes that online communication processes "mingle structural forces … with the actions of agents who themselves are enmeshed in complex and reciprocal structural relationships with both vernacular and institutional authorities."[34] Vernacular authority is achieved through participation in these complex webs of discourse. The vernacular is an

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[31] Kent A. Ono and John M. Sloop, "The Critique of Vernacular Discourse," *Communication Monographs* 62 (1995): 21-22.

[32] Robert Glenn Howard, "The Vernacular Web of Participatory Media," *Critical Studies in Media Communication* 25, no. 5 (2008): 492.

[33] Ibid., 508.

[34] Ibid., 497.

important lens through which to view discourse because it can call attention to the ways in which ideas circulate in different segments of society. Within this, it is essential to consider the way that everyday discourse always incorporates and interacts with the institutional, as this is the locus for change as issues are reframed in the public eye. Ted Striphas has explored this tension through the lens of the e-book, which entangled the everydayness of books with restrictive intellectual property law and shifting notions of the book as a commodity.[35] In the case of legal discourse, adding vernacular to the mix provides a way to understand how, while everyday reformulations of the law do not carry legislative weight, they can start to move the needle in the direction of public opinion when incorporated into institutional advocacy. In other cases, vernacular legal formations crop up where there is no law, and in these cases vernacular legal expertise can directly inform new laws.

I claim that, in this formulation, individuals can see power exerted across nodes in their network, and in turn use this network to engage in tactical resistance to the structures that govern and discipline them. This does not mean that institutions have no presence online and that domination is never exerted. In fact, this is quite far from the truth—as companies like Google and Amazon host increasingly large amounts of data, and state actors continually rely on court orders as well as cover web surveillance to gain information, domination is very much present online. However, the same system that makes corporate domination insidious also increases the power of everyday individuals. As Yochai Benkler writes, the structure of the internet (hyperlinks and interconnected networks) suggests that "the coordinate behavior of many autonomous individuals settles on an order that permits us to make sense of the tremendous flow

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[35] Ted Striphas, *The Late Age of Print: Everyday Book Culture from Consumerism to Control* (New York: Columbia University Press, 2009).

of information that results from universal practical ability to speak and create."[36] Thus, while the sheer amount of speech online may be daunting, discourse aggregates around particular nodes, and in turn tactical actions aggregate around these same nodes.

Visibility is also its own type of action. Often times, the act of engaging in discourse online—be it a conversation on Twitter, a Facebook post, or an e-mail chain among just a few individuals, can serve to document instances of domination or the unexpected exertion of power in an online space. As John B. Thompson writes, visibility online is not merely the side effect of a massive public network of discourse, but rather it can be an "explicit strategy of individuals who know very well that mediated visibility can be a weapon in the struggles they wage in their day-to-day lives."[37] This type of mediated visibility can be seen in the revenge porn victims who have gone public about their experiences in an effort to both expose the practices of online revenge porn websites as well as to reach out to other victims who are in need of support. Calling attention to phenomena that large portions of the population may be unaware of is an essential strategy in the digital activist's toolkit, and one that is frequently observed in digital rights discourse.

Of course, there are obstacles to this visibility. Eli Pariser famously asserted in his book and related TED Talk that modern netizens live in "filter bubbles" that are the result of social media filtering algorithms that serve users content related to content they've previously "liked."[38] The effects of these filter bubbles came to light during the 2016 U.S. Presidential

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[36] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006): 172.
[37] John B. Thompson, "The New Visibility," *Theory, Culture & Society* 22 no. 6 (2005): 31.

[38] Eli Pariser, *Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (New York: Penguin Books, 2012).

election, as many pundits and scholars claimed that Donald Trump's win and the vitriol against Hillary Clinton could be traced to "fake news" being shared among politically enclaved groups online.[39] Matthew Hindman writes that political speech online does not always follow egalitarian patterns due to what he terms the "Googlearchy"—the hierarchy created by the "link topology" of popular search engines like Google. This search layer both elevates particularly powerful voices and tailors itself to specific users, creating what he calls "niche dominance." This means that individual users may not be encountering the diversity of voices that one might expect from a seemingly flat network.[40]

Despite these challenges posed by ranking and filtering algorithms, social media can often lead to disempowered voices reaching a larger audience, and this visibility can have a tremendous impact on a movement. In many of my case studies, one outspoken activist has been transformed into a figurehead for a movement largely due to their online discourse. Take for example the reddit user who suggested, during the SOPA/PIPA protests, that users move their domain registration from GoDaddy to other hosting companies who did not support the bill.[41] In this case, one individual calling attention both to a mode of domination and a mode of resistance spurred a massive protest action that led to many individuals changing their domain registrar, as well as companies like NameCheap running specials for those switching over from GoDaddy.

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[39] Craig Silverman, "This Analysis Shows How Fake Viral Election News Outperformed Real News on Facebook," *Buzzfeed*, Nov 16 2016. https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook.

[40] Matthew Hindman, *The Myth of Digital Democracy* (Princeton: Princeton University Press, 2008): 179.

[41] Erik Kain, "Reddit Makes Headlines Boycotting GoDaddy Over Online Censorship Bills," *Forbes*, Dec 26 2011, http://www.forbes.com/sites/erikkain/2011/12/26/reddit-makes-headlines-boycotting-godaddy-over-online-censorship-bills.

The link between visibility and credibility in protest movements has been studied by Papacharissi and de Fatima Oliveira. Examining Twitter during the protests in Egypt during the "Arab Spring," the authors found that as Tweets gained visibility, users gained credibility within the movement.[42] In this sense, visibility contributed to the perception of a user's expertise. Expertise is a highly-valued quality within protest movements and advocacy groups. In digital rights arguments, especially, speakers with a knowledge of the law are highly-valued, as they can help to translate sometimes arcane or obscure legal codes into language that is easily understandable to the layperson. In many instances, this expertise is acquired not through official legal training, but through personal experience and self-directed research—what I call vernacular legal expertise.

Vernacular legal expertise

I define vernacular legal expertise as legal knowledge acquired in the absence of official credentials that allows citizens to make arguments pertaining to their digital rights. Typically, this occurs through online means. This expertise has the potential to unsettle the high barriers to entry of the U.S. legal system, as everyday individuals gain fluency with the law and engage in online legal activism. The discourses created through this type of civic engagement are a complex blend of legal expertise, grassroots irreverence, and the discourse of protest and social movement. In its ideal form, this vernacular legal expertise can also inform law and governance, as everyday frameworks can filter up into legal code when they are taken up in the appropriate channels. For example, in the case of revenge porn laws, vernacular legal expertise is evident

[42] Zizi Papacharissi and Maria de Fatima Oliveira, "Affective News and Networked Publics: The Rhythms of News Storytelling on #Egypt," *Journal of Communication* 62 (2012).

both in the communities formed by survivors, as well as the legal advocacy undertaken by coalitions between survivors and legal experts, which transmutes victims' narratives and vernacular discourse into concrete suggestions for legal change. In processes like the DMCA rulemaking, vernacular legal expertise joins with official legal arguments in the rounds of public comments, increasing the chance that an everyday reformulation of intellectual property law may in time be reflected in legal code.

While law may seem to be an unambiguous dictate, rhetorical scholars like James Boyd White have argued that law is, in fact, a branch of rhetoric, because law constructs a vision of a society.[43] Boyd writes, "the law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends."[44] Boyd here presents an expansive consideration of law's rhetorical capacities, though he confines his assertion to the text of the law itself. Yet, given the importance of precedent, especially in cases pertaining to the internet, I believe it is important to consider jurisprudence as a whole in light of the constitutive capacities that Boyd describes, due to the importance of non-lawmaking legal texts (such as judicial opinions) in inflecting future interpretations and judgments. In recent history, law has been the province of experts and often emanates from a privileged sect of society. Thus, many laws reflect and preserve the experience of society's most privileged members. However, some have argued for the agency of everyday people (i.e. those people outside the legal field) in shaping legal meaning. Robert Cover, for instance, put forth an expansive definition of jurisgenesis—the construction of new legal meanings that, at times, diverges from dominant

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[43] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *University of Chicago Law Review* 52, no. 3 (1985): 684.

[44] Ibid., 692.

legal interpretations.[45] Cover called upon his audience to recognize that law is situated within narratives, and more broadly within discourse.[46] In this sense, our lived legal world is bound together primarily by a shared set of interpretive commitments, which invites the possibility that law can be shifted as narratives shift.

Supplying a critical framework for studying the ways in which everyday people affect jurisprudence, Marouf Hasian calls for scholars studying the law to take a critical rhetorical turn that involves "taking seriously the possibility that the person on welfare, or the individual who daily confronts racism, has as much to say to us about jurisprudence as the greatest jurist."[47] This requires us to assume, as White suggests, that law is constitutive and that empowered elites benefit from denying that this is the case. Hasian calls on researchers to "simultaneously interrogate the taken-for-granteds of dominant rhetorics while trying to provide a 'vernacular' voice for those alternative views that circulate in the legal and public spheres." This involves granting legitimacy to vernacular conceptions of law—the interpretations and misinterpretations that circulate amongst citizens who are outside of the empowered legal sphere.[48] A fundamental assertion that we must accept when we take the legal discourse of everyday people to have some conceptual validity is that arguments emanating from vernacular communities and uncredentialed, self-taught experts may not have the same well-reasoned character as arguments

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[45] Robert Cover, "Nomos and Narrative" in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), 95.

[46] Ibid 5.

[47] Marouf Hasian Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder: Westview Press, 2000), 3.

[48] Ibid 4-5.

made by lawyers, by NGOs, or in courtrooms or statehouses. Rather, as Ewick and Silbey write, "to discover the law outside of formal legal settings, we must tolerate a kind of conceptual murkiness."[49] Rather than, for instance, understanding a concept such as private property as something instantiated solely in doctrine, we must turn our attention to property "as it is claimed, used, protected and fought over in the social spaces outside of official agencies of law."[50] While these discursive reconfigurations of legal code may not have validity in the eyes of the state, I claim that vernacular legal expertise can, in fact, affect law in the long term, as everyday people discover venues to translate their legal knowledge into forms that the dominant legislative regime finds acceptable. As precedent shapes jurisprudence, vernacular conceptions shape the law in public life.

While common law has a rich history reaching back centuries, the type of vernacular legal expertise I describe is enabled by network technology. Vernacular legal expertise is one alternative view that grants everyday individuals agency in collaboratively re-imagining and reshaping the law. As scholars like Patricia Aufderheide and Peter Jaszi have argued, the law is often unnecessarily opaque and alienating to everyday people. While Aufderheide and Jaszi focus specifically on intellectual property law, they found in their research that ignorance of the law prevented people from exercising the full breadth of their rights.[51] In these cases, all that was needed was more information—something that the internet offers in abundance. Gabriella Coleman has taken up Cover's notion of jurisgenesis in relation to free and open source (F/OSS)

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[49] Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: The University of Chicago, 1998), 20.
[50] Ibid., 21.

[51] Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011), 115.

software developers, who she says have reconfigured the meaning of free speech as it relates to intellectual property. Calling this "legal tinkering," Coleman claims that the F/OSS community rearticulated computer code as free speech during the early 2000s. Activists and lawyers who participated in the F/OSS community observed these vernacular reformations and took up the code-as-speech framework in intellectual property advocacy, leading to important legal judgments that established software as speech. Thus, the programmers' legal tinkering had a material effect on legal code.[52] In this piece, Coleman urges her readers to pay attention to the "alternative social forms" that these hackers demonstrate through their legal tinkering, and the vision of democratic citizenship they communicate.[53] This legal tinkering derived from a particular sort of expertise that arises in internet communities. Coleman notes that software engineers and lawyers both deal in "logical, internally consistent textual practices" that makes it relatively easy for technologists to gain legal fluency.[54] Christopher Kelty, also writing about the F/OSS community, grants them the title of "recursive public." Kelty defines these publics as "vitally concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means of its own existence as a public." These groups are independent from dominant powers and are concerned with producing alternatives to dominant systems of power.[55] In this sense, a recursive public shares marked similarities with vernacular culture, in that they are set apart from dominant institutional powers and seize the available

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[52] Gabriella Coleman, "CODE IS SPEECH: Legal Tinkering. Expertise, and Protest among Free and Open Source Software Developers," *Cultural Anthropology* 24, no. 3 (2009): 448.

[53] Ibid., 449.

[54] Ibid., 426.

[55] Christopher Kelty, *Two Bits* (Durham: Duke University Press, 2008), 3.

modes of resistance in order to speak to power. This contributes to governance—which I will discuss in more detail in the following section—or the "filtering up" and amplification of everyday actions and norms into the official governmental sphere.

Expertise is also an essential aspect of how groups interact and shape the boundaries of the collective. Recursive publics "respond to governance by directly engaging in, maintaining, and often modifying the infrastructure they seek, as a public, to inhabit and extend—and not only by offering opinions or protesting decisions, as conventional publics do (in most theories of the public sphere)."[56] This ability of the recursive public to act to modify the conditions in which they live applies, I argue, not solely to F/OSS developers but also to many groups with less technological experience but with other kinds of self-taught expertise. The type of obsessive research engendered by the internet as well as the autodidactic tendencies of many internet users leads to a similar level of expertise as the one Coleman describes in the F/OSS community. As Johanna Hartelius writes, to be an expert is to "rhetorically gain sanctioned rights to a specific topic or mode of knowledge."[57] While generally expertise is conferred by a particular credential or course of training, Hartelius notes that there are also experts who locate their expertise in everyday experience—for instance, people with depression, or trauma survivors.[58] Revenge porn victims, the subject of my third case study, are, unfortunately, experts in managing the effects of online harassment. Given the paucity of official legal remedies, developing and sharing this experiential expertise has become essential to revenge porn victims. There is no one reliable legal course of action, and so a fluency with the patchwork of methods available to remove

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[56] Ibid., 9-10

[57] E. Johanna Hartelius, *The Rhetoric of Expertise* (New York: Rowman and Littlefield, 2010): 1.

[58] Ibid., 103.

photos helps victims minimize harms as quickly as possible. Furthermore, in coalition with credentialed experts such as lawyers, vernacular experts can leverage their stories and experiences to have an effect on the law. As previously mentioned, network technology serves to make the structures of governance and the flows of power more visible to the average citizen. Thus, when combined with the ability of these same citizens to educate themselves on their rights and articulate requests for legal change, citizens have a powerful ability to intervene, both strategically and tactically, in structures of governance both online and offline in order to further their digital rights.

Digital rights and governance

Given the vast diversity between internet platforms, as well as the many competing priorities of users, it should be no surprise that the definitions of digital rights vary greatly depending on who is defining them. For instance, the organization Ranking Digital Rights defines them as "human rights that extend into the digital realm."[59] In its assessment of which organizations preserve digital rights, however, Ranking Digital Rights focuses primarily on privacy and freedom of expression. Other digital rights groups like the Electronic Frontier Foundation also have a strong focus on privacy and freedom of expression, though they also rope in related issues, such as fair use and intellectual property. This is another common formulation of digital rights—the rights to ownership of digital information. Hector Postigo focused on this formulation in his book *The Digital Rights Movement*, which is largely about organizations and grassroots actors seeking intellectual property reform. This movement combined prominent legal

[59] "Frequently Asked Questions," *Ranking Digital Rights*, https://rankingdigitalrights.org/who/frequently-asked-questions.

scholars like Lessig with digital artists and hackers in an effort to reform copyright law.[60] Similar to this, Sky Croeser has written of a group that she calls the digital liberties movement, an "emerging social movement that draws together activism around online censorship and surveillance, free/libre and open source software, and intellectual property."[61] The digital liberties movement includes NGOs like the Electronic Frontier Foundation, Fight the Future, and the American Civil Liberties Union, as well as the broader campaigns like the movement against SOPA/PIPA, which I discussed in the introduction.

With this definitional variation in mind, I consider digital rights to be the set of rights and liberties that best protect laypeople and ensure their participation in the online public sphere—privacy, freedom of expression, and the ownership of data and cultural artifacts. Importantly, I claim that digital rights should not be focused solely on freedom of expression and the right to anonymity. Rather, a fully inclusive set of digital rights includes the ability of all people, regardless of race, gender, or sexuality, to have equal voice online, which includes freedom from harassment and discrimination. In some instances, this may mean striking a balance between freedom of expression and privacy. Digital rights are important because they ensure the ability of citizens to interrogate power and to control the flow of their information online—flows that would not be visible to citizens were it not for network technology and the increased transparency and connection it enables. Thus, by preserving digital rights we better enable citizens to use the affordances of network technology to liberatory ends.

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[60] Hector Postigo, *The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright* (Cambridge: The MIT Press, 2012).
[61] Sky Croeser, "Contested technologies: The emergence of the digital liberties movement," *First Monday*, 17 no. 8 (25 July 2012).

Essentially linked with digital rights is the concept of governance—both the governance of "real space" by nation-states, as well as the governance of the internet by broader, more globalized collectives. Brown and Marsden differentiate the term regulation—an official delineation of rules and practices, from governance, a broader term that "encompasses the institutional politics surrounding such regulation, including regimes with no enforcement powers at all, not even by norms, which therefore fall outside legal analysis."[62] Governance, often, is a multistakeholder process, bringing together government and civil society actors in order to establish best practices. Thus, the idea of internet governance commonly relates to large multistakeholder bodies such as ICANN, or the UN Council on Human Rights Online. However, the ways in which these groups operate are so different that there is no one "multistakeholder method." Rather, governance online is often a fairly ad-hoc process, encompassing not just law but also informal regulation and corporate policy. For instance, when it comes to harassment, many policies never rise to the level of law, instead being written into corporate policies. Similarly, fair use, a provision of the DMCA, is not a law, but rather a set of informal guidelines by which users and rights holders can assess whether a particular use of copyrighted material is a violation or not. Given the heavy involvement of non-government actors in issues of digital rights, it is essential to consider governance online. Furthermore, I wish to open up governance to encompass an even broader set of issues than those that Brown and Marsden allow for. With this in mind, I define governance as the process of formal and informal decision making that has constitutive effect on online spaces.

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[62] Ian Brown and Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge: The MIT Press, 2013), 13.

Sandra Braman writes that information policy is the "proprioceptive organ" of the state, measuring many things, among them the cultural sense of agency within a particular regulatory regime. The way that information is handled and conceptualized reveals a society's conception of agency, as well as how far actual agency extends. Take, for instance, the difference between Iran's intranet and the relatively open informational borders of the United States. Furthermore, Braman notes that studying the changes in law is best undertaken not just by looking to the letter of the law itself, but to all of the norms, habits, and informal regulation within the "information policy field." These three areas are government (the formal legal institution), governance ("decision-making with constitutive [structural] effect whether it takes place within the public or private sectors, and formally or informally"), and governmentality ("cultural predispositions and practices that produce and reproduce the conditions that make particular forms of governance and government possible").[63] With a focus on studying information policy across these three vectors, Braman notes that "it is possible to see a specific law developing out of cultural practice, becoming a form of discourse, and ultimately being translated into a technology."[64] My study of digital rights law and its links with discourse and technology follow a similar method to Braman's, and as such it is essential to consider the role of governance and governmentality in shaping digital rights issues, which are often not seamlessly delineated in formal legal codes. The feedback loop between law, discourse, and technology establishes a stronger link between governmentality and governance (the "filtering up" of everyday discourse into law), rather than

[63] Sandra Braman, *Change of State: Information, Policy, and Power* (Cambridge: The MIT Press, 2009), 3.

[64] Ibid.

putting governance solely in the hands of the empowered, be they NGOs or governmental institutions.

In an age where the internet is so intimately involved with the lives of everyday individuals, from employment, to government, to culture, there are an increasing number of groups dedicated to internet governance, each of which employs a different model. Beyond this, there are an increasing number of digitally-inflected models for traditional democracy. Among this first group are internet governance bodies like ICANN and the World Wide Web Consortium (or W3C), but also special subsets of larger bodies, like the United Nations' Information Communication Technology (ICT) Task Force, which operated from 2001 to 2004 and helped to organize the two World Summit on the Information Society (WSIS) conferences. The latter group, on the other hand, includes things like the online public comments used in the DMCA rulemaking process and during the FCC's hearings on net neutrality. Importantly, each of these processes is designed with the goal of giving more people a voice. The vast majority of internet governance groups hold fast to multistakeholder models that employ the expertise of individuals and groups with a variety of viewpoints, power positions, and geographical locations.[65] In the case of digitally-inflected traditional governance processes, like online public comments or the White House's petition platform, increased numbers of people are given a voice and a public platform compared to previous models which, while they invited individualized participation, did not include the high degree of visibility present in online actions.

Network technology, as a whole, allows for more dialogue between those in power and those with less power. However, it is hard to say what action derives from these exchanges. As

[65] Brown and Marsden 3.

Weber writes, "the Internet offers valuable opportunities for transparent communication and for the achievement of open access to discussion topics, thereby enhancing information exchange and dialogue between the governance-related institutions and the interested parties concerned."[66] Yet, Weber claims that more transparency—including open access to information and negotiations—is required, as this would likely mobilize more actors and "increase the level of democratic legitimation."[67] While this is sometimes an informal process, there are also many occasions where this networked governance is more formalized. John Dryzek, for instance, writes that governance networks have joined markets and hierarchies as "a recognized mode of interaction in the delivery of public outcomes."[68] These governance networks, according to Sørensen and Torfing, are horizontal groups of autonomous actors who negotiate within a stable framework, self-regulate "within limits set by external agencies," and contribute to the production of public purpose.[69] These networks can exist beyond the grasp of the state, or can integrate state agencies and actors. Dryzek notes that often in these networks there is a risk of one discourse becoming dominant, and proposes that as governance networks feature a greater variety of rhetors (and thus a greater discursive spread), rhetoric becomes all the more necessary.[70] Similar to Pfister's point about bloggers writing online generating copia, networked

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[66] Rolf H. Weber, "The Enhancement of Transparency in Internet Governance" *SSRN*, (presentation, GigaNet: Global Internet Governance Academic Network Annual Symposium, 2007): 342.
[67] Ibid.

[68] John S. Dryzek, *Foundations and Frontiers of Deliberative Governance* (Oxford: Oxford University Press, 2010; reprint Oxford: Oxford University Press, 2013), 121.

[69] Eva Sørensen and Jacob Torfing, "The Democratic Anchorage of Governance Networks," *Scandinavian Political Studies* 28, no. 3 (2007): 197.

[70] Dryzek 133.

governance bodies can allow heterogeneous discourses to come together and, in so doing, to carve new deliberative pathways.

Another essential figure in the internet governance landscape are the large companies who increasingly provide the platforms that everyday people use to speak up online. The decisions that these companies—primarily social media websites and search engines—make is known as "privatized governance," or the control of information flow by private actors online. As DeNardis and Hackl write, because private intermediaries like Facebook make "day-to-day decisions about what content is allowed on their platform and the conditions under which this content should be removed," they perform a governance function on their platform.[71] Laura DeNardis writes that internet governance has been increasingly delegated to private entities—private content-hosting entities as well as financial institutions—rather than governments. However, privatized governance is different from offline privatization, such as the hiring of private contractors to work for the government, because often times law enforcement expects private intermediaries to perform governing functions for free, or as a show of legal compliance.[72] In this way, private governance is often intermeshed with government oversight. So, beyond the problems posed by solely private governance, there is also a pressing concern about how much reach governments have over digital platforms and technology. This came to a head recently in the Apple vs. FBI case, in which the FBI attempted to compel Apple to break the encryption on an iPhone used by a shooter in San Bernardino, California. Apple declined on

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[71] Laura DeNardis and Andrea M. Hackl, "Internet governance *by* social media platforms," *Telecommunications Policy* 39 (2015): 766.

[72] Laura DeNardis, *The Global War for Internet Governance* (New Haven: Yale University Press, 2014): 14.

the basis that, once such a backdoor existed, there was no guarantee that it wouldn't either fall into the wrong hands or be used by the government on other phones.[73] Siva Vaidhyanathan has also written extensively about Google's role in governance, claiming that because of its global dominance, Google exerts a governing effect even outside of its platforms, setting norms for other technology companies.[74]

The feedback loop between law, discourse, and technology

In order to understand how arguments for digital rights function, it is helpful to think of a feedback loop between law, technology, and discourse. As Sandra Braman noted, taking a broader view of information policy can allow us to see how an idea that originates in an everyday or informal discursive space can slowly work its way through increasingly formalized arenas of governance. I claim that the same principle can be applied to rights arguments more broadly, and that when looking specifically to digital rights it is essential to turn our attention to how discourse not only affects law, but the role that technology has in both shaping discourse as well as shaping legal code. As discussed earlier in this chapter, online discourse can represent pre-existing power structures, but it also provides opportunities for disempowered individuals and groups to get the attention of the empowered. This is the direct result, in many cases, of technology and network architecture. As Lawrence Lessig writes, code is just as capable of ordering behavior as the law.[75] Much in the same way that law regulates human behavior, code shapes what we can and cannot do, as well as what we can and cannot see.

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[73] Arjun Kharpal, "Apple vs. FBI: All you need to know," *CNBC*, March 29 2016, http://www.cnbc.com/2016/03/29/apple-vs-fbi-all-you-need-to-know.html.

[74] Siva Vaidhyanathan, *The Googlization of Everything (and why we should worry)*, (Berkeley: University of California Press, 2011), 50.

[75] Lawrence Lessig, *Code version 2.0* (New York: Perseus Books, 2006).

Political issues play out both on infrastructural and informational levels of networked platforms. For instance, a Chinese citizen cannot access Facebook due to the country's firewall. Similarly, members of a private Facebook group for grieving parents feel comfortable sharing their most candid feelings because they know that the chances of their posts reaching beyond their intended audience are slim. In these cases, technology sets limits—desired and not—to the behaviors that users can undertake. However, it also has unintended consequences. For instance, the group for grieving parents, while private to its members, nonetheless is part of Facebook's platform, and because of this user information is shared with Facebook to help them target ads, improve platform services, and better understand their user base.[76] While this may not be troubling to some, in recent years increasing attention towards Facebook's privacy policies has led many users to change their behavior.[77] As DeLeuze notes, as society transitions to a data-focused control society, in which power is more distributed, technologically-enabled surveillance (which happens continuously on a small scale, as opposed to the centralized surveillance of the panopticon) is virtually endless and serves to order user behavior.[78] Taking this further, Galloway draws a parallel between computer protocols (commands that order processes and determine what is allowable) and the protocols at work in everyday society—social protocols among groups, as well as disciplinary protocols present in surveillance societies. Social

[76] Ylva Hård af Segerstad, Mathias Klang, "The Depths of Shallow Networks," *Selected Papers of Internet Research* (2013).

[77] Ben F. Choi and Lesley Land, "The effects of general privacy concerns and transactional privacy concerns on Facebook apps usage," *Information & Management* 57 no. 5 (2016).

[78] Gilles DeLeuze, "Postscript on the Societies of Control," *October* 59 (1992).

protocols affect offline behavior, computer protocols affect online behavior.[79] In short, technology affects both law and discourse, and is in turn shaped by these same forces.

Just as technology affects law and discourse, discourse is also essential to governance—both the discourse of the empowered elites in government, as well as that of everyday people. In this sense, an investigation of topoi is especially fruitful. Because, as McKerrow writes, discourse enacts power, and because power informs the oblique forms of governmentality that are at work within and between many vernacular communities, an investigation of topoi helps us to understand governmentality and governmental norms in particular communities. For instance, if a group argues for their rights from the assumption that any attempt to limit online discourse is most likely censorship, this group will argue much differently and will see threats in different places than a group who argues from the basis that online discourse should uphold civic values. While the latter group may see vicious disagreements as a threat to their norms, the former group may see those engaging in these disagreements as worthy of protecting and fighting for. Through exposing governmental norms in vernacular discourse, we can then assess how these both inform and are informed by law and technology. For instance, a group that decries any attempt to limit speech online as censorship is likely to valorize technology for its democratic capabilities, and to fight for law that preserves this openness in technology and within the public sphere. We can see this in Vaidhyanathan's study of Google's "techno-fundamentalism," or Google's belief that technology can solve most problems. Google both implements private policies and weighs in on public policies that preserve the openness of technology and uphold their corporate commitments.[80]

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[79] Alexander R. Galloway, *Protocol: How Control Exists after Decentralization* (Cambridge, MA: The MIT Press, 2004).
[80] Vaidhyanathan 40.

In this sense, we see discourse (Google's blog posts, their policy recommendations, and so on) interacting with technology (the way that Google shapes their own technologies as well as the influence they exert on the larger technological sphere), which in turn has the potential to affect law. The techno-fundamentalist frame carries through all of these instances. Examining the arguments emanating from particular groups alongside how these groups are both constrained and enabled by technology (including how they position themselves relative to technology) can help illuminate the relationship between discourse, power, and technology. When these arguments pertain to legal advocacy, the ways that groups construct the relationship between law and technology have the potential to recursively inflect law.

The functioning of the feedback loop between law, discourse, and technology is far from pre-ordained. Rather, an alteration in any one area has the potential to drastically change the outcome of a particular situation. As many internet scholars have noted, the internet is not necessarily a liberatory technology—for instance, Hindman's "Googlearchy" theory upholds the notion that discourses emanating from the powerful sects of society will continue to dominate online despite the ease of one-to-many connectivity that would in theory support the idea that diverse opinions would filter through online.[81] Furthermore, the mechanisms of government move slowly—as we see in the case of Aaron Swartz, who was prosecuted under outdated legislation that predated the technologies he used.

Writing in the 1920s, John Dewey addressed this problem—"Political and legal forms have only piecemeal and haltingly, with great lag, accommodated themselves to the industrial transformation."[82] This is, in part, due to the fact that the public is so far removed from the

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[81] Hindman 179.

[82] Dewey 114.

mechanisms of government that it cannot make adequate use of the "organs through which it is supposed to mediate political action and polity."[83] The solution to this, in Dewey's estimation, is "the improvement of the methods and conditions of debate, discussion, and persuasion."[84] While this is certainly easier said than done, what is important to note here is that Dewey is highlighting the importance of civic discourse both for the rehabilitation of a fragmented public as well as the communication of relevant concerns to those in power. Thus, relocating power within the public who then, informed by experts, make their needs known to a receptive government, is the ideal form that progress might take. At present, it is plain to see that this has not come to pass. However, the unprecedented communication enabled by the internet, as well as the fast clip of technological innovation, has the potential to aid the public in recognizing themselves and being able to amplify their concerns to the level of the law.

If the public is still struggling to recognize themselves in a world where the conditions for public debate are lacking, then what options are there for citizens to empower themselves? Michel de Certeau divides practices into strategies and tactics. Strategies are those actions that assume a "proper" place, made possible when a powerful subject can be isolated from an "environment." The strategic model, de Certeau writes, is responsible for the construction of political, economic, and scientific rationality—those disciplines that presuppose an individual subject wholly responsible for their own actions and successes.[85] In contrast to strategies, de Certeau presents tactics, which cannot count on such a "proper" designation. Tactics are

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[83] Ibid., 121.

[84] Ibid., 208.

[85] De Certeau xix.

available to those without power, in opportune moments. Much like Lloyd Bitzer noted that a rhetor must seize the opportunity to address an exigence, an "imperfection marked by urgency," an individual employing the tactical model must watch for and seize opportunities.[86] While the chips may seem to be stacked against everyday people engaging in digital rights advocacy, I claim that tactical interventions into legal discourse are made newly possible by network technology. These tactical interventions are brought about by the visibility of power, the ability to access information and develop vernacular legal expertise, as well as a more permeable membrane between everyday individuals with low power and more empowered individuals and groups. This latter process in particular has the potential to sustain intervention beyond the momentary flash that de Certeau claims characterizes the tactical model. However, their permanence does not necessarily elevate them to the level of a "proper" strategy, for these legal interventions are always situated within their technological environment. This process both employs the feedback loop between law, discourse, and technology, and affects it on a fundamental level.

There is a precedent in the literature for organizations and groups that work tactically to change—through technology, discourse, and law—the structures that govern them. The most commonly studied group who have seized creative means to make their concerns known and to seek legal change are free and open source software (F/OSS) developers. As Ekstrand, Famiglietti, and Berg argue, this group has carried many of the goals of the critical legal studies movement (a movement among legal scholars that was born and dissipated during the 1980s) in

[86] Bitzer 6.

their actions.[87] The most famous case of legal activism within the F/OSS community is the DeCSS protests during the late 1990s and early 2000s. CSS was a form of encryption on DVDs that made it so that users on the open-source Linux system could not play the discs on their computers. DeCSS "broke" the technological protection measures of DeCSS, allowing Linux users access to content that they previously were incapable of using. One of the creators of DeCSS, Jon Lech Johansen, was arrested in his home in Norway and charged with violating a Norwegian criminal statute. As a result of this, many F/OSS programmers and Linux users launched protests against Johansen's prosecution as well as the Music Picture Association of America (MPAA) and DVD Copy Control Association's pursuit of those who distributed and used the DeCSS program. These protests took many creative forms, with one user writing the DeCSS code as a series of 456 haikus, and another printing the full text of the code on a t-shirt.[88] In their article "Who Posts DeCSS and Why?" Eschenfelder, Desai, and Howard examined DeCSS sharing practices. Their study found that users did not generally present DeCSS as a piracy or cracking tool (as a way to get free content or somehow transgress the law). Rather, a large number (up to 39%) of users who posted DeCSS were strongly affiliated with the F/OSS community, and were likely posting the code as a show of support for F/OSS and potentially as an act of protest.[89] However, the authors found that these acts of protest rarely included what rhetoric scholars would consider coherent arguments. Indeed, one of the authors' major findings

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[87] Victoria Smith Ekstrand, Andrew Famiglietti, and Suzanne V. L. Berg, "Birthing 'CLA': Critical Legal Activism, the IP Wars and Forking the Law," *Cardozo Arts and Entertainment* 31 (2013).

[88] Coleman 441.

[89] Kristin R. Eschenfelder, Robert Glenn Howard, and Anuj C. Desai, "Who Posts DeCSS and Why?: A Content Analysis of Web Sites Posting DVD Circumvention Software," *Journal of the American Society for Information Science and Technology* 56, no. 13 (2005): 1406.

is that the scholarly definition of an argument was perhaps too narrow to capture the myriad acts of resistance represented in the sharing of DeCSS.[90] In sharing DeCSS on their personal sites, members of the F/OSS community engaged in tactical resistance, seizing upon an opportune moment and using the technological measures available to them to register their protest against restrictive copyright law. In this way, we can see the way that the feedback loop between law, discourse, and technology functions in practice.

What we see in the F/OSS community, and what I claim can be seen in many of the digital rights advocacy efforts I will discuss, is a concern for a set of rights that is shaped innately by a group's concept of itself—what its values are, what it stands for, and its worldview. While these groups may not always be as organized as many social movement scholars would like, they are united by the assumptions in which they ground arguments—the topoi that they use. Within these arguments are contained governmental and behavioral norms that, when a group is tactical in their protest and nimble in their discourse—developing and exhibiting vernacular legal expertise, finding ways to amplify their voice to those empowered elites who may still be off-limits to them—can filter upwards through discursive and legislative gatekeepers and have a material effect on the way that groups live their lives.

Frictions in the discourse of digital rights

While many within internet studies may see rhetoric as a narrow lens through which to study online phenomena, I claim that looking at the persuasive aspects of digital rights discourse reveals several important features of how digital right are shaped in discourse, technology, and law. First, through looking at the topoi deployed by a variety of groups arguing across a variety

[90] Ibid., 1413

of issues, it is possible to see where everyday people are making tactical discursive intervention into the legal structures that govern them—interventions that can lead to laws being changed in a way that is more fair to vernacular communities. Furthermore, these same topoi can be tracked across various power positions, highlighting how particular arguments when deployed on a vernacular level are quite different when deployed at a corporate or legislative level. Beyond further unfolding arguments, looking at digital rights advocacy (which may or may not take the form of text-based, thoroughly-reasoned arguments) also reveals where the points of tension crop up as discourses meet each other. These points of tension can reveal areas that have not been previously addressed in digital rights law, as well as areas that require further investigation and attention if groups are to reach consensus on a particular issue. While network technology is liberatory in the sense that it allows massive public discussion as well as new forms of internet-based advocacy that can intervene in governance in tactical ways, the dark side of this is that as certain topoi dominate online advocacy, these same topoi can sometimes be turned against those trying to push the conversation in new directions.

Beyond examining the arguments used by those advocating for digital rights, this project also uses the rhetorical lens to illustrate how everyday publics have become more empowered through their use of network technology. While many studies have posited the creation of a "new public sphere" online, I claim instead that network technology has enabled everyday people—from within their pre-existing publics and communities—to develop new expertise that better enables them to advocate for their own best interest. An essential feature of digital rights communities online is that, while they are not necessarily always technically sophisticated, members of these communities have a strong sense of their rights and of the ideal form that their community will take. Through vernacular legal expertise as well as the increased connectivity

between individuals in low power positions and individuals and groups with more clout, these everyday people can use their expertise to amplify their concerns about digital rights in a manner that can lead to legal change. Thus, the case studies that follow illustrate the many ways in which arguments for digital rights can advance progress, but also the ways in which the interactions between law, the deployment of technology, and the topoi in these arguments can silence smaller voices. In so doing, I advance a framework that is applicable to human rights discourse and legal advocacy more broadly.

Chapter 2

Net Neutrality: From Technologists to Television

In the fall of 2014, I was the teaching assistant for Introduction to Digital Communication, a course that drew a wide variety of undergraduates together in pursuit of an undergraduate minor in Digital Studies. The goal of the course was to provide students with a historical and critical perspective on online communication, covering topics from the birth of the internet to the role of the internet in influencing culture and politics. As so-called "digital natives" who have grown up online, the students were passionate about the topics covered and generally engaged in class.[91] However, their interests tended to cluster around particularly relevant topics to their everyday lives—the effects of social media on interpersonal relationships, dating apps, and sexism and racism online were issues that inspired particularly robust discussion. For their final assignment, students were tasked with creating a persuasive video blog about a topic in digital communication. While anyone who has ever taught a large lecture course knows that grading over a hundred assignments is an exercise in repetition, when I sat down to grade my students' video blogs I was surprised to find that approximately half of them had chosen the same topic. Most interestingly, they had not chosen the "hot button" issues that had so captured their interest and sparked their conversations throughout the semester. Instead, my students had chosen to take a stand on a fairly obscure regulatory issue—net neutrality.

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[91] Marc Prensky, "Digital Natives and Digital Immigrants," *On the Horizon* 9 no. 5 (2001).

The fall of 2014, in retrospect, was a significant turning point for net neutrality, defined as the principle that internet service providers should treat all web traffic equally without imposing cost or speed penalties. The FCC's 2010 Open Internet Order, which outlined a set of principles encouraging broadband internet providers to adopt transparent and neutral network management practices, had been publicly challenged by Verizon, who wished to charge more for certain types of traffic over their network.[92] In response, communities of technologists, economists, and civil liberties activists took to public channels to decry the creation of internet "fast lanes," launching the latest and most broad-sweeping debate about net neutrality. This debate came to encompass an FCC public comment period that attracted a reported 3.7 million comments, an "internet slowdown day" similar to the SOPA/PIPA internet blackouts in 2012, a lengthy segment on John Oliver's humorous news show *This Week Tonight*, as well as a video statement by President Barack Obama. Net neutrality received significant media coverage relative to other digital rights issues, and spurred massive public debate both in the mainstream media as well as on internet forums such as reddit. The net neutrality debate of 2014 and 2015 culminated with the FCC's declaration that ISPs would be treated as common carriers under Title II of the Telecommunications Act, which prohibits ISPs from charging different rates for different types of web traffic or from creating so-called "fast lanes" whereby particular websites can pay to have their content delivered more quickly.

G. Thomas Goodnight writes that "public policy argument may be understood as a productive, situated communication process where advocates engage in justifying and

[92] Federal Communications Commission, "In the Matter of Preserving the Open Internet," Report and Order (Washington DC: GPO, December 23 2010).

legitimating public interests."[93] In the case of net neutrality, this discourse was a productive mix of both expert and lay opinions, with significant input from NGOs and other advocacy organizations who simultaneously set the agenda for the public and amplified perspectives from the public sphere in public debates and hearings. The result was a new Open Internet Order, released in 2015, that made network neutrality the official policy of the FCC and reclassified internet service providers as Title II carriers. Sky Croeser wrote in 2014 that the net neutrality debate may be the most important issue in determining the future of the internet and that an analysis of the net neutrality struggle has the potential to reveal common threads that unite what she terms the digital liberties movement.[94] A look at the net neutrality discourse reveals that net neutrality as a policy issue was spearheaded by technologists and gained traction in the public sphere over time, largely due to work on the part of digital rights NGOs and high-profile technology activists. Thus, the debate about net neutrality has several movements that occur over a fairly long period of time, and calls up several discursive themes and topoi from the birth of the internet—namely a faith in the internet's natural resistance to regulation and the belief that all speech should be treated equally online coupled with a pervasive cynicism as to the government's willingness to listen to its citizens, as well as a tension between the government and privatized governance entities. Most importantly, the evolution of the debate over net neutrality laid bare for many individuals the feedback loop between law, technology, and discourse.

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[93] G. Thomas Goodnight, "The Metapolitics of the 2002 Iraq War Debate: Public Policy and the Network Imaginary," *Rhetoric and Public Affairs* 13, no. 1 (2010): 66.

[94] Sky Croeser, "Contested technologies: The emergence of the digital liberties movement," *First Monday* 17 no. 8 (2012).

In what follows, I will first present a history of net neutrality and its evolution over time, from a technical principle in the early 2000s to a digital rights principle by the time of the FCC's 2014 decision. Following that, I will introduce the feedback loop between law, technology, and discourse that manifests throughout the net neutrality debate, as well as the importance of examining the topoi, or underlying assumptions, present in arguments for and against net neutrality. I will then proceed through the parts of the feedback loop, calling attention to net neutrality's legal history as well as the FCC, the entanglement of this regulation with privatized governance (on the part of both ISPs and web platform providers), and finally the discourse present in the 1.1 million net neutrality comments released online. These comments show not only a public who is newly aware of the interactions between regulatory bodies like the FCC and web providers, but also arguments that are rooted in the advocacy of NGOs and the arguments of politicians. I conclude with a discussion of the FCC's public comment period as a point of contact between a strong public (the FCC) and a weak public (the advocates for net neutrality who wrote in to express their opinions). I argue that this was a successful example of everyday individuals taking up the mantle of digital rights and making themselves heard by successfully intervening in the feedback loop between law, technology, and discourse. My primary texts in this analysis are legal documents, statements released by President Barack Obama and FCC Chairman Tom Wheeler, public-facing statements of interested parties, public comments to the FCC, and vernacular discourse on reddit. Official legal documents will include the FCC's 2010 Open Internet Order, the document that sparked the net neutrality debate, as well as the opinion in *Verizon vs. FCC*, that vacated several parts of the order. This selection of texts provides a broad overview of the many types of discourse at play in the net neutrality debate, and helps to illustrate the concept's framing as a rights issue as well as a technical principle.

The political history of net neutrality

The political history of net neutrality is one of deregulation coupled with technological and discursive shifts—illustrating, in all, the many interactions between law, technology, and discourse that forms the feedback loop which is central to this project. The term net neutrality is attributed to technologist Tim Wu, who penned an article in 2002 comparing several different approaches to the concept.[95] Wu defines network neutrality as a network design principle that holds that "a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application."[96] The early internet was neutral by design, until a type of filtering technology called deep-packet inspection, which allowed networks to filter traffic in real time, was developed in the early 2000s. The political history of the net neutrality debate results from technological innovations like deep packet inspection coupled with a continuous deregulation of ISPs, beginning with the Brand X decision in 2000, which separated cable and DSL internet for regulatory purposes (thus loosening regulation on cable internet providers), and continued in 2005 when the FCC also deregulated DSL by classifying broadband service providers as an "information service."[97]

At around this time, the FCC began to put forth early versions of the net neutrality

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[95] Tim Wu, "A Proposal for Network Neutrality," (2003).

[96] Tim Wu, "Network Neutrality FAQ," *Tim Wu's Home Page,* http://www.timwu.org/network_neutrality.html

[97] Federal Communications Commission, "FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services," *FCC News*, (Washington, DC: FCC, August 5 2005).

principle in the form of statements and speeches expounding upon the importance of internet freedom and internet openness. An early FCC policy governing net neutrality was called the Internet Freedom Guidelines, and the 2004 FCC chairman gave a speech in which he discussed the four "Internet Freedoms."[98] During this period, net neutrality evolved discursively "from a technical principal to something associated with civic and economic ideals."[99] Initially adopted by the technologist community in the mid-2000s, it began to reach the public sphere in 2006, when the FCC issued an Internet Policy Statement issuing preliminary net neutrality rules. While the statement did not refer to net neutrality explicitly, it did outline a set of goals "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet."[100]

While there were echoes of net neutrality in many early decisions, the FCC did not begin consciously putting forth a net neutrality stance until 2009, when they called for public comments in advance of issuing the Open Internet Order in 2010. This order outlined three essential rules that the FCC would adopt with regard to ISPs going forward: transparency on the part of broadband providers about the speed, performance, and management practices of their networks, no blocking of lawful content, and no unreasonable discrimination in transmitting traffic. The Open Internet Order was the catalyst for the contemporary net neutrality debate, which will be my primary object of analysis in this chapter. At around this time, the FCC hosted

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[98] Michael K. Powell, "Preserving Internet Freedom: Guiding Principles for the Industry," (Address, Silicon Flatirons Symposium, February 8 2004).

[99] Danny Kimball, "What We Talk about When We Talk about Net Neutrality," in *Regulating the Web: Network Neutrality and the Fate of the Open Internet*, ed. Zack Steigler (Lanham: Lexington Books, 2013): 34.

[100] Marlene H. Dortch, "Policy Statement" Federal Communications Commission (Washington, DC: September 23 2005).

closed-door talks between online platform providers (including Google) and ISPs (like Verizon and Comcast) in an attempt to hone the details of net neutrality in practice. As Kimball notes, this resulted in "a very loosely translated version of the [net neutrality] principle" entering public discourse—the result of compromises made between online platforms and ISPs.[101] To complicate matters, the 2010 order led directly to Verizon filing suit against the FCC in 2011, arguing that the FCC was exceeding its authority by regulating ISPs in this way. In 2014, the U.S. Court of Appeals for the D.C. Circuit ruled that because the FCC had classified broadband internet providers as information services in 2005, they could not be regulated as common carriers. Because the 2010 order applied only to common carriers, significant parts of the order were vacated in this decision. However, the court did agree that broadband internet providers posed a potential threat to internet openness.[102]

In May 2014, the FCC released a new proposal tentatively allowing fast and slow lanes in light of the D.C. Circuit Court's decision earlier that year.[103] However, this proposal also included questions about the potential for Title II reclassification, keeping the possibility open that at some future point ISPs might be reclassified. This proposal led to a call for public comments. In the first round of comments, the FCC received a reported 1.1 million comments (though only 800,000 unique comments have been released to the public). With a subsequent round of reply comments, the docket of public comments topped 3.7 million. On November 10,

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[101] Kimball, "What We Talk About" 44.

[102] Kevin E. McCarthy, "OLR Backgrounder: Appellate Court Decision in Net Neutrality," (Connecticut Office of Legislative Research).

[103] Federal Communications Commission, "Notice of Proposed Rulemaking" (Washington, DC: May 15 2014).

2014, then-President Barack Obama endorsed net neutrality in a short speech released online.[104] In February 2015 FCC Chairman Tom Wheeler endorsed Title II reclassification in an op-ed for the New York Times, and later that month, on February 26, the FCC passed Title II net neutrality rules in a 3-2 vote.[105] Throughout this period of controversy, policymakers ended up referring to net neutrality as "open internet" or "internet freedom" which linked net neutrality to notions of "technical efficiency, marketplace competition, and freedom of expression."[106] In March of 2015, the FCC published their new Open Internet Order in the Federal Register. Following this, carriers petitioned the order and held oral arguments. Despite this opposition, the D.C. Circuit Court affirmed the Open Internet Order in June 2016.

The feedback loop between law, technology, and discourse in the net neutrality debate

In the history of net neutrality since 2002, it is already possible to see the feedback loop linking law, technology, and discourse. The net neutrality concept was a technological reality and a theoretical principle at its origin, but through shifts in technology such as deep packet inspection, legal cases that led to the deregulation of ISPs, and a discursive shift that sutured the technical principle of net neutrality to a more nebulous "internet openness," net neutrality became something different—a digital rights issue that was discussed in those terms. As previously mentioned, one of the most interesting facets of the net neutrality issue is that, in a rare instance, a large swath of the internet-using public was asking the government for more

[104] Obama White House, "Net Neutrality: A Free and Open Internet | The White House" https://obamawhitehouse.archives.gov/net-neutrality.

[105] "A Timeline of Net Neutrality," http://whatisnetneutrality.org/timeline.

[106] Kimball, "What We Talk About" 35

regulation. Generally speaking, this is anomalous for digital rights issues. As was seen in cases like the protests against SOPA and PIPA, digital rights advocates most commonly argue for the government to back away from digital technology and the internet, in keeping with the commonly held ideal of the internet as an open space free of government intervention. However, in this particular case, citizens and technology activists who perceived ISPs' fight against net neutrality as corporate overreach appealed to the government to reign in ISPs who were implementing discriminatory practices. This tension between regulation and freedom interlocks with a number of other issues that carry throughout the discourse of net neutrality: privatized governance by companies who run both online platforms as well as provide broadband internet, the law's effect on technology, and the ways in which advocacy groups engage in discursively constructing alternatives to the current regime of governance, and in so doing recruit citizens who feel similarly. In this way, the net neutrality debate shows how the feedback loop between law, discourse, and technology works in practice.

In this instance and in many of the public comments that I will discuss in the following sections, we can see how pushing for increased regulation was a complicated issue for "citizens of the internet" in 2014 and 2015—alongside the long-standing view that the internet should be as free from government intervention as possible, there was also a growing pessimism about the ability of everyday citizens to make a difference in the law and a disillusionment with the government's ties to large corporations. However, with the success of the SOPA/PIPA protests still relatively fresh in their minds, advocates urged the public to contact their representatives and write in to the FCC. As Sky Croeser notes, while the digital liberties movement would seem a natural candidate to adopt the tactics of "hacktivism" in their advocacy, the majority of digital

liberties activism has "taken place through the authorized channels for democratic dissent."[107] Thus, these efforts on the part of Fight for the Future, the Free Press and other groups were very much in keeping with digital rights protests of yore. Similar protests took place around SOPA/PIPA, and much of the net neutrality advocacy was geared towards tapping into these same themes and feelings, such as a concern for free speech online, a faith in the inherent democracy of the internet network, and a fear of interference in this network. In this way, supporters of net neutrality in 2014 were encouraged to contact the FCC and voice their disappointment with the policy under consideration.

The fact that the net neutrality concept was "diluted" from its original status as a principle of network design is not, I claim, necessarily and indication that the policy was less efficacious or lacking in some original potency. Rather, what this discursive shift indicates is that the sphere of concerned parties discussing net neutrality expanded over time to include individuals who did not have the technical literacy of the technologists who originally popularized the term. In addition, discursive studies of net neutrality have pointed out what I will illustrate on a wider scale in the subsequent sections, which is that various groups arguing for solutions to the net neutrality "problem" all make arguments that are deeply rooted in particular assumptions about the internet, society, and economics that are not always well-interrogated, and can also put them fundamentally at odds with others desiring similar solutions, making compromises difficult. Arguments for and against net neutrality take their roots in vastly different views of the world and the telecommunications landscape. Generally, there is a divide between two sides: one arguing from the perspective of human rights, political freedoms, and

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[107] Sky Croeser, *Global Justice and the Politics of Information: The Struggle Over Knowledge*, (Routledge: 2015), Kindle Loc 2740.

creative freedoms, and another grounded in efficiency and innovation.[108] However, the net neutrality debate laid bare the feedback loop between discourse, law, and technology, and in so doing made everyday people aware of the ways that they could intervene in the power flows of governance. This set the stage for a large collective of impassioned citizens to take up the net neutrality issue and make their public opinion heard in the FCC's call for public comments.

Topoi in the discourse of net neutrality

While the public discourse surrounding net neutrality perhaps contributed to the "dilution" of net neutrality as a technical principle, it also reveals some essential features of digital rights discourse that carry through other digital rights debates. Thus, before discussing the feedback loop between law, technology, and discourse in detail it is important to pause and consider the role of topoi in regulatory discourse. G. Thomas Goodnight writes that studying public policy requires an understanding of "the taken-for-granted conventions that make up the general and special topoi" concerning the matter at hand. These topoi are embedded in the practices and words of everyone from the highest official to the least empowered member of the public.[109] If we consider topoi to be a generative construct, which through repetition aid the evolution of ideas and arguments, then we can see that the public comment period for net neutrality helped to fully instantiate what until then had been circulated through a variety of discursive spheres. The public comment period was a period of world-building whereby, through reading, circulating, and echoing common topoi, the impassioned public developed both a strong

[108] Sachin Padmanabhan, Leon Yao, Luda Zhao, and Timothy Lee, "Topic Analysis of the FCC's Public Comments on Net Neutrality," unpublished manuscript, 2014.

[109] Goodnight, "The Metapolitics of the 2002 Iraq War Debate" 67

concept of net neutrality as well as a strong sense of the values and assumptions underlying the so-called internet community. In the net neutrality debates, we see individuals who lacked formal training in the legal issues attending the FCC's decision, but who understood the culture of the digital liberties movement and, through melding this culture with their own beliefs and values as both US citizens and "citizens of the internet" both accepted and contributed to arguments for their digital rights.

Beyond the lay discourse on net neutrality, regulators and those in power circulated the so-called "diluted" version of net neutrality. While early conceptions of net neutrality circulated by technologists like Tim Wu tied the concept to efficiency, and had their roots in a classic principle of network design called the end-to-end principle.[110] The end-to-end principle is the notion that "whenever possible, communications protocol operations should be defined to occur at the end-points of a communications system, or as close as possible to the resource being controlled."[111] This creates a flexible network that can transmit information efficiently and without discriminating between particular types of traffic. While the concept began during the 1960s as a network design principle, it evolved by the early 2000s into both a philosophical and economic argument that supported fair competition in online markets as well as free and open communication of information. In this way, we can see how net neutrality was born of a set of topoi common among those technologists with whom the concept originated—equality and impartiality on the part of the network. Much in the way that Fred Turner notes the ideals of 1960s counterculture were translated into the birth of Silicon Valley, these principles of openness

[110] Kimball, "What We Talk About" 37.

[111] "End to End Principle in Internet Architecture as a Core Internet Value," *Core Internet Values*, http://coreinternetvalues.org/?page_id=1415

that began with the creation of ARPAnet embedded themselves in the foundational discourse surrounding the development of the commercially-available internet. This sense of history appears in the public comments submitted to the FCC, as well, with commenters recalling that U.S. taxpayers helped to fund the creation of ARPAnet.[112]

In this sense, the notion that net neutrality emerged solely as a network design principle does not fully capture the lineage of the concept, for the very assumptions upon which net neutrality as a design principle rests call up not only other, older network design principles, but also topoi such as efficiency and equality. Thus, it is far from a purely technical argument even in its earliest stages. Still, in its early days, net neutrality was tied to a smaller cache of topoi than its later formulations due to the fact that it remained a network design principle iterable only to a relatively small group of people. As the idea gained traction in the public sphere, it became associated with democratic political ideals and, as such, transformed into a digital rights issue rather than a primarily technical concern. Fred Turner notes a similar and related phenomenon occurred with John Perry Barlow's cyber-utopian vision of the internet as the "electronic frontier," noting that by the late 1990s (five or so years after Barlow originally published the piece) "Barlow's version of cyberspace had become perhaps the single most common emblem not only for emerging forms of computer-networked communication, but for leveled forms of social organization and deregulated patterns of commerce as well."[113] While Barlow's piece was political at its center, it nonetheless seems to have coalesced with other notions such as those of

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[112] Sunlight Labs, "Federal Communications Commission Net Neutrality Comments (non-experts)," text file, line 1119.

[113] Fred Turner, *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (Chicago: University of Chicago Press, 2008): Kindle loc 2420.

Levy's "hacker ethic"—which posited free access to computers and information, decentralization, and a utopian vision of digital creations—to take on a life somewhat larger than originally intended as it folded in economic and social ideals as well.

The transmutation of net neutrality from technical concern to political issue, while spurred by technologists, was also due in part to the rhetoric of everyday people as they became aware of the net neutrality controversy. As net neutrality was taken up as a rights issue, the circulation of everyday discourse helped to form a stable concept of net neutrality as a cornerstone of digital rights and, more specifically, freedom of speech online. Topoi in net neutrality discourse served as connection points "between the abstract and concrete" and helped speakers to continuously restructure concepts and memories throughout time.[114] Thus, while net neutrality policy may have been largely a technical matter, the cultural association and memory of net neutrality shifted over time through the web of inter-related topoi that were deployed in net neutrality discourse. In looking through the representative samples of discourse coming not just from laypeople, but from technologists, advocates, and regulators, I observed many of the same arguments seen by other researchers, including a concern about ISPs' monopoly over internet service, the potential for weak net neutrality to stifle innovation and make it more difficult for startups and small companies to break into the market, as well as the importance of net neutrality for free speech. However, I also found other themes that tie in the topoi evident in many digital rights arguments overall. Among these were a sense of "internet citizenship" and the notion that dismantling net neutrality would somehow be against the philosophy of networked architecture, as well as a number of commenters establishing credibility both through

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[114] Carolyn R. Miller, "The Aristotelian *Topos*: Hunting for Novelty," in *Rereading Aristotle's* Rhetoric, eds. Alan G. Gross and Arthur E. Walzer (Carbondale: Southern Illinois University Press, 2000): 142

appealing to their expertise, but also through appealing to their "regular" lifestyle and comparatively low status.

The role of government and law in net neutrality

The history of net neutrality, as previously demonstrated, is largely tied to a host of legal cases. Beginning with the *Brand X* decision, broadband internet providers were slowly deregulated and classified as "information services" by the FCC, as opposed to common carriers. Information services are not bound to the same standards as common carriers, which are required by law to carry traffic without discriminating against particular types (as, for instance, phone lines are). This deregulation coupled with the development of technologies like deep packet inspection set the stage for privatized governance decisions that manifested as paid prioritization and throttling of traffic (the "slow" and "fast" lanes as they were described by advocates). Furthermore, net neutrality shows an uneasy compromise between digital rights advocates—who traditionally push for less regulation and less government involvement—and regulators tasked with litigating what the role of corporations and technology should be in the open internet. While advocates were requesting more regulatory oversight from the FCC, they also mistrusted the FCC's motivations and commitments. This shows through in much of the discourse on net neutrality and, as I will illustrate at the end of this chapter, this mistrust comes into play in the functioning of the feedback loop between law (or regulation), technology, and discourse.

On May 13, 2014 reddit co-founder Alexis Ohanian hosted an "Ask Me Anything" (AMA) alongside Oregon Senator Ron Wyden. Reddit regularly hosts AMAs, where users can ask questions of an individual—often a public figure, but also often an everyday individual with an interesting job or experience (for instance, recent AMAs at the time of this writing include an

actor on a popular HBO show alongside an AMA for a pizza delivery driver in a college town). The conversation that unfolded revealed a pervasive cynicism and mistrust of both the government and large corporations alongside power-to-the-people empowerment rhetoric. Wyden, long a defender of internet freedom, acknowledged over the course of this conversation that net neutrality was an exceptional issue in that, generally speaking, "the government should be involved in the Internet as little as possible." Wyden went on to note that "the government is being drawn in by the effect that the monopoly ISPs are having on innovation and competition on the net."[115] Here, we see a clear illustration of how the issue of net neutrality was one of competing governance agendas: while the solution to the net neutrality issue was regulatory, the problem was caused by private companies enforcing speed throttling and paid prioritization (thus exercising privatized governance). Still, the discourse surrounding net neutrality strongly held up the role of the people in convincing the FCC to reclassify ISPs. In the same AMA, Alexis Ohanian—also a staunch defender of internet freedom and a high-profile figure in digital rights debates—wrote that when net neutrality was pursued on a purely legislative level (in the early 2000s) it did not succeed. However, due to the flare of grassroots support at the time of the AMA, Ohanian put the key to defending net neutrality in the public's hands, writing that "if we make it political suicide to vote against reclassifying broadband under Title II, we can trump all those millions of internet provider lobbying dollars."[116] This is a more optimistic view than many commenters, who decried the government's unwillingness to listen to those without millions of

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[115] "We are U.S. Senator Ron Wyden and Alexis Ohanian: lovers of and fighters for the Open Internet. AUA on Net Neutrality!" *Reddit*, May 13 2014, https://www.reddit.com/r/IAmA/comments/25hauk/we_are_us_senator_ron_wyden_and_alexis_ohanian.

[116] Ibid.

dollars in lobbying funds.

Nonetheless, the refrains that echoed throughout online discussions and public comments to the FCC was one of simultaneous mistrust of both corporations and government. The FCC, as a government agency composed of individuals with deep-running corporate ties, attracted quite a bit of skepticism. Throughout public comments and reddit threads, users doubted that anyone would read their words, dismissed the power of their vote, and expressed a disbelief that the government would listen to non-moneyed interests (even if that group was comprised of millions of tax-paying citizens). The FCC is an independent agency of the U.S. government, and is composed largely of those who have worked in the telecommunications industry for some time (and members of the FCC often go on to work for telecommunications providers). For this reason, many in the public comments during the net neutrality debate expressed strong skepticism, primarily directed at FCC Chair Tom Wheeler, about the agency's ethics with regard to regulating ISPs. However, individuals nonetheless called upon the FCC to intervene to assure strong net neutrality, and celebrated the FCC's position when the agency made the decision to classify ISPs as common carriers. Thus, while the net neutrality debate took place in a fairly traditional way, the mistrust of government and faith in open architecture as the best governing mechanism held strong throughout the net neutrality debates.

Technology and its relation to privatized governance

Another significant knot in the issue of net neutrality is the question of private governance—the mediation of rights and liberties by private entities, often platform owners like Google and Facebook. In the case of net neutrality, two different types of privatized governance—that emanating from ISPs and that emanating from services like Netflix and

Google—were at odds with one another, and appealing both to the public and the government for their support. The contemporary debate about net neutrality positioned it largely as a political and legal issue. While it was certainly this, it was also, at its heart, a conflict between privatized governance entities and thus an illustration of the ways in which technological and regulatory changes interact—and how this can affect the rights of everyday people. As Laura DeNardis writes, "technologies of internet governance increasingly mediate civil liberties such as freedom of expression and individual privacy."[117] In altering the pricing structure and speed for different types of content, ISPs had, in the view of many users and platforms, limited the ability of companies to compete in the marketplace and users to have consumer choice. Beyond this, advocates were concerned about the potential for this insidious type of privatized governance to limit free expression and speech.

Legally, the continuous deregulation of ISPs coupled with innovation and increasing consumer internet use in the period from roughly 2000-2010 created a climate where internet startups could thrive and innovate, but also where broadband internet providers could begin to test the boundaries of the open web with strategies such as throttling and paid prioritization—direct results of the development of deep packet inspection and other technological changes. As major player companies in the net neutrality debate like Google and Netflix became more powerful, however, the issue of net neutrality (or the lack thereof) became more contentious. When the FCC released the Open Internet Order in 2010, setting the stage for *Verizon v. FCC*, the neutrality debate launched in full force, with web platform providers like Google lobbying the government to increase regulation of ISPs in order to protect their business. In this sense,

[117] Laura DeNardis, *The Global War for Internet Governance* (New Haven: Yale University Press, 2014): 1.

much of the net neutrality conversation took place between corporations with the government playing a smaller role.

Netflix's case in particular is an excellent illustration of technological innovation outstripping legislation—when broadband internet providers were deregulated in the mid-2000s, streaming video was in its infancy, with sites like YouTube just beginning to offer what was often a slow, poor-quality video. However, as higher internet speeds and innovations in streaming took place, companies like Netflix (which started as a mail-order DVD rental service) began to make a bulk of their profits through streaming—and streaming began to account for more and more web traffic. Streaming video service Netflix has been said to comprise 37% of all internet traffic in 2016.[118] Thus, weak net neutrality had the potential to harm Netflix's bottom line if ISPs began charging Netflix more to stream their content at faster speeds—despite the fact that this broadband service would not be especially costly to ISPs.[119] In 2014, Netflix users using Comcast's internet service noticed remarkable slowdowns on their streaming content, the result of throttling. In February of 2014, Netflix agreed to pay more to Comcast to end the slowdown.[120]

This demonstrates both of the effects of private governance as well as the feedback loop between law, technology, and discourse. Decisions made on a corporate level at Comcast

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[118] Neil Hughes, "Netflix boasts 37% share of Internet traffic in North America, compared with 3% for Apple's iTunes," *appleinsider*, January 20, 2016, http://appleinsider.com/articles/16/01/20/netflix-boasts-37-share-of-internet-traffic-in-north-america-compared-with-3-for-apples-itunes.

[119] Daniel A. Lyons, "Internet Policy's Next Frontier: Usage-Based Broadband Pricing," *Federal Communications Law Journal* 1, no. 66 (2003).

[120] Chris Morran, "Netflix Agrees To Pay Comcast to End Slowdown," *Consumerist*, February 23 2014, https://consumerist.com/2014/02/23/netflix-agrees-to-pay-comcast-to-end-slowdown.

affected both everyday users' experiences of the internet, but also the bottom line of another large internet platform provider (Netflix). Because everyday individuals felt these effects, the conflict between Comcast and Netflix was an impetus for public action and debate about the practical consequences of weak net neutrality. Thus, the net neutrality debate invited activism both from companies like Netflix as well as established digital rights NGOs. These protests were fairly traditional in nature. However, what became clear throughout the discourse on net neutrality from 2010-2014 was that the deep entanglements between the government and corporate and technological interests had become newly visible and were newly felt by everyday internet users. Furthermore, as the next sections will address, the massive participation in the FCC's request for public comments demonstrated significant public interest and passion about the issue, and these comments moreover demonstrated that everyday individuals were beginning to see the flows of power online and how they were affected as both consumers and citizens.

Net neutrality discourse in public comments, by the numbers

The FCC's first call for public comments garnered between 800,000 and one million comments (the final tally was 1.1 million comments, however only 800,000 have been released to the public—the rest of the comments were either submitted after the deadline had passed, or were handwritten and mailed and thus were not released online). The Sunlight Foundation, an NGO devoted to promoting government transparency, did one of the most exhaustive analyses of the net neutrality comments and also published their raw data online—as such, they are one of my primary resources in this study, both for demographic figures as well as raw data. They noted that the response was fairly typical in that a large volume (60%) of comments came from form letters, and 40% came from individual submissions. This is actually a significantly lower

percentage than other high-volume dockets, which often comprise upwards of 90% in form letter contributions.[121] What this means is that the net neutrality comments attracted a significantly higher percentage of individual submissions than did other similarly-sized calls for public comment, indicating that individuals felt strongly enough about the issue to pen their own unique messages rather than go through one of the numerous campaigns that allowed users to submit form letter comments. As the Sunlight Foundation said, "It could be an indicator of a genuinely higher level of personal investment and interest in this issue, or perhaps this docket drew organizers who employed different "get out the comment" techniques than we have seen in the past."[122]

What was most notable about the comments, however, was their revelation of a public who are newly aware and impassioned about the relationship between government, corporations, and the internet—and who are trying to intervene in some of these relations through their discourse. While some academic studies have undertaken an analysis of the content of net neutrality comments, the majority of analyses of the comments at this time have come from NGOs, such as the aforementioned Sunlight Foundation study, but also by the Knight Foundation and Pew.

The net neutrality comments included a wide variety of people. The Sunlight Foundation, through work with the Open Technology Institute and Public Knowledge, that expert parties made use of a more complex form on the FCC website, while "most public comments were

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[121] Bob Lannon, "What can we learn from 800,000 public comments on the FCC's net neutrality plan?" *The Sunlight Foundation*, September 2 2014, https://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan.

[122] Ibid.

submitted using a simplified form or via email."[123] This made isolating the expert submissions fairly clear, though there were also expert submissions that went through the simplified form. All in all, the Sunlight Foundation found that roughly 600 comments submitted were from experts, though there was a significantly higher number of comments that their natural language processing detected as expert but that fell below a 200-word threshold, or were part of a large form letter campaign that used "expert" language. The total number of initially classified expert comments was significantly higher, at 2,846. The Knight Foundation report also included an analysis of who the influencers were in the net neutrality debate across both public comments and Twitter, as well as the demographic information of many participants in these conversations—this calculation included both individuals as well as companies who were speaking out for or against net neutrality. Overall, opponents of net neutrality—namely ISPs Verizon and Comcast—did not speak up as much during the public comments, but expended millions of lobbying dollars (roughly $180 million between the two companies). The only proponent of net neutrality to come remotely close to these expenditures was Google, who reported roughly 60 million dollars in net neutrality-related lobbying expenditures. When it came to those discussing net neutrality on Twitter, the Knight Foundation found that those commenting were disproportionately male and from major U.S. urban areas.[124]

The Knight Foundation (working with data analytics firm Quid) released a report in which they found three themes that were most prominent among the comments. The first is that there is "strong legal ground for reclassification of Internet service providers as Title II common

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[123] Ibid.

[124] The Knight Foundation, "Decoding the net neutrality debate: An analysis of media, public comment and advocacy on open Internet," *The Knight Foundation*, http://www.knightfoundation.org/features/netneutrality.

carriers." The second argument was an objection to "fast" and "slow lanes" on the internet. The third common frame was the internet service providers are already monopolies.[125] Beyond analyzing the content of the public comments, the Knight Foundation also analyzed discussions of net neutrality on Twitter, noting that this is where many pro net neutrality groups concentrated their activism. Knight found that these groups pushed three main arguments: protecting the diversity of the internet, encouraging the FCC to schedule public hearings prior to making a decision, and reclassifying ISPs to allow for better regulation.[126] Similarly, Padmanabhan, Yao, Zhao, and Lee three common frames of argument in the net neutrality comments—the majority of comments made at least one of these arguments: net neutrality is essential to protecting freedom of speech, ideas, and internet communication, net neutrality is essential to fair market competition, and net neutrality is needed to protect the internet from future legislation and government intervention.[127]

Despite this active public interest in net neutrality, many at the time said that the FCC was unlikely to seriously consider public comments, a fact that was confirmed by FCC spokespeople who said that, while the agency would review all comments, the most serious consideration would be given to comments of substantive legal value. These comments were, by and large, submitted by ISPs themselves or by digital rights advocacy organizations, but almost never by everyday individuals without legal credentials or other subject matter expertise. However, the public comment period for net neutrality is still noteworthy due to the significant number of individual original submissions (i.e. submissions not deriving from form letters)—

[125] Knight Foundation 15.

[126] Ibid., 17.

[127] Padmanabhan, Yao, Zhao, and Lee.

40% of the total comments. In this sense, the lack of clear vernacular legal expertise does not mean that the public comments are inefficacious when it comes to changing laws. Rather, as Gangadharan writes, public comment periods like the one seen in net neutrality represent an effective relationship between weak publics (the impassioned everyday individuals writing in about the issues) and strong publics (the government and other decision-making bodies). Still, the author acknowledges that these public comment periods may not always be as effective as they possibly could be due to the divide between stronger and more expert parties and laypeople, which sometimes results in more powerful parties leaving out relevant information that may be of interest to the public.[128]

Due to the exceedingly large number of net neutrality comments as well as my desire for methodological consistency—which involves reading and cataloguing each comment by hand—I have contained my analysis of the public comments submitted to the FCC to a representative sample of those comments that were labeled as non-expert by the Sunlight Foundation. There are already several analyses of the total comments that have been done using computational methods like natural language processing and sentiment analysis. However, the nature of this project, which involves staying close to the text and considering each argument made in its totality, made computational approaches unfeasible and also, unfortunately, precluded my ability to read all of the comments submitted to the FCC. Future studies with further resources will hopefully be able to provide a nuanced rhetorical perspective on the net neutrality debates that also involves the coding and analysis of every comment made.

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[128] Seeta Peña Gangadharan, "Public Participation and Agency Discretion in Rulemaking at the Federal Communications Commission," *Journal of Communication Inquiry* 33 (2009).

Free speech, citizenship, and consumer choice in everyday and institutional discourse

Among the public comments, there were three interlocking refrains—free speech, citizenship, and consumer choice. Each of these refrains integrates topoi about the purpose of the internet and the internet's role as an engine of free speech and innovation and, most importantly, reveals citizen understandings of the feedback loop between law, technology, and discourse as it became visible in the net neutrality controversy. A large number of the comments appealed to the general concept of freedom, but among these the most common arguments made were for freedom of speech, but also for freedom of speech as framed in the sense of a negative right—freedom from censorship.[129] One commenter wrote that net neutrality is what keeps us from censorship, and that dismantling net neutrality would create "a censorship for the poor." This writer also appeals to the Constitution of the United States, writing that the country was founded on freedom.[130] These notions are rooted in a democratic vision of the internet as it is tied in with United States politics—writers frequently appeal to American values and their status as tax-paying Americans, and extend these notions of citizenship to the internet. While the internet is of course a global network, when it comes to ISPs, net neutrality was very much an issue occurring within the United States, though as with any matter of economic significance it may have had ripple effects far outside of U.S. borders. The Sunlight Foundation found similar themes, noting that more than half of the comments positions "internet access as an essential freedom."[131] Here, we see the vernacular culmination of years of discursive development which transfigured net

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[129] Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1958).

[130] "Non-expert comments" line 2016.

[131] Sunlight Foundation Report.

neutrality from a technical principle to a right—and a right intimately tied to multiple types of citizenship.

While a large number of comments invoke the notion of U.S. citizenship and the rights that it implies, a smaller (though notable) number of comments discuss a sense of internet citizenship and a desire to preserve the status of the internet community. Some do this explicitly, as in the case of a commenter who wrote that "many of us in the Internet community realize that you are doing this not because you are unfamiliar with the subject at hand, but because you are an important part of the pyramid of monopolistic power."[132] This commenter evokes the "Internet community"—undoubtedly a fairly nebulous group of people, but a group that the commenter sees as a sort of vernacular community outside the regulatory establishment, juxtaposed with institutional actors who do not have the public's best interest at heart. This commenter goes on to note that the FCC is a government agency paid for by "we the people." In this sense he links internet citizenship to U.S. citizenship—regulators, he posits, are tasked with ensuring the rights of the internet community in their capacity as U.S. citizens. Another commenter notes that ISPs have already worked to create "an environment that is completely against the spirit of the internet." [133] This evokes the topoi of the internet as a space of unimpeded freedom of speech, as does another commenter who writes that the internet is the "final portal of free speech." This comment, along with many others, exhibits the cynicism that was on display in Alexis Ohanian and Ron Wyden's AMA—the internet, to many impassioned citizens writing in about net neutrality, is one of the last places where they feel their speech is truly free. Others expressed their commitment to freedom of speech in more abstract terms, with

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[132] "Non-expert comments," line 4247.

[133] Ibid., line 630.

another commenter writing that "a platform like the Internet is wonderful because of its lack of overhead; one can bring his or her idea to the masses with ease, AND ALL IDEAS ARE EQUAL."[134]

As the large number of comments concerning freedom of speech illustrated, net neutrality was understood by the public as a larger democratic project by the time of the public comments. While a number of comments evoked a sense of internet citizenship, there were also a large number of comments evoking the notion of "we the people," and the status of the commenter as an American taxpayer. Numerous threads on reddit instructed readers to contact their representatives and exercise their rights as citizens. Thus, net neutrality was bound up within the cadre of essential rights granted to U.S. citizens, and advocating for its continuation was cast as an act of good citizenship. Then-President Barack Obama released a short speech on YouTube in November of 2014, after the majority of the FCC's public comments had been submitted, clearly outlining his support for net neutrality. In this address, he opened with the statement that the internet has been based on openness, fairness, and freedom since its inception—here, Obama calls attention to the history of the internet and also repeats the topoi of the internet as a space of liberty. He goes on to note that there are no "gatekeepers" controlling which sites users are allowed to visit, and decrying the fact that ISPs might attempt to subtly control user access by imposing costs for "fast" and "slow" lanes. Here, we see net neutrality late in its discursive life fully conceptualized as a right that is intimately tied to freedom of speech and the broader set of rights entailed by U.S. citizenship.

In Obama's 2014 YouTube address, he framed the issue of net neutrality as one primarily of consumer choice—in doing this, he linked this type of choice to American values of freedom

[134] Ibid., line 776.

(as well as the early-internet topoi of openness). The association of net neutrality with economics and consumer choice is also clearly visible in the comments period, as well as in much of the official advocacy emanating from groups like the Electronic Frontier Foundation and Fight for the Future. For example, in a July 2014 statement, EFF Intellectual Property Director Corynne McSherry said that "an open, neutral, and fast Internet has sparked an explosion of innovation in everything from shopping to the way we exchange ideas and debate potential political change."[135] Even Tom Wheeler, then-chairman of the FCC, said in a statement on net neutrality in February 2014, that "innovators cannot be judged on their own merits if they are unfairly prevented from harnessing the full power of the Internet, which would harm the virtuous cycle of innovation that has benefitted consumers, edge providers, and broadband networks."[136] In these comments by institutional and non-institutional actors alike we can see how, by the time of the public comments in the fall of 2014, net neutrality was an economic issue that was intimately linked to innovation (primarily in the technology sector), freedom, and open access to information. While net neutrality was primarily a network design principle at the time of Wu's article, the late 2000s and early 2010s showed that the battle for net neutrality was one that would have to be waged with ISPs themselves, meaning that topoi concerning consumer freedom took root alongside other long-standing topoi such as freedom of information as a central goal of a neutral network. In this way, we can see the complicated interlocking issues that revealed the feedback loop between law, discourse, and technology.

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[135] "EFF to FCC: Defend the Neutral Internet," *Electronic Frontier Foundation*, July 16, 2014, https://www.eff.org/press/releases/eff-fcc-defend-neutral-internet.

[136] Tom Wheeler, "Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules," February 19, 2014.

While many of the comments addressing the technological reality of weak net neutrality also included perspectives on the economic ramifications of weak net neutrality for everyday people, a significant number of comments also expressed concern about the corporate ties of the FCC officials and the importance of their role in preventing monopolies. As the Sunlight Foundation found, roughly half of the comments in the first round contained this sentiment, including form letters from the EFF. The Sunlight Foundation found that "typical terms in these comments included 'work,' 'competition,' 'startup,' 'kill,' 'barrier' and 'entry.'"[137] For instance, one comment concluded with the following: "You can't have it all Tom, take the money they gave you and walk into the Hall of Shame or do the right thing and uphold the Clayton Antitrust Act."[138] What is important to note in the non-expert comments, however, is that while some commenters make policy-based arguments, the vast majority of commenters express primarily opinions, values, and particular concerns with aspects of the FCC's current stance on net neutrality. In comparison, the expert comments that I examined outline proposed solutions to the net neutrality question, and many provide supporting material or links to support their positions. These expert submissions generally come from NGOs and advocacy organizations, while non-expert comments come almost exclusively from private citizens. Thus, vernacular legal expertise is not as present in net neutrality debates as it was in other rulemakings, such as the Digital Millennium Copyright rulemaking, the subject of the next chapter.

[137] Sunlight Foundation Report.

[138] "Non-expert comments," line 1041.

The feedback loop in practice: strong and weak publics in the net neutrality comment period

The Sunlight Foundation's decision calculus when weighing whether comments came from expert or non-expert parties reveals something important about net neutrality discourse: while a vast majority of comments came from non-experts, a significant number of these comments exhibited expert language. While, as previously mentioned, the Sunlight Foundation ultimately decided that only 21% (600) comments of the original selection of 2,846 comments marked as expert by their natural language processor actually originated from (credentialed) experts, it is worth noting the significantly higher number that exhibited what the algorithm saw as expert language. What this indicates is that, while by and large the net neutrality debate was put on the agenda by those with expertise and influence (and thus power), these groups succeeded in stirring public opinion to such an extent that the expert language that they put forward appeared in thousands of comments from the public. This indicates that the rulemaking process, as Gangadharan has written, can serve as a way to link weak and strong publics and allow those without decision-making power to make their concerns heard by the regulatory institutions that govern them.[139] In this sense, the net neutrality debate not only reveals the feedback loop between law, technology, and discourse, but provided an inroad for citizens to intervene in the flow of power between technology companies and ISPs (representing technology) and regulators (representing law).

Many commenters, while they were ultimately classified as non-experts, write from positions of some technological expertise. A significant number of comments come from software engineers who position themselves as such, with many of them going on to express

[139] Gangadharan 337.

concern that, without net neutrality, the playing field will not be level for them. One commenter writes that "I am a programmer by trade and if I ever hope to reach my ambitions I need the Internet to be free. I need the same ecosystem to exist that allowed Mark Zuckerberg to create Facebook and Larry Page and Sergey Brin to create Google."[140] This echoes Tom Wheeler's 2014 statement about the potential of weak net neutrality to prevent tech founders from innovating in the same way as their forebears. These types of comments were often in support of the notion that weak net neutrality will harm innovation or irreparably damage the market for engineers and smaller ISPs—similar to those framing their argument for net neutrality as a matter of consumer choice. Commenters like these seek to position themselves as, if not experts, then credible authorities on technology who understand the harms that could arise from failing to protect net neutrality—and also as individuals who have a personal stake in strong net neutrality. A number of comments also evinced a sophisticated understanding of net neutrality and desired legal outcomes. The Sunlight Foundation found that around two-thirds of comments included key words such as "common carrier," "(re)classify," "authority" and "Title II," terms that indicate some understanding of the Telecommunications Act as well as a desired policy result.[141] While these were largely classified as non-expert submissions, these commenters adopted more expert language than many other comments that were framed largely as opinions or an airing of grievances.

While many commenters positioned themselves as some sort of expert, there were a number of other commenters who located their expertise in their status as ordinary and average people—a type of experiential expertise that positions them, similar to the previously mentioned

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[140] "Non-expert comments" line 405.

[141] Sunlight Foundation Report.

comment about a "censorship of the poor," as individuals uniquely capable of understanding the financial and informational disadvantages posed by weak net neutrality. Commenters in this category seek to create credibility by illustrating their relatively low status position, often noting that they will be continually disadvantaged if net neutrality does not prevail. One commenter notes that he is a 17-year-old student who is passionate about freedom of information, but that he will never achieve his goals without net neutrality. A handful of comments (roughly six in my sample) juxtapose the 1% and 99%, phrases borrowed from Occupy Wall Street that refer to socioeconomic elites (the 1%) and the everyday citizen (the 99%). Forty-three of the comments I analyzed, while not explicitly evoking the concept of the 99%, discuss what will happen to "the rest of us" if net neutrality fails. These commenters position themselves as extra-institutional actors, at the mercy of decisions made by institutions that claim to serve them. While each comment was submitted individually, these recurring themes show that those writing in to the FCC very much feel themselves to be part of a disadvantaged class who will be severely impacted by weak net neutrality, in juxtaposition with the moneyed interests symbolized by the ISPs as well as the FCC board members with previous corporate ties. This harkens back to Ohanian and Wyden's AMA, where while citizens clearly positioned themselves as the majority, they also expressed a profound cynicism that the government would ever truly work for them.

While all of these comments were classified as non-expert due to factors such as their length and the fact that they were submitted using the simplified form used by the majority of commenters, what they do show (along with the aforementioned comments discussing free speech, openness, and consumer choice) is the rising tide of public opinion on net neutrality. While, as a regulatory issue intended to be decided by the FCC, net neutrality was never put to a popular vote, it nonetheless attracted the attention of millions of members of the public due to its

salience in their everyday lives. Thus, net neutrality discourse among vernacular communities represents the development and, eventually, amplification of public opinion through deliberation and public comments.

Nancy Fraser defines a weak public as a public with the ability to form public opinion, but one that is unable to make decisions based on that opinion; this is in contrast to the "strong public" where discussion is concerned (and leads to) decision-making.[142] In this sense, the many publics involved in the net neutrality debate—software engineers, redditors, digital rights activists, and so on—were weak publics, developing and sharing amongst themselves a set of values and commitments as they pertained to internet openness. Without a direct democratic avenue to rule on net neutrality (as would have been the case if, for instance, it had been a ballot measure or some other more formalized democratic process), those who were passionate about net neutrality had few options but to take to the FCC's call for public comments with their concerns. Gangadharan public comment processes are often an interface that links strong publics and weak publics. However, for this process to work, the strong public must have the infrastructure in place for weak publics to make their opinion heard, and weak publics must be able to discuss amongst themselves and form that public opinion.[143] In other words, there must be an avenue for discourse to affect law.

While many may decry the internet's fragmentation, vastness, or incivility as a barrier to deliberation, there can be little argument that over one million public comments (comprising forty percent original submissions) serve as a strong indicator of public opinion. However, what

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[142] Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," In *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge: The MIT Press, 1992): 134.

[143] Gangadharan 349.

is also important to examine is the extent to which tension between expert and vernacular discourse appears in the comments. As I will show in the chapters that follow, vernacular legal expertise manifests in response to a number of digital rights issues that affect everyday people most intimately—intellectual property legislation that prevents someone from legally tinkering with their car, for instance, or a woman who finds herself unable to secure employment because a Google search for her name turns up intimate images posted by a vindictive ex. These situations inspire both tactical legal workarounds and also alternate reformulations of rights and liberties. However, net neutrality as an issue left open fewer avenues for tactical resistance and, to a certain extent, vernacular reimaginings of the law. The average U.S. consumer only has access to a small number of broadband ISPs, and is to a certain extent at the mercy of their local market when purchasing access to the internet. While some responded to the net neutrality debate by pushing for an expansion of fiber optic networks, the majority of advocacy that I observed on reddit and Twitter was devoted to asking citizens to write to the FCC—and again, these comments were frequently framed as an issue of consumer choice that was imbricated with citizens' rights under U.S. law.[144]

In this sense, the net neutrality proceedings were a fairly standard democratic process, though the vernacular adoption of dominant arguments was another notable feature of this discourse. As previously discussed, the net neutrality issue was introduced into the public sphere by technologists, large companies (both ISPs and web platforms), and digital rights NGOs. As such, much of the framing throughout the comments adopts the vocabulary and topoi initially circulated by these groups—with the transformation of the technical principle of net neutrality

[144] Andy Kessler, "Forget Net Neutrality, Focus on Fiber," *The Wall Street Journal,* Feb 12, 2015, http://www.wsj.com/articles/andy-kessler-forget-net-neut-focus-on-fiber-1423785125.

into a stand-in for internet openness and freedom that Kimball had noted. This brings us back to the Sunlight Foundation's determination that only 21% of the comments initially classified as expert by their language processing software were determined to emanate from "true" experts. While the net neutrality comments did not necessarily exhibit vernacular legal expertise, they did exhibit expert language and phrasing such that an algorithm designed to recognize this type of discourse could not tell the difference.

In this sense, the members of weak publics writing in to the FCC were attempting, as best they could, to intervene in governance on a matter that affected them intimately. As Gangadharan claims, "if members of the public generate, circulate, and make audible their opinions in a public sphere and agency officials are open to and active listeners of a public sphere, agency discretion can guide officials towards public-spirited rather than narrowly interested decisions."[145] By circulating their discourse, citizens were able to intervene in a regulatory process that intimately affected the technology they used every day—thus illustrating the feedback loop between law, technology, and discourse. Thus, while vernacular legal expertise was not as present in the net neutrality as in similar rulemaking processes, what was most present was a massive show of public opinion, and the public amplification of arguments (and their underlying topoi) presented by empowered advocates and agenda-setters in the net neutrality discussion—all of which demonstrated the effects that discourse can have on law and technology.

[145] Gangadharan 337.

Setting the stage for grassroots support

The net neutrality debate is simultaneously a great victory in the fight for digital rights, but also a relatively straightforward example of a democratic rulemaking process. While the SOPA/PIPA fight managed to, in a short time frame, elevate an obscure law into the public sphere, net neutrality had a much slower ascent into the spotlight, unfolding over a period of years as the legal and regulatory landscape evolved. However, the issues are more than comparable in terms of how much public support they received—in each case, advocates and everyday individuals made an exceptionally strong showing, and the 3.7 million public comments from both rounds of the FCC's call for comments will remain an impressive figure in rulemakings to come.

While in the end a fairly orderly rulemaking process, the net neutrality debate as it unfolded in the years leading up to the 2015 decision shows how the feedback loop between law, technology, and discourse worked in practice. The legal history of net neutrality involved the continuous deregulation of broadband service providers, while simultaneously technology developed that allowed ISPs to filter, throttle, and block content. Furthermore, as the internet became more important to everyday life, net neutrality became more of a priority—especially after concrete examples of throttling such as the conflict between Comcast and Netflix in 2014 illustrated the consequences of weak net neutrality rules. As a result of these instances as well as prolonged and concerted efforts by digital rights NGOs and U.S. legislators like Ron Wyden, who circulated discourse about the importance of the open internet (an argument that tied net neutrality to notions of openness and freedom of speech, many of which harkened back to the early internet), the public took up the mantle of net neutrality with fervor. The participation in the FCC's call for public comments coupled with the subsequent decision on the part of the FCC

to classify broadband internet providers as common carriers is an example of the successful functioning of the feedback loop between law, technology, and discourse.

Net neutrality is a glimpse into the values held dear by digital rights advocates, and also shows how groups and individuals occupying various sides of the debate as well as holding various levels of power make their case. NGOs like the Electronic Frontier Foundation and the Free Press helped, through their advocacy, to transform net neutrality from an obscure technological principle into a digital rights issue, and the impassioned "citizens of the internet" who felt their rights being impinged by the ISPs that they relied on for internet service. The net neutrality debate also saw corporate advocacy and a clash of privatized governance, as companies like Netflix and Google stood up against paid prioritization and throttling (which was a show of governance on the part of ISPs). In these ways, net neutrality is an introduction to the concerns and tensions of digital rights advocacy. The most primary of these concerns is a belief that the internet should be generally free and unimpeded by forces both corporate and governmental, but with an uneasy acceptance of the regulation that becomes necessary when internet access is a market and corporate-owned platforms serve as gateways to information access and innovation.

This tension has its root in the birth of the internet and the cyber-utopian thinkers of the early 90s, and carries through to the present day internet ecosystem, where the majority of internet users enter uneasy partnerships with corporations and proprietary technologies every time we browse the internet, use third-party apps, post on social media, or build our personal websites. As I will illustrate in subsequent chapters, this uneasy compromise has led to both legal and ideological dissonance across a variety of digital rights issues. In the chapter that follows, I will examine the Digital Millennium Copyright Act (DMCA) rulemaking, which pits citizens

against content rights holders every three years as citizens and NGOs argue for why particular circumventions of copyright are legal and essential.

Chapter 3

Who Makes the Rules Around Here? Vernacular Participation in the DMCA Rulemaking

In October of 2015, I attended an Electronic Frontier Foundation "Speakeasy" event at a bar in downtown San Francisco. These gatherings often occur around notable events and provide a chance for EFF members to mingle and to celebrate the EFF's recent accomplishments. The crowd was jovial, with members making introductions and sharing stories about how long they had been members of the EFF, and EFF employees circulated getting to know their supporters. At a table in the corner, submissions gathered in a game of copyright trivia.[146] After all the guests had arrived and the evening was in full swing, an activist from the EFF made a statement on the most recent DMCA Section 1201 rulemaking, the triennial process in which the U.S. Copyright Office accepts submissions from the public requesting exemptions to the anti-circumvention provision of the Digital Millennium Copyright Act, which prohibits the "breaking" of digital rights management (DRM, or the "locks" on digital content that prevent unauthorized access and reproduction). The 2015 rulemaking had a number of notable successes, including renewing and expanding previous exemptions for breaking DRM on audiovisual media for the purposes of education and critique, and most notably the exemption that allowed users to circumvent DRM on the software in cars for security research and repairs. In conversation with one of the EFF activists later in the evening, I asked what the EFF's strategies had been during the 2015 rulemaking. He responded that the EFF has become "good at getting exemptions

[146] I was able to guess all of the correct answers to the copyright trivia quiz and won an EFF baseball cap, which has thus far been my only material gain as a result of digital rights research.

passed"—they have been a prominent voice in rulemakings for years, and as such have learned how to tailor their requests in such a manner that the Copyright Office will be likely to grant the exemption.

That evening demonstrated that while the DMCA rulemaking is an open process, there are significant barriers to entry that it has taken advocates time to understand. Beyond the role of NGOs like the EFF, the DMCA rulemaking is an unusual process due to the high level of everyday involvement that it courts, and for the ways in which vernacular conceptions of law and intellectual property are manifested in the conversations and public comments surrounding the rulemaking. Anyone can submit a request for exemption, and groups are encouraged to debate and submit counterarguments throughout the process, which involves multiple rounds of public comment and also public hearings. Thus, the DMCA rulemaking is ripe for inquiry into the way in which creators and tinkerers advocate for changes to copyright law. Copyright has become newly visible in the digital age due to disruptive technologies like smartphones, streaming video, and services like now-defunct Napster, all of which enable users to access information in large volumes and in new ways.[147] Copyright manifests not just in audiovisual media but also in devices like mobile phones, automobiles, and even coffee makers.[148] As such, everyday people frequently find themselves at odds with copyright law, sometimes without even knowing it. When these intellectual property issues become especially problematic, everyday people may find themselves becoming de facto copyright reform advocates—and the DMCA rulemaking is a primary venue for this advocacy.

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[147] Bill D. Herman and Oscar H. Gandy, Jr., "Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings," *Cardozo Arts & Entertainment* 24 (2006): 123.

[148] Brian Barrett, "Keurig's My K-Cup Retreat Shows We Can Beat DRM," *Wired*, May 8, 2015. https://www.wired.com/2015/05/keurig-k-cup-drm.

In this chapter, I will analyze two representative examples of groups who succeeded in having exemptions passed in the DMCA Section 1201 rulemaking. First, remix video creators in 2012 and 2015, and second, automobile mechanics and farmers in 2015. In this analysis, I look at the DMCA rulemaking as a venue for the development and exhibition of vernacular legal expertise. This is important because vernacular legal expertise has the potential to allow everyday individual to intervene in law through discourse. In the case of the DMCA rulemaking I find that, while vernacular legal expertise is prominent, this expertise requires translation and compilation by groups like the EFF who are "good at" passing exemptions—which often depends on the reframing of vernacular reimaginings of the law into legalistic language, strengthening the link between everyday discourse and law in the feedback loop between law, technology, and discourse. Nevertheless, the topoi exhibited in the vernacular discourse surrounding particular exemptions filters up into the arguments made by empowered advocates, and is often cited by the Register of Copyrights in their final ruling. In this process, we can see both how vernacular legal expertise manifests among communities, and also how vernacular arguments can be translated into institutional frames with the help of technologically and legally literate advocates.

In what follows, I will first present a brief history of the DMCA and the section 1201 rulemaking, which has been held every three years since 2003. Second, I will examine the role of the digital citizen and their ability to intervene discursively in intellectual property law through vernacular legal expertise. Third, I will present two representative case studies. The first of these is the exemption for remix video, passed first in 2012 and subsequently renewed in 2015. In this case, the EFF took it upon themselves to interview several remixers and compile their arguments into a legalistic framework that was more suited to the DMCA proceedings. The second case

study is the 2015 rulemaking, which brought together automobile tinkerers and members of the agricultural community to argue for an exemption for the jailbreaking of automobile software. In this case, the rulemaking process revealed a tension between the definition of property as defined by the technology companies distributing vehicles and the individuals purchasing and tinkering with these vehicles. This tension between the meaning of property and ownership was also tied, in the comments, to a complicated vision of digital citizenship. I conclude that the DMCA rulemaking is a space for vernacular reimagining of copyright law, but that these reimaginings succeed in intervening in the feedback loop between law, technology, and discourse largely because of the translation of vernacular arguments by empowered advocates.

The Digital Millennium Copyright Act and the section 1201 rulemaking

The Digital Millennium Copyright Act—the primary piece of legislation currently governing copyright on digital and online content—was passed in 1998 under the Clinton administration as an answer to many of the intellectual property challenges posed by burgeoning digital technologies. The law followed the World Intellectual Property Organization (WIPO) meeting in 1996, during which a treaty was signed where several countries agreed to provide legal protection against "circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention."[149] The DMCA, introduced by Senator Orrin Hatch, not only prohibited circumvention of DRM—the encoding that prevents unauthorized access to digital content—but

[149] WIPO Copyright Treaty, art. 11, Dec. 20 1996, http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

also prohibited the distribution of circumventing technologies. As Hector Postigo notes, this was a contentious process between content industry, library, and technology stakeholders, but very few organizations who participated in the birth of the DMCA were representing consumers.[150] During the debates over the bill, the Commerce Commission expressed concerns that the DMCA would not accommodate fair use, the four factor test by which use of copyrighted work may be permissible. The test for fair use assesses the purpose and character of the use, the nature of the original work, the amount of the portion taken, and the effect on the market. However, due to objections from copyright industry representatives, the words "fair use" do not appear in the DMCA. Rather, it was decided that the U.S. Copyright Office would hold triennial rulemakings in order to identify potential negative impacts of the circumvention ban on consumers, and assess classes of copyrighted works where circumvention could be allowed.[151] The part of the DMCA that laid out the plan for these rulemakings was Section 1201, hence why the rulemaking is referred to as the 1201 rulemaking, the DMCA rulemaking, or the DMCA section 1201 rulemaking interchangeably.

Federal rulemakings occur in nearly every agency in the U.S. government and serve as a way to bring expert knowledge from interested parties to bear on regulatory issues. Generally speaking, rulemakings serve as a way to refine existing laws and create more detailed regulations. This occurs through analysis on the part of the agency, but also involves soliciting

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[150] Hector Postigo, *The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright* (Cambridge: The MIT Press, 2012): 176.

[151] Mark Gray, "New Rules for a New Decade: Improving the Copyright Office's Anti-Circumvention Rulemakings," *Berkeley Technology Law Journal* 29, no.1 (2014): 763.

input from experts and members of the public.[152] The guidelines for the 1201 rulemaking are fairly brief, noting that the purpose of the rulemaking is to assess whether users of copyrighted work are likely to be adversely affected by the circumvention prohibition, and laying out a set of guidelines for the Copyright Office to weigh requests for exemptions. According to section 1201, the Copyright Office is to assess the following things during their triennial rulemaking:

> (i) the availability for use of copyrighted works;
> (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
> (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
> (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
> (v) such other factors as the Librarian considers appropriate[153]

While some of these guidelines bear a resemblance to the criteria for fair use, the term fair use is not included in the DMCA.

As the general nature of these guidelines might suggest, the rulemaking does not always progress in a standard way. There have been five rulemakings since the DMCA was passed (beginning in 2002) and, as scholars and journalists have noted, the rulemaking process has changed over time, notably with regard to the increase in total exemptions awarded each year.[154] During the earliest 1201 rulemakings, the Copyright Office was extremely narrow in their interpretation of a class of works as well as a standard of harm. For example, in the first

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[152] Maeve P. Carey, "The Federal Rulemaking Process: An Overview," *Congressional Research Service*, June 17 2013.

[153] 28. 17 U.S.C. § 1201(a)(1)(C) (2012).

[154] Sarah Jeong, "Why DMCA Rulemaking Is an Unsustainable Garbage Train," *Vice Motherboard*, November 2 2015, https://motherboard.vice.com/en_us/article/why-dmca-rulemaking-is-an-unsustainable-garbage-train.

rulemaking, the Register denied a majority of requests for exemption on the basis that they did not show "substantial adverse impact" as a result of anticircumvention rules. However, the notion of "substantial" adverse impact does not appear in the DMCA itself, so this was largely an interpretive decision on the part of the Register regarding the severity of the impact.[155] Similarly, early rulemakings adhered to a very narrow notion of a class of works, with the Register claiming that defining classes based on use or function as opposed to strict technical criteria was outside the scope of the law. For instance, the 2003 rulemaking saw the Register deny exemption requests for "legitimate research projects," while in 2006 the Register ruled that circumventing DRM was allowable for film professors—both use-based exemptions.[156]

While much has been written about the DMCA itself, the 1201 rulemaking process has not been widely studied. This is due in part to the fact that it is somewhat anomalous compared to other rulemakings. The DMCA rulemaking receives a significant amount of comments written by everyday people seeking exemptions, whereas other rulemakings may be dominated by industry groups, expert submissions, or form letters (as the rulemaking on net neutrality was, with form letters comprising 60% of the total submissions). In this sense, the DMCA rulemaking exhibits significantly greater amounts of vernacular participation (and thus vernacular legal expertise) than other rulemaking processes. For this reason, some scholars studying rulemaking processes exclude the DMCA from their studies.[157] However, others such as Gabriel Michael

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[155] Gray 765.

[156] Marybeth Peters, Register of Copyrights, "Recommendation of the Register of Copyrights in RM 2005-11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," November 17 2006, http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

[157] Jason Webb Yackee and Susan Webb Yackee, "A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy," *The Journal of Politics* 68, no. 1 (2006): 128-139.

argue that it is this precisely why the DMCA rulemaking should be studied more closely—it represents a salient issue for everyday people.[158] Much like the net neutrality rulemaking, the DMCA is a site at which the feedback loop between law, technology, and discourse becomes especially clear—technological constraints on copyrighted content (in the form of DRM) prevent citizens from making lawful use of copyrighted content, even in cases where that use is a fair one. Thus, the rulemaking provides space for discursive intervention into these areas of friction between law and technology, and because each exemption is specifically tailored to a particular type of content or use, citizens are able to exert a more measurable impact than on broader-sweeping issues like net neutrality.

While it is a venue for vernacular invention, the DMCA rulemaking has been criticized for being simultaneously onerous and inconsistent. As Herman and Gandy argue, the rulemaking is best conceptualized as "a vehicle for reducing the role of the courts—and of fair use—in the digital millennium."[159] To achieve this end, the DMCA rulemaking gives an unusual amount of power to the Copyright Office. Herman and Gandy further argue that this delegation of authority leads to "credit claiming and blame shirking."[160] Koberidze notes that other common complaints about the rulemaking are that it is unduly burdensome and repetitive, in that new requests for exemption must be submitted every three years (even for exemptions that were previously awarded).[161] Furthermore, the rulemaking is a lengthy and complex process—this heightens the

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[158] Gabriel J. Michael, "Politics and Rulemaking at the Copyright Office," *Journal of Information Technology and Politics* 11, no. 1 (2014).

[159] Herman and Gandy 124.

[160] Ibid 147.

[161] Maryna Koberidze, "The DMCA Rulemaking Mechanism: Fail or Safe?" *Washington Journal of Law, Technology & Arts* 11, no. 3 (2015): 215.

burden on any one individual or group and also raises the barrier to entry for everyday people seeking exemptions, even for exemptions that are clearly noninfringing to outside observers.[162] Thus, while the DMCA rulemaking is a productive site at which to observe vernacular intervention, it is not necessarily a smooth or straightforward process, and thus everyday individuals often require assistance and framing from NGOs and other empowered actors to make sure their statements and participation have the most impact.

To add an additional layer of complication to the rulemaking, there is an ongoing controversy over whether or not the Copyright Office takes comments made by everyday individuals into account. For instance, Nina Mendelson found in her analysis of the preambles of several major rulemaking decisions that, while they all acknowledged the receipt of public comments, there was little evidence that the content of these comments had been taken into account.[163] Other scholars argue that the types of participation that manifest in rulemaking processes are not always the most productive, noting that public comments in a rulemaking often express values and preferences rather than well-reasoned policy. This was also the case in the net neutrality comments, where many commenters expressed opinions rather than legal arguments.[164] Yet, the openness of rulemakings can inspire citizens to "invest the time and cognitive resources required to form the higher information/higher thought preferences that

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[162] Gray 774.

[163] Nina A. Mendelson, "Rulemaking, Democracy, and Torrents of E-Mail," *George Washington Law Review* 79 (2011): 1343.

[164] Cynthia R. Farina, Mary Newhart, Josiah Heidt, and CeRI, "Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts," *Michigan Journal of Environmental and Administrative Law* 2, no. 1 (2012): 135.

enable their engagement in reasoned decision making."[165] In the case of the DMCA rulemaking, many individuals wrote in because they had a vested interest in the matter at hand. Importantly, the Copyright Office does frequently cite comments and statements from public hearings in their final rule, making it possible to measure the influence of individuals' participation in the rulemaking. As the following sections will demonstrate, the DMCA rulemaking became a venue for citizens to argue for their rights on the basis of vernacular legal expertise, and in so doing to shift the legal landscape and further new understandings of digital rights.

The power of citizens in the DMCA rulemaking

Isin and Ruppert argue that digital citizenship is established through making rights claims.[166] In the DMCA rulemaking, we see a particular vision of citizenship that is both distinctly American as well as distinctly digital. When NGOs such as the Electronic Frontier Foundation (EFF) form coalitions with grassroots actors, legal arguments can be combined with vernacular narratives about the specific impacts of the DMCA. What results is a distillation process whereby the fragmentation of online discourse can be both filtered and clarified into coherent requests for exemption, while still maintaining a vernacular character. This process solidifies "legal tinkering"—the process by which individuals construct new legal meanings—and helps citizens to intervene through discourse in the feedback loop between law, discourse, and technology.[167] In the case of the DMCA rulemaking, many of the exemptions sought by both

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[165] Ibid 136.

[166] Engin Isin and Evelyn Ruppert, *Being Digital Citizens* (London: Rowman & Littlefield, 2015), 9.

[167] Gabriella Coleman, "CODE IS SPEECH: Legal Tinkering. Expertise, and Protest among Free and Open Source Software Developers," *Cultural Anthropology* 24, no. 3 (2009): 421.

NGOs and groups of everyday people without official representation relate to the ways in which copyrighted technology is used in everyday life. Often, those commenting find themselves on the wrong side of copyright law not because they set out to circumvent digital rights management technologies, but because they attempted to fix a broken device, streamline a lesson in their classroom, or use copyrighted work in a self-expressive work—and in so doing confronted copyright law's material instantiation in the form of DRM on their media or devices. DRM has been broadly criticized for granting rights holders absolute control and for a lack of transparency and flexibility for the average user who may want to pursue a legitimate and noninfringing fair use.[168] While legal code does to some extent accommodate these uses, the real-life examples are often more complicated than the law might suggest. Thus, the vernacular invention that happens in public comment periods like the one enabled by the DMCA is a rich resource through which we can understand how everyday people understand intellectual property and how this understanding can, over time, shape the norms of intellectual property and eventually filter upwards into legal code.

While the DMCA rulemaking is an institutionalized process, it provides a venue for those who have developed vernacular legal expertise in the course of their day-to-day lives to intervene tactically in a system that often operates in a top-down fashion. Tactics, as "an art of the weak," have no stable base.[169] Thus, they are forever in operation behind enemy lines, and inextricably bound to the exigence of the present moment. Tactics gain validity in "circumstances which the

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[168] Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: The MIT Press, 2007).

[169] Michel De Certeau, *The Practice of Everyday Life*, trans. Steven F. Rendall (Berkeley: University of California Press, 1984): 37.

precise instant of an of an intervention transforms into a favorable situation, to the rapidity of the movements that change the organization of a space, to the relations among successive moments in an action."[170] Tactics are at play in two important ways in relation to the DMCA. First, the act of breaking DRM in order to create fair use works or to make repairs is a tactical maneuver—it is outside the institutional rules put in place by rights holders. Second, the DMCA rulemaking is in fact one of the most direct avenues for everyday people to have a material effect on the law that governs them, and their discourse when given this opportunity reveals important foundations of digital rights.

While the DMCA rulemaking may provide inroads for everyday people to shape law, some have noted that the DMCA is more valuable for setting norms rather than changing law, due to the fact that exemptions expire every three years and must be re-argued in order to be renewed. [171] However, what is also important to keep in mind is that the legal norms produced through the DMCA persist throughout time, and that these new normative views of intellectual property, once amplified into the form of exemptions, set the stage for future rulemakings to move in a more progressive direction. Robert Asen writes that "policies express a nation's values, principles and priorities, hopes and ideals, and beliefs about citizens' responsibilities and obligations to each other."[172] Given the feedback loop between law, technology, and discourse which reveals to ordinary citizens the flows of power that govern their online lives, and provides inroads to intervene in this governance, it is important to consider that the vernacular reformations of law circulated among localized communities can impact the legal landscape,

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[170] De Certeau 38.
[171] Gray 765.

[172] Robert Asen, "Reflections on the Role of Rhetoric in Public Policy," *Rhetoric & Public Affairs* 13, no. 1 (2010): 127.

even if these vernacular formations are not translated officially into legislation. The DMCA rulemaking is an example of this, for citizen-shaped legal norms persist from rulemaking to rulemaking, and grow as vernacular communities encounter technology and law in new and different ways. Everyday encounters with law often involve the depiction of law as "a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals."[173] Many of the citizens who eventually found themselves drafting comments to the Copyright Office describe everyday encounters with law where they have been forced to work around particular strictures—using a camcorder to record the image playing on a TV screen, or relying solely on vehicles without computers due to DRM, or, in many cases, knowingly violating copyright law because there is no other way to accomplish their desired task.

Within all of these encounters with the law, through tactical intervention and the development of legal vernaculars, citizens lay the groundwork for reformulations of legal code. As the next chapter on non-consensual pornography will illustrate, citizens must often invent legal workarounds for situations for which there is not yet clear-cut legal remedy. Given the exigence of the DMCA section 1201 rulemaking, those with vernacular legal expertise have the chance to intervene into the law. The rulemaking is quite situated in time—with public comments taking place over a period of months, with specific deadlines and procedures, and with the effects of a given exemption lasting only three years. Thus, the rulemaking represents a point at which everyday individuals who engage in tactical resistance against the dominant intellectual property regime in their day-to-day lives can harness the power of their vernacular legal

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[173] Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: The University of Chicago, 1998), 28.

expertise in order to translate their wants and values upwards to the level of the law. Furthermore, the rulemaking serves to assert the commenters on a particular issue as members of a recursive public—a public that is "vitally concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means of its own existence as a public."[174] When groups like remixers, farmers, or vehicle tinkerers combine forces to collectively envision new legal futures that suit their interests, their expertise can be instantiated in more formal processes like the rulemaking, and, through the feedback loop between law, technology, and discourse, can affect law itself.

Remixers, vidders, and the 2012 and 2015 DMCA rulemakings

In 2012, the Electronic Frontier Foundation submitted an extensive request for an exemption to cover circumvention of DRM on "audiovisual works made available via DVDs, Blu-ray discs, and online distribution systems … where circumvention is undertaken for the sole purpose of extracting clips for inclusion in primarily noncommercial videos."[175] This request sought to expand exemptions from 2009 for noncommercial uses of copyrighted work, and specifically highlighted remix video creators as those adversely affected by DRM, with over 100 pages of appendices full of explanations of different types of remix. Notably, this appendix also contained several interviews with remixers (who create political remix videos from institutional sources) as well as vidders (who create videos that speak to particular fan communities for television shows and movies) and scholars who study remix and new media. The exemption was

[174] Christopher Kelty, *Two Bits* (Durham: Duke University Press, 2008), 3.

[175] "Comments of the Electronic Frontier foundation and Organization for Transformative Works," Docket No. 2014-07 (2014): 1.

granted by the Copyright Office later in 2012, and renewed again in 2015, when the EFF submitted a new request for exemption that also included many of the same materials from the 2012 request.

While the remix exemption bore a passing resemblance to previous exemptions for educational purposes and documentary filmmakers, a particularly salient aspect of this particular exemption in 2012 was the building of a coalition between the EFF, an NGO with a long history of wading into intellectual property battles online, and video remixers who in many cases had become de facto copyright reform activists due to the prevalence of DMCA takedowns in their communities and the degree to which they ran up against copyright law in the process of making their videos. The result was an exemption that was grounded not solely in the EFF's claims, but in the vernacular discourse of a community adversely impacted by anti-circumvention rules. The remixers' discourse consisted of rights-based arguments about free expression and the ownership of cultural artifacts. What the compiled comments show is a coalition between remixers and the EFF in which the EFF translates and amplifies the vernacular legal constructions of the remixers, pulling out threads of argument from the remixers' interviews and weaving them into a densely cited argument. While remixers may possess vernacular legal expertise, they do not necessarily have the access to the rulemaking process afforded to the EFF, an organization composed of lawyers and technology experts. In this sense, the EFF helps remixers' discourse become iterable to those with legal expertise.

In the appendices to the EFF's document, video remixers of all stripes express the need for high-quality footage that can so often only be obtained through circumventing DRM on DVDs, Blu-rays, and high quality digital streaming services. However, beyond making their case in interviews, they also outline the day-to-day processes of their particular online communities,

and the values and principles contained within their actions and creations. As remixer Eli Horwatt notes when asked if his fellow remixers are amateurs (rather than professionals trained in video production), he says "Amateur, latin for 'lover,' refers to someone who does something for no other reason than for the love of doing it. In this sense, the word 'amateur' represents the activities of PRV makers. But insofar as amateur implies dilettantism, it is inappropriate."[176] Horwatt goes on to note that PRV makers are in fact gifted video editors, but that they are largely self-taught and see remix creation as a sort of labor of love. This points to the vernacular sensibilities at the heart of remix creation. Video remixes often maintain and speak to vernacular communities who frequently find themselves outside of mainstream media narratives. For example, remixes like Elisa Kreisinger's "Queer Carrie" queer heteronormative media, telling a vernacular story while simultaneously appropriating and subverting mainstream media images.[177] Kreisinger was interviewed for the EFF's comments as well, and noted the importance of political remix video in strengthening marginalized communities and promoting free speech.[178] Thus, while not all remixers are necessarily part of the same everyday community, most have a sense of the common bond that unites those creating video as being somewhat outside the establishment.

Asked about their familiarity with the DMCA, most remixers noted that they and their friends only became familiar with it out of necessity. As remixer Jonathan McIntosh notes in his EFF interview, remixers have formed "a small community" around remixing, and that this

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[176] Ibid 58.

[177] Olivia Conti, "Political Remix Video as a Vernacular Discourse," in *Routledge Companion to Remix* Studies, eds. Eduardo Navas, Owen Gallagher, and xtine burrough (New York: Routledge, 2014) 349.

[178] "Comments of the EFF and OTW," 57.

community, while primarily interested in "creating a video to add to the larger public debate on important or contentious topics of the day" nonetheless comes together around DMCA reform due to the prevalence of DMCA takedown notices and other forms of constraint encountered as part of remixing.[179] These issues come to the fore when remixers get takedown notices, or "when (very often) [YouTube] blocks them from uploading their vids in the first place. The ability to challenge those decisions would have the most direct, practical impact on how vidders operate on a day to day basis."[180] This points to the challenge that remixers face when dealing with fair use while also sharing their work online in places like YouTube. Title II, Section 512 of the DMCA states that certain websites may qualify as "safe harbors" for copyright infringement if users are responsible for uploading the majority of the content to the site. These sites are insulated from copyright liability as long as they cooperate to some extent with rights holders.[181] In order to cooperate with Section 512 and rights holders, YouTube added the Content ID system in 2007, which checks uploads against an archive of copyrighted footage, allowing rights holders to block, track, or monetize uses of their content.[182] Thus, it's fairly common for remixes and other transformative works to get flagged as a violation, especially they incorporate popular institutional footage, despite the fact that the work would pass the legal test for fair use. This type of everyday confrontation with intellectual property law (and the injustice of an automated system that blocks fair use videos) has led many remixers to an unexpected and unintended

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[179] Ibid., 81.

[180] Ibid., 55.

[181] Brette G. Meyers, "Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content," *Cardozo Arts & Entertainment* 26 (2009): 939.

[182] "How Content ID Works—YouTube Help" *Google Help*, https://support.google.com/youtube/answer/2797370?hl=en.

familiarity with copyright law.

In framing this aspect of the remixers' work, the EFF notes that while remixers and vidders may be, in some cases, illegally circumventing DRM (such as circumventing a Blu-ray prior to the passage of a Blu-ray specific exemption, for instance), they have their own code of ethics about copyrighted content, with one vidder noting that she always purchases copies of the media that she remixes.[183] Thus, the EFF claims that while remixers may be aware of fair use because it is a commonly discussed legal standard with significant resources devoted to helping creators determine whether or not their works are fair, these same remixers may not be aware of Section 1201, the anticircumvention rule.[184] They claim that 1201 represents a "set of perverse incentives and traps for the unwary."[185] Here, the EFF takes the remixers' arguments that they become familiar with the law largely out of necessity and translates it into their claim that Section 1201 is not widely publicized enough for remixers and other content creators to be aware of it, and thus the many ways in which they may accidentally break the law.

Content ID also illustrates an area of tension between law and technology, for many of the difficulties faced by remixers are the result of technological measures taken to ultimately produce a lawful fair use. For instance, while a remixer's use of copyrighted content may be fair, they may find themselves in violation of the DMCA due to their circumvention of DRM on DVDs and other sources that they need in order to get the highest quality footage. As Eli Horwatt noted in his interview, "remixers are protected by the right to make derivative transformative

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[183] "Comments of the EFF and OTW," 8.

[184] Ibid.

[185] Ibid., 10.

works and on the other hand are legally rebuked for doing so based on the technological requirements involved." Horwatt calls for a DMCA exemption for remixing as the best possible remedy for this contradiction.[186] Those rights holders objecting to the exemption said that remixers did not need to circumvent DRM in order to obtain footage, rather they could pay to license particular clips, use screen-casting software to record videos playing on their computer, or use a camcorder and a TV to tape footage off of the screen. Many of the interviews with remixers and vidders took down these suggested solutions as unrealistic. One vidder, Akemi42, noted that to use the methods suggested by copyright holders would be cost-prohibitive, requiring the purchase of a flat-screen TV, a digital camcorder, or expensive screencasting software, whereas the software required for ripping DVDs (and thus breaking the DRM on them) is freely available online.[187]

Beyond the prohibitive expense of these methods, many remixers noted the significant degradation in quality that happens when screencasting or recording a screen with a camcorder. Says one vidder who has made videos from "flicker copies" (or taped screens): "They seem to be about the adventures of two migraine-inducing smudges, one of whom is slightly taller than the other."[188] Jonathan McIntosh also noted that the ability to access high-quality footage online (from streaming services, for example) is essential for remixers who wish to create timely remixes that respond to current events in an immediate way. This expresses the PRV creator's goal of engaging in cultural critique and dialogue—McIntosh expresses a concern that if remixers need to wait to license clips or wait for particular sources to be published on DVDs

[186] Ibid., 59.
[187] Ibid., 118.

[188] Ibid., 120.

they will miss the "window of public debate."[189] The EFF takes up this claim that access to high quality video in a timely fashion is important, and translates it into expert language suited for a legal audience. In their argument, they first introduce the claim that remixers need high quality video, but then frame their argument as one about the role of law and art relative to one another. Citing a 1903 case, *Bleistein v. Donaldson Lithographing*, in which the judge declared that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits," the EFF cautions the Copyright Office against making remixers defend their artistic choices.[190] In this way, they take the many comments made by remixers from an artistic and cultural perspective and translate these arguments into a form more iterable to regulators and lawmakers, grounding them in legal precedent.

While not all remixers necessarily consider themselves part of the same community—as evidenced by the differentiation between vidders (who make videos to speak to the fandoms of particular shows or movies) and political video remixers (who remix primarily to make political statements), for instance—what the EFF's collection of interviews shows is that they all share a set of common experiences, commitments, and values. The majority of remixers have some experience with intellectual property law through receiving and contesting DMCA takedowns, as Gianduja Kiss mentioned in their interview. Furthermore, remixers are advocates for fair use—they feel strongly that they should be able to use copyrighted content in small amounts, noncommercially, for the purposes of critique, as outlined in the four factors affecting fair use. Yet, all the remixers interviewed by the EFF (and many more who I spoke with during my

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[189] Ibid., 80.
[190] *Bleistein vs. Donaldson Lithographing*, 188 U.S. 239 (1903).

previous research on remix) found themselves constrained by the prohibition on circumvention. While the final products that they created may have held up to a court's assessment of fair use, without a DMCA exemption they would still be labeled pirates and outlaws if they had broken the DRM on a DVD or a streaming video in order to create their work. Isin and Ruppert argue that the imaginary of citizenship that comes into being through rights claims casts the citizen as a subversive subject—this subversive subject certainly comes through in the remixers' comments.[191]

The values and priorities that the remixers expressed in their interviews have the potential to filter up into law in the form of exemptions to the DMCA Section 1201. As John Crawford Thomson has argued, individuals engaged in activities that put them at the fringes of intellectual property law engage in constructing heuristic rules that distance their activities from copyright law, which helped them participate in their activities without feeling that they were at legal risk.[192] These heuristics bear a resemblance to what I call topoi—organizing values and assumptions from which groups build their arguments. The three most prominent heuristics that Thomson found across his interview subjects (DJs, zine creators, undergraduate web design students, and startup creators) were a strong drive to create, a perception of a right to sample and borrow from copyrighted work, and a belief that making money from one's creation was the riskiest factor with regard to copyright liability. These three heuristics appear across the arguments made by remixers as well—take for instance the passionate arguments by vidders about the necessity not just of creating vids, but creating vids with the highest possible

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[191] Isin and Ruppert 24.

[192] John Crawford Thomson, *The Social Construction of Copyright* (dissertation, University of Wisconsin-Madison, 2013), 132.

production value. Vidder Jackie Vjono describes a vid that he made using low-quality footage that he attempted to color-correct by hand in Photoshop, the result of which was strong conceptually but of poor visual quality. Vjono describes this as "one of my biggest heartbreaks."[193] The notion of a right to sample is also clearly communicated across many of the interviews (and indeed across all of the rulemakings I have studied, as I will show in the following section), with a clear understanding of fair use and the ability of creators to assess whether or not their works are transformative. The noncommercial nature of this particular request for exemption rests, fundamentally, upon the notion that transformative works that creators do not profit from are more defensible from an intellectual property standpoint than commercial videos. Thus, Thomson's identified heuristics bear out not just in his sample groups, but in the DMCA rulemaking as well.

In both the 2012 and 2015 rulemakings, the Register passed and expanded the requested exemption, first to include remix videos and then, in 2015, to include the right to circumvent DRM on Blu-ray discs. In looking through the ruling and comments, it becomes clear that the remixers' interviews and the ways in which they framed their interests and priorities had an impact on the Register's decision. To begin with, the Register acknowledges that the purposes of noncommercial videos are primarily critique, commentary, and making broader societal statements.[194] Furthermore, they acknowledged that, generally speaking, the uses for copyrighted content in these cases tend to be transformative and likely to qualify as a fair use.[195] However,

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[193] "Comments of the EFF and OTW," 120.

[194] Register of Copyrights, "Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works" Docket No. 2011-7 (2012): 106.

[195] Ibid., 127.

what most sets the 2012 ruling apart from previous rulings is the assessment that high quality video is important for many noncommercial remix videos and that the methods suggested in previous rulemakings (where exemptions had not been so generous) were inadequate to allow remixers to capture such footage. The Register writes: "motion pictures are not widely and reasonably available in other formats not subject to technological protections … the record indicates that all of the most popular forms of commercial distribution of motion pictures, including DVD, Blu-ray, and online distribution services, are protected by access controls."[196] While VHS tapes were not necessarily more available in 2009, when the last rulemaking was decided, in 2012 the Copyright Office took remixers at their word that high quality footage was indeed necessary for remixes—a theme that, as previously shown, appears continuously throughout the interviews compiled by the EFF—and granted an exemption partially on the basis of this fact.

In the 2012 and 2015 rulemakings, which relied on many of the same materials (initially compiled in 2012), we can see how remixers' arguments, while they very much resembled the EFF's arguments, were rooted in different topoi than the legalistic arguments made by the EFF. Sandra Braman writes that cultural practices can echo into the letter of the law, and in the case of remixers we can clearly see a value and practice rooted in a particular subculture (creators of vids and political remixes) wending its way up the chain of legality, with the help of the Electronic Frontier Foundation, until it is instantiated in regulation.[197] The participation of the remix community is one example of a technically (though not legally) fluent community coming

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[196] Ibid., 131.

[197] Sandra Braman, *Change of State: Information, Policy, and Power* (Cambridge: The MIT Press, 2009), 23.

together to argue for exemptions. While remixers argued from the standpoint of the importance of remix to art and culture, the EFF translated these claims into arguments from legal precedent. Thus, arguments about the importance of high quality were transformed into arguments against imposing legal interpretations on art, and claims about the necessary expertise developed from remix praxis were transformed into an argument that everyday people are often unaware of the strictures of the law until they run up against its boundaries, thus making an exemption essential to prevent further accidental law-breaking. The remix exemptions, in this sense, demonstrate a community with a clear set of values and principles, but also a community that does not necessarily have the legal vocabulary or resources to defend themselves. Thus, the EFF's recruitment of remixers to interview and the subsequent translation of remixers' priorities becomes essential to passing exemptions—a task at which they have succeeded for many years.

Circumvention and citizenship in the 2015 rulemaking

In the 2015 rulemaking, one of the most contentious issues concerned the circumvention of DRM on the computers in cars and farm equipment. While the battle to circumvent DRM on mobile devices had been fought in previous rulemakings, 2015 was the first time that the software in vehicles (labeled Class 21 in the rulemaking proceedings) had come up for debate. The computers embedded in most modern cars do everything from regulating basic automobile functions like drivetrains and emissions to interfacing with global positioning systems and satellite radio. This led to an interesting rulemaking in that it brought in parties who were not present in the discourse of previous rulemakings, namely farmers and other users of large equipment from companies like John Deere. During the rulemaking, statements made by John Deere indicated that the company did not believe that consumers of their products fully owned

the software running on their equipment's on-board computer systems, stating rather that customers had an "implied license."[198] This led to advocates in favor of the exemptions whipping up grassroots support, under the refrain "John Deere says you don't own your tractor."[199] This discourse made visible the flows of power between large companies like John Deere (who, while not a "technology company" in the traditional sense, do produce technologically-enhanced equipment) and intellectual property law, wherein companies propagated interpretations of the law that did not align with popular conceptions of intellectual property rights.

Statements like those made by John Deere revealed the interaction between technology and law for a group who had not participated in previous rulemakings. The conversation around jailbreaking automobile and equipment computers was the most widely-publicized of any during the 2015 rulemaking, and had many unique discursive features. While themes of freedom persisted in the Class 21 comments in much the same manner that they appeared both in the remix comments and in other calls for public comment, those arguing for automobile exemptions argued largely from a foundation of individual rights and property ownership that was connected either to U.S. citizenship or membership in smaller vernacular collectives such as the agricultural community. The topoi of individualism coalesced with topoi of tinkering as a liberatory activity in a way that harkened back to the roots of early computer culture.

Many writing individual comments frame themselves as good citizens, and they see the limitation of their abilities to circumvent DRM on devices that they own to be fundamentally in violation of their rights as both U.S. citizens and property-owners. Isin and Ruppert, who argue

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[198] Darin Bartholomew, "Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201," *U.S. Copyright Office*, 2.

[199] Dan Nosowitz, "Farmers Demand Right to Repair," *Modern Farmer*, July 18, 2016, http://modernfarmer.com/2016/07/right-to-repair.

that digital citizens are defined by making rights claims, note that the milieu for this performance is cyberspace. Unlike other scholars who consider cyberspace to be separate from "real space," the authors define cyberspace as "a space of relations between and among bodies acting through the internet," a definition that they repeat frequently throughout the subsequent text.[200] The DMCA rulemaking reveals digital citizenship as an asynchronous, online process, one that corresponds to the intellectual property law of the United States while also playing into the larger global intellectual property regime, including numerous global treaties and the interests of the multinational corporations that hold many of the copyrights in question. As the remixers' comments illustrated, intellectual property online is a challenge to certain types of digital citizenship—participation in creative communities, for instance. This same refrain appears throughout the DMCA rulemaking, as commenters evoke U.S. citizenship alongside membership in different communities—all of which chafe at the boundaries of restrictive anticircumvention laws. Many of these arguments, as I will demonstrate, evoke the topos of U.S. citizenship as a stand-in for liberty and free speech, as well as the underlying belief that these free and open conditions are essentially linked to innovation, progress, and financial benefit for everyday individuals.

Notably, many of the Class 21 comments evoke a particularly American conception of property rights. Several make note of the U.S. Constitution and Bill of Rights. One exemplary comment in this vein invokes the right to own and use property as one sees fit, concluding with the sentiment that "this is a liberty that should be self evident in our democratic republic whose

[200] Isin and Ruppert, 28.

supreme law is the U.S. Constitution."[201] Another comment invokes the Bill of Rights, reading "having options is what has made America great. Freedom of Speech, Gathering, the Press, etc. Innovation occurs because the option existed to pursue it."[202] Similarly, a number of comments invoke the founding fathers, specifically famous inventor Benjamin Franklin. One such comment reads "it is un-American to prevent us from tinkering. What do you think Ben Franklin would say?"[203] Another commenter expresses his passion for self-education, noting that thinkers like Ben Franklin and Thomas Edison were cut from a similar cloth—and that overly restrictive laws preventing tinkering will irreparably harm innovation by limiting future autodidacts and tinkerers.[204] Others evoke the notion of America as a monolithic entity, symbolizing a sort of general freedom and consumer choice—one that business owners should respect in order to retain customers. One such comment reads: "This is AMERICA!!!! We pay you for out [sic] products as a good business owner you should allow your customers to be happy and let us fix and mod our products as we please."[205]

Across all of these comments, America is invoked as a stand-in for liberty, but also for a robust marketplace made possible by innovation and consumer choice. The notion of tinkering as a liberatory activity has a long history in the United States, and through the work of technologists like Stewart Brand has worked its way well into computer culture. For example, Brand's

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[201] "Combined Comments (298) Received through Digital Right to Repair Website," *U.S. Copyright Office*, retrieved from https://copyright.gov/1201/2015/comments-020615. 212.

[202] Ibid., 37.

[203] Ibid., 53.

[204] "Combined Comments (1501) Received through Digital Right to Repair Website, *U.S. Copyright Office*, retrieved from https://copyright.gov/1201/2015/comments-020615. 529-530.

[205] Ibid., 819

introduction to the *Whole Earth Catalog*, an early counterculture publication that preached the importance of self-education and do-it-yourself philosophy, touts the ability of the everyday person "conduct his own education, find his own inspiration, shape his own environment, and share his adventure with whoever is interested" as the primary remedy to powers exerted from above, by governments and institutions.[206] Thus, this topoi of particularly American freedom echoes across many different vectors of American society, all the way to the current focus on free and open-source technology and its attendant "legal tinkering." In the case of the 2015 rulemaking, it is also tied to notions of property and ownership, as individuals were newly aware of the power exerted by car companies over their products through intellectual property law. The notion that a company would attempt to prevent or disallow tinkering was anathema to many of the commenters, for reasons that they tied explicitly back to U.S. citizenship and tradition. In this vein, many commenters write that they feel they should be able to do whatever they like with their purchases—much in the same way that the owner of a car can change the color of the paint and swap in after-market parts and upgrades, commenters do not see any reason why the software in their vehicles and farm equipment should follow any other rules of ownership.[207]

In the 1201 rulemaking, many comments are devoted to citizens expressing the ways in which they have already come up against the boundaries of the law while trying to be compliant and law-abiding. In this sense, there is a more general sense of citizenship that suffuses the comments on the DMCA rulemaking—the belief in a general set of rights that may or may not be tied to the nation-state, but that nonetheless the commenters feel are being trampled, largely

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[206] Stewart Brand, "The Purpose of the Whole Earth Catalog," Fall 1968. http://www.wholeearth.com/issue/1010/article/196/the.purpose.of.the.whole.earth.catalog.

[207] "Combined Comments (298)" 29.

by corporations. For instance, a commenter writes that "the rights and freedoms to use lawfully obtain *[sic]* digital hardware, software, and material … foster creativity, expression, and healthy competition." Yet, they go on to note that this right is threatened by corporations trying to monopolize the market.[208] This comment underscores the vital role that circumvention plays in the ability of citizens to participate in the market via expression, innovation, and competition. While those writing may not explicitly appeal to the nation-state, they nonetheless are performing the law in an effort to gain rights—their participation in a regulatory rulemaking firmly positions them as citizens appealing to the state, and the rights that they espouse, while not always explicitly codified in U.S. law, emanate from vernacular constructions of the rights of a citizen in a digital world.

Other commenters express rights claims that are based in other types of citizenship that have higher value to them than the vision of citizenship expressed by the DMCA. For instance, a common topos used by those arguing against DRM on tractors and farm equipment appealed to the longstanding tradition of those in the agricultural community, and the value of self-sufficiency expressed through the ability to fix your own equipment. One commenter writes, "there's a long history of independence of the farming community being able to maintain and repair their equipment to continue working each day."[209] Another commenter wrote about his tractor, which was built in the 1960s and does not contain a computer—as such, he is proud to be able to fix every part of it himself. However, he expresses concern that the next time he wants to buy a piece of equipment, this may no longer be the case.[210] In these comments, the agricultural

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[208] "Combined Comments (1501)" 403.

[209] "Combined Comments (298)" 42.

[210] Ibid., 39.

community is established as a vernacular community offering alternative values of citizenship, a community with its own traditions and extrainstitutional norms. If citizenship is defined in part by making rights claims, then these commenters assert their right to access and tinker with all parts of their equipment as essential to their citizenship in agricultural communities.

Many of the public comments also indicate that users do not believe the government will listen to everyday individuals over corporations and other moneyed interests, and that this leads to the disenfranchisement of everyday individuals. For example, one comment reads: "… it's time the U.S. administration started doing what it's consistently failed to do for decades, which is to act for the people."[211] Regarding corporations, the sentiment is similarly pessimistic. Commenters believe that companies' strict insistence on anti-circumvention is "corporate greed at the expense of the consumer" and can see little logical basis for companies to prohibit customers from circumventing DRM for the purposes of seemingly innocuous activities such as backing up media, preparing a lesson, or fixing something that is broken or outdated.[212] One commenter in the EFF's collected comments wrote that "Capitol Hill has set itself outside of the laws that govern the U.S. majority, so the folks there don't care."[213] Another commenter made a distinction between intellectual property rights and ownership, writing that "it is time the Public is no longer made a prisoner of the media companies. They own intellectual rights but not for what we buy and own."[214] This sense of consumer entrapment carries throughout many of the comments, with other comments decrying the abuse of copyright to lock consumers into paying

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[211] Ibid., 36.

[212] Ibid., 37.

[213] Ibid., 36.

[214] "Combined Comments (1501)," 930.

more money. This is especially prevalent across the comments from Digital Right to Repair, as many home tinkerers and independent mechanics were being prevented from servicing cars as DRM on automobile software prevented cars from being serviced anywhere than a licensed dealer—an often costly endeavor that prevented home tinkerers from servicing their own equipment.

In response to these requests for exemption, vehicle and equipment manufacturers objected strongly on the basis of both intellectual property and safety concerns. The most well-publicized response came from John Deere, who first objected to the broadness of the proposed class of works, Class 21, because it referred to "aftermarket personalization, modification, or other improvement."[215] John Deere was concerned that circumvention of TPMs in Class 21 would allow pirates and unethical competitors to "free-ride off the creativity" of vehicle manufacturers.[216] The most publicized part of the letter, however, is John Deere's statement that "in the absence of an express written license in conjunction with the purchase of the vehicle, the vehicle owner receives an *implied license* for the life of the vehicle to operate the vehicle, subject to any warranty limitations, disclaimers or other contractual limitations."[217] This notion that the inclusion of copyright-protected software in a vehicle somehow nullified consumer ownership through an "implied license" became an exhortation widely publicized by groups seeking public comments in support of the Class 21 Exemption. In a Wired article published during the rulemaking, Kyle Wiens argued that "we can't let John Deere destroy the very idea of

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[215] Darin Bartholomew, "Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201," *U.S. Copyright Office*, 2.

[216] Ibid.

[217] Ibid., 4-5.

ownership."[218] Indeed, many groups writing in to the Copyright Office during the rulemaking noted that companies had done little to prove that their customers were granted only a license to the embedded software in their vehicles.

The comments made by both sides on the Class 21 exemption illustrate vastly different notions of property rights. As shown by the massive number of comments from everyday individuals asserting their property rights over both their vehicles and the software that helps them run, the belief that ownership entitles a user to do whatever they like with their product abounds throughout the public comments. Property rights, as they are illustrated in the public comments during the rulemaking, are absolute and, more often than not, tied to an American rights framework. As one commenter writes, "don't mistake copyrights for property rights."[219] The statements made by companies like John Deere and General Motors, on the other hand, evince a broad conception of intellectual property that extends a corporate hand into the vehicles of consumers even when the vehicle itself is bought and paid for. The notion that users have only an "implied license" to use their vehicles is anathema to the commenters, but a very sensible logical leap for a company seeking to guard its intellectual property even as that intellectual property is distributed inside physical objects and devices. Furthermore, opponents of the exemption asserted that the software in vehicles has expressive purpose—a claim that harkens back to a famous early digital rights case, *Bernstein vs. U.S. Department of Justice*, which gave software the same legal standing as other forms of speech.[220] As Robert Asen notes, policy

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[218] Kyle Wiens, "We Can't Let John Deere Destroy the Very Idea of Ownership," *Wired*, April 21, 2015, http://www.wired.com/2015/04/dmca-ownership-john-deere.
[219] "Combined Comments (298)," 20.

[220] *Bernstein v. United States Dept. of Justice*, 192 F.3d 1308 (9th Cir. 1999).

circulates in objects as well as laws—a social security check's meaning extends far beyond the material benefits it confers to its recipient.[221] Similarly, the software in cars and farm equipment carries with it the prevailing intellectual property laws. What arises from this is a very material confrontation between everyday users and the intellectual property that governs digital objects—the notion that they did not completely own an object that was in their physical possession inspired robust protest from the commenters, and also highlighted the inconsistency of the very concept of property when it comes to vehicles and their software. This inconsistency, revealed in the back-and-forth between commenters and corporations, had a favorable impact on the ruling.

The robust comment period and public backlash against statements like John Deere's made for an impressive rulemaking from a publicity standpoint. In the Register's final rule, the exemption for Class 21 was passed—and the Register acknowledged many of the comments made during the rulemaking. In final ruling, the Copyright Office noted that "proponents assert that if the exemption were to be granted, users would be empowered to dissect and understand the functional aspects of these programs in order to create tools and applications for use on or in coordination with ECUs."[222] This summary of proponents' arguments ties in many of the topoi deployed by commenters—empowerment and the freedom to tinker, tinkering as a liberatory and educational venture, as well as the importance of tinkering for future innovation. In this way, we see that the arguments of commenters were both translated by the intermediaries who compiled their arguments, but also that the Copyright Office heard these concerns and took them into account. Importantly, the Register also acknowledged the argument that tinkering with an

[221] Asen, "Reflections on the Role of Rhetoric in Public Policy," 127
[222] Register of Copyrights, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies" Docket No. 2014-07 (2015): 220.

automobile's software was much like tinkering with the mechanical parts of the car—a modification made to a functional, rather than an expressive, part of the total machine.[223] The Register, in other words, was not persuaded by the opponents' claims that the software in vehicles was expressive, and thus on the level of speech. They also acknowledged that while opponents had focused on non-lawful modifications such as cheating emissions tests in their examples, the vast majority of purported reasons to circumvent DRM on vehicle software was to make lawful repairs and modifications.[224] In this sense, the opponents seem to have set up a straw figure of a "pirate" and "free rider" who would modify their vehicle in an unlawful way. This characterization stood in stark contrast to the citizens who wrote in about their desire to fix and tinker with their vehicles in the spirit of self-reliance and individualism.

Ultimately, the register wrote that circumvention was acceptable "except for computer programs primarily designed for the control of telematics or entertainment systems for such vehicle when circumvention is a necessary step undertaken by the authorized owner of the vehicle to allow the diagnosis, repair or lawful modification of a vehicle function."[225] The final rule also mentioned that such circumvention was allowable as long as the user was not in violation of regulations set in place by the Department of Transportation or the Environmental Protection Agency.[226] All in all, the 2015 DMCA rulemaking was a resounding success for many arguing for exemptions, but the vehicle exemption in particular stands out due to its novelty, the

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[223] Ibid., 235.
[224] Ibid., 239.

[225] Ibid.

[226] The repeated mention of environmental protection during the comments and in the Register's final rule may have been a nod to the revelations that Volkswagen had been using DRM-protected software to cheat vehicle emissions standards, which was revealed around the same time as the 2015 rulemaking.

unlikely coalitions that it brought together, as well as the unexpected tensions it highlighted between the ownership of physical objects and equipment and the ownership of computer software.

Advocates and the translation of vernacular arguments

The DMCA rulemaking provides a site for citizens to instantiate their vernacular reimaginings of the law in the form of DMCA Section 1201 exemptions, though this is often accomplished largely through coalitions with technologically and legally literate groups who help to translate vernacular arguments into legalistic ones. Just as net neutrality laid bare the feedback loop between law, discourse, and technology, the anti-circumvention clause of the DMCA reveals that technology and law do not often keep pace with one another. What sets the DMCA section 1201 rulemaking apart from larger regulatory rulemakings, however, is that it occurs on a smaller scale and offers greater inroads for intervention by smaller vernacular collectives. In the examples in this chapter I have analyzed testimonies and public comments from media studies faculty, fan vidders, political video remixers, artists, farmers, and auto mechanics. These testimonies and comments cover only a small fraction of the total exemptions that are requested at each rulemaking, and represent only a segment of the wide variety of interested parties in each rulemaking. In each of these cases, individuals have run up against the boundaries of the DMCA in trying to partake in their everyday activities—be it their livelihood or a treasured pastime. In response to these strictures, everyday people have examined the law as it relates to them and formulated arguments for particular exemptions. This is most certainly vernacular legal expertise, but it is also digital citizenship. As Isin and Ruppert argue, the digital

citizen is defined by making rights claims online.[227] In this sense, commenters in the DMCA rulemaking strongly assert themselves as digital citizens. However, given that the rulemaking process is grounded in U.S. law, the commenters also assert a sort of "dual citizenship," invoking their rights as Americans alongside their fundamental mistrust of the United States government and their faith in the forward march of digital progress. Here we see one of the many ways in which vernacular legal expertise doesn't always adhere to traditional legal logics. Yet, nonetheless, it emanates from vernacular communities who have developed, amongst themselves, notions about how their communities should be regulated.

In the case of remixers, everyday remixing activities pushed them up against the boundaries of intellectual property quite frequently, as they were forced to deal with DRM when trying to obtain source material and DMCA takedowns even when they posted ostensibly fair use materials. Through these struggles, many of them became fluent enough in copyright law that they could advocate for their interests within a legal framework. In coalition with the EFF (who gathered their statements) the remixers made their case for why exemptions should be made for transformative remix, leading to the requested exemption being passed in 2009 and then expanded in 2012. In the case of the tinkerers, mechanics, and farmers advocating for automobile jailbreaking exemptions in 2015, many had not thought about copyright's entanglement with physical objects before, and in asserting their rights claims pointed out a logical inconsistency between automobile companies' views of their products and consumers' views of the cars and equipment that they purchase. In both cases, however, those writing in articulated vernacular views of ownership and rights with regard to the media and software that they use. These comments pointed to an understanding of the feedback loop between law, technology, and

[227] Isin and Ruppert 12.

discourse—confronted with the limits of law with regard to the technology they use, citizens discursively reconfigured intellectual property law in a more just way. Given the venue of the rulemaking, these vernacular reformations were able to filter up to the U.S. Copyright Office, and into the awarded exemptions.

While exemptions do not hold the weight of legislation, given that they are set to expire every three years, the ways in which everyday citizens and NGOs come together to advocate for changes to law have a ripple effect on the ways in which everyday people perceive of their rights—one that has the potential to shift the flow of power and change popular understandings of intellectual property law. While some have claimed that the DMCA rulemaking has more value in setting norms that in changing law, these legal norms have undoubtedly shaped the understanding of copyright law, as shown by the remix exemption being renewed and expanded each year since it was first awarded. In this way, seemingly ephemeral tactical actions like creating a remix or jailbreaking a cell phone become cemented as part of a more stable framework of digital rights, one that, while it may not be written into the DMCA for time immemorial, has a measurable impact on the way that intellectual property rights are conceived of and exercised. In this way, we can see how vernacular invention affects the legal landscape even when it is exercised through less formalized processes such as the DMCA rulemaking, and through the translation of digital rights NGOs like the Electronic Frontier Foundation. In the next chapter, which concerns non-consensual pornography (or "revenge porn") I examine what happens when vernacular legal expertise develops in response to legal blind spots. This leads both to legal victories that take everyday people's experiences as their starting point, but also to unexpected resistance from within the movement for digital rights.

Chapter 4

Legal Lacunae and Tensions within the Fight for Revenge Porn Legislation

In an article for CNN published in April of 2015, Hilary (a pseudonym) spoke about her struggles after an ex-boyfriend published nude images of her on a public website. The images, which she had e-mailed and texted to him during their long-distance relationship, appeared alongside personally identifying information about Hilary, inviting viewers to contact her via social media and e-mail. In her attempts to get the images removed, she was met with a request for proof that the images were hers. Because she had taken the images herself, Hilary retained copyright on the images. However, the owner of the site where they had been published demanded further proof in order to take the images down. In order to strengthen her copyright claim in the face of the recalcitrant site owners, Hilary was forced to submit her nude images (with her name attached) to the U.S. Copyright office in order to register her copyright. In Hilary's words, "they're forcing me to disclose them further when that's what I was trying to prevent. The feeling at the time was not only humiliating and dehumanizing, but you also feel very vulnerable."[228]

While the notion of submitting one's nude photos to a government office may be unimaginably humiliating for most of us, the consequences of this phenomenon, colloquially termed "revenge porn," can be far worse. One woman found that her former partner was using

[228] Erica Fink, "To fight revenge porn, I had to copyright my breasts." *CNN Money*, April 27 2015. http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/

her intimate images and contact information to solicit sex from strangers online.[229] In another prominent case, an Italian woman whose ex-boyfriend shared a video of her performing oral sex on another man committed suicide in 2016 after her video became an online meme, shared and participated in by famous football players and even by one Italian company.[230] Revenge porn also affects minors, as was the case when a 15-year-old in Florida shot herself with her mother's handgun after her ex-boyfriend shared a video of her in the shower with other students in their school via WhatsApp.[231] These stories are, unfortunately, far from uncommon—in one survey, 51% of revenge porn victims reported considering suicide.[232]

Revenge porn, or non-consensual pornography, rose in prominence during the mid-2000s as social media increased the ease with which images could be broadcast to large networks of people. Much revenge porn appears on sites specifically dedicated to that type of content, under the eye of owners who are reluctant to remove images—and some of whom even run secondary "legal" sites that victims can pay to have their images removed. Hilary's case illustrates the paucity of legal remedies available to revenge porn—at least until recently. One of the reasons that Hilary was forced to submit her images to the Copyright Office is because she lived in a

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[229] Kristina Marusic, "Revenge Porn Almost Ruined Her Life, But Now She's Saying 'Welcome to Our Word, Jerks!'" *MTV News*, March 19 2015, http://www.mtv.com/news/2109455/revenge-porn-laws/.

[230] Emily Fairbairn, "Tiziana Cantone killed herself over leaked sex tape because in Italy sex for fun is still a sin," *The Sun*, September 16 2016, https://www.thesun.co.uk/living/1799725/tiziana-cantone-killed-herself-over-leaked-sex-tape-because-in-italy-sex-for-fun-is-still-a-sin.

[231] Mary Briquelet and Kate Zavadski, "Nude Snapchat Leak Drove Teen Girl to Suicide," *The Daily Beast*, June 10 2016, http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html.

[232] Sameer Hinduja, "Revenge Porn Research, Laws, and Help for Victims," *Cyberbullying Research Center*, July 14, 2016, http://cyberbullying.org/revenge-porn-research-laws-help-victims.

state that didn't have a revenge porn law on the books. As of the time of this writing, thirty states have passed revenge porn laws specifically dealing with the nonconsensual distribution of images online. However, the laws have been controversial among both opponents and supporters. While some see this as a success in the battle against gendered violence online, other groups see it as a potential infringement to free speech. Among outspoken anti-revenge porn activists, many of the laws currently on the books seem to lack teeth—not protecting self-taken images, for instance, and thus forcing victims to go through copyright takedown processes.

Revenge porn is among the most insidious and harmful types of online harassment, exposing victims' intimate images alongside social media and other types of contact information, inviting abuse and harassment. Online harassment is one of the most fraught areas of digital rights advocacy, as it sits at the nexus of two divergent points of view regarding the value of free speech for digital rights—one that protects civil liberties above all, and one that privileges civil rights and protecting vulnerable populations. As a result of this divergence, revenge porn laws have come under criticism from civil liberties groups like the Electronic Frontier Foundation and American Civil Liberties Union, who argue that revenge porn laws are a content-based restriction on speech and thus unconstitutional. These groups are concerned that revenge porn laws will limit the ability of journalists to publish matters of public interest (such as newsworthy photos that include incidental nudity, or photos related to a political sex scandal) and may be overbroad enough that they can be used to limit other types of speech. As a result, these groups have campaigned against revenge porn laws and have succeeded in some cases in having revenge porn bills struck down.

Because of this staunch resistance from many actors traditionally associated with digital rights advocacy, such as the EFF and ACLU, it is important to note that anti-revenge porn laws

have derived almost entirely from grassroots efforts, with affected individuals banding together and, through the help of empowered advocates, amplifying their concerns to the level of the law. In this sense, vernacular legal expertise is central to the fight for revenge porn legislation, as vernacular frames have been translated into what I term survivor-centered legislation, which centers the experiences and practices of those affected by revenge porn. In this sense, revenge porn legislation is much different than the DMCA rulemaking, in that the agenda has been set and the efforts driven largely by vernacular actors.

The role of vernacular actors in legal advocacy brings the feedback loop between law, discourse, and technology into plain view. Technology has undoubtedly increased the ease with which malicious individuals can acquire and share intimate images, and online venues like the Google search engine have vastly increased the harm wrought by revenge porn, as intimate images and humiliating details become linked to a victim's name in perpetuity. For this reason, Google and Microsoft's 2015 decision to take down revenge porn search results at the request of victims has been monumental, and marked as a major victory for those advocating for harsher criminal penalties for non-consensual pornography. However, this also presents a clear threat to the strength of vernacular voices, for as large technology companies weigh in both technologically and discursively in the revenge porn debate they run the risk of unbalancing the feedback loop between law, discourse, and technology in their favor.

Revenge porn in context

Revenge porn, or non-consensual pornography, is defined as "form of sexual abuse that involves the distribution of nude/sexually explicit photos and/or videos of an individual without

their consent."[233] While often done by ex-lovers seeking to humiliate their former partners, there have also been several high-profile cases of photos being stolen through hacking e-mail accounts, cloud storage accounts, and image storage services, as was the case when intimate images of celebrities were released in 2014 as the result of an iCloud hack. There is also a historical precedent for present-day revenge porn cases: in 1984 U.S. Fifth Circuit Court of Appeals Case *Wood v. Hustler*, a woman named LaJuan Wood sued *Hustler* magazine, alleging invasion of privacy and portrayal in a false light. A neighbor had stolen nude photos of Wood and submitted them to *Hustler*'s "Beaver Hunt" column, which was dedicated to allegedly "real" women and experiences. The column contained Wood's full name and other personally identifying details, alongside fabricated information about her sexual proclivities. Ultimately, though Hustler attempted to argue that the statue of limitations had passed (this being the age of print, it was over a year before Wood discovered her photos had been published), the magazine awarded $150,000 in damages to Wood.[234] At the time, this was an unusual case and a fairly clear-cut violation of Wood's privacy. However, as sharing images has gotten increasingly common due to mobile phones, social media, and changing norms, this type of nonconsensual image distribution is much easier and more widespread.

The majority of revenge porn victims are women, though men may represent up to 10% of victims.[235] Adding to the harm caused by revenge porn, photos and video are often published alongside personally identifying information, including the victim's full name, place of

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[233] "End Revenge Porn Archives." *The Cyber Civil Rights Initiative*, n.d. https://www.cybercivilrights.org/category/end-revenge-porn/.

[234] *Wood v. Hustler Magazine*, 736 F.2nd 1084 (1984).

[235] "Love, Relationships, and Technology survey," *McAfee Business*, 2013. https://promos.mcafee.com/offer.aspx?id=605366.

employment, e-mail address, social media profiles, or even home address. Non-consensual pornography is published in a diverse array of venues. There are a number of dedicated platforms for revenge porn, though several high-profile sites have been shut down in recent years.[236] This content is also commonly published on social media websites such as Twitter and Facebook, though many of these sites have policies banning nudity and adult content that result in many revenge porn images being taken down after a short time online. However, given the practice of posting victims' social media accounts alongside their images, much revenge porn-related harassment takes place through social media long after pictures have been removed.[237] Furthermore, pictures on revenge porn platforms can be difficult to remove, and are often duplicated across several sites.

The harms wrought by revenge porn are numerous. First and foremost, the violation and betrayal leaves victims feeling distraught, with 93% of respondents to a Cyber Civil Rights Initiative survey reporting significant emotional distress.[238] Beyond this, the harassment invited by the publication of personally identifying information alongside the images leaves victims feeling unsafe, as they are besieged with harassment and abuse. 49% report harassment and stalking online, and an additional 30% report harassment and stalking offline. The consequences can be especially ruinous for victims' careers, with 54% experiencing difficulty focusing at

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[236] Mike Masnick. "Now That Basically All Revenge Porn Has Moved Out of The US, Al Franken Says FBI Should Do Something," *TechDirt,* April 6 2015,https://www.techdirt.com/articles/20150404/06563730546/now-that-basically-all-revenge-porn-has-moved-out-us-al-franken-says-fbi-should-do-something.shtml.

[237] Mary Anne Franks, "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators," *The Cyber Civil Rights Initiative*, July 18 2014.

[238] Ibid., 6.

work, 8% quitting their jobs or school, and 6% being fired after their photos were published.[239] It's often difficult for victims to seek future employment or education, as the photographs dominate web searches for their name (often before any other professional content, simply due to the number of links and the pattern of web traffic to the revenge porn platforms). 13% reported difficulty getting a job due to their online search results. In order to escape the consequences of revenge porn publication, victims often have to change names, e-mail addresses, and phone numbers, or move to another address in order to escape harassment and regain control over their online reputation.[240] Even then, victims have reported feeling as if the pictures could resurface at any moment, and that they live in fear and have a difficult time trusting other people.

The owners of revenge porn sites, while an especially pernicious force in the fight against online harassment, but have also been implicated in several of the opening salvos in the legal battle against revenge porn. However, it is important to note that many early arrests hinged on charges that were tangential to the distribution of non-consensual pornography. For instance, Hunter Moore (who coined the term revenge porn and operated IsAnyoneUp, one of the genre's most well-known sites, from 2010-2012) was arrested in January of 2014 for paying a hacker to break into women's e-mail accounts in search of pictures. Craig Brittain, who ran another revenge porn site called IsAnyoneDown, was arrested for identity theft and extortion after allegedly running a second website where victims paid a "lawyer" to have their pictures taken down.[241] Similarly, Kevin Bollaert was sentenced to 20 years in prison in 2015 for operating a

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[239] Ibid., 7.

[240] Ibid.

[241] "The FTC ordered IsAnyoneDown's Craig Brittain to never start a revenge porn site again." *VICE*, January 31 2015, https://www.vice.com/read/ftc-bans-craig-brittain-from-ever-operating-a-revenge-porn-site-again-999

similar scheme—one revenge porn platform as well as a second website that victims paid to have their pictures removed. It was erroneously reported at the time of his arrest that he was arrested under California's revenge porn law, however this was not the case—ultimately, the charges that put him in jail were identity theft and extortion.[242]

As of the time of writing, thirty states have passed laws criminalizing revenge porn, and a federal bill, the Intimate Privacy Protection Act, is in committee.[243] For those living in states without revenge porn laws, the best way to take down a revenge porn site thus far has been the Digital Millennium Copyright Act, which allows them to submit copyright takedown requests for self-taken images, as was the case for Hilary. For victims whose partner took the images, finding a way to have them removed has often been difficult or impossible. The current regulatory regime regarding revenge porn rests largely in the hands of legislators and the expert lawyers who help them draft laws. However, these laws have been informed by the experiences and practices of revenge porn survivors, creating what I term survivor-centered legislation. Beyond this, in cases where legal protection is inadequate (as it often is), victims have networked with one another in order to share strategies for recovering from revenge porn. In this sense, anti-revenge porn advocacy is a grassroots cause that has been taken up by experts. This does not mean, however, that it has been unimpeded in its progress—civil liberties groups, traditionally on the vanguard of digital rights issues, have strongly objected to revenge porn laws on the grounds that they may limit free speech. This has both resulted in an ideological conflict between competing views of the role of free speech in digital rights, and created an inroad for private

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[242] http://www.nbcsandiego.com/news/local/Kevin-Bollaert-Revenge-Porn-Sentencing-San-Diego-298603981.html

[243] Carrie Goldberg, "State Revenge Porn Laws," November 26, 2016, http://www.cagoldberglaw.com/states-with-revenge-porn-laws.

governance to step in, unbalancing the feedback loop between law, technology, and discourse. In the following section, I will introduce the primary advocates for revenge porn laws, setting up the vernacular foundations of the laws as they currently exist.

The seeds of activism

Vernacular legal expertise manifests in two ways in the revenge porn debate. First, revenge porn victims often acquire vernacular legal expertise by necessity as they fight to have their pictures taken down. Faced with state and local laws that are ill-equipped to deal with online harassment, revenge porn victims are often forced to find legal workarounds in order to assure that their pictures are removed from the internet. Second, individuals affected by revenge porn have in many instances teamed up with experts in order to advocate for legal change. As Hilary's case demonstrates, often times victims find themselves relying on a patchwork of laws in order to get their pictures removed, which can be a very complicated process with a steep learning curve. Thus, by sharing information with one another and also by recruiting empowered advocates to fight for their best interest, revenge porn survivors can assure that their experiences, narratives, and legal reconfigurations are translated into state-sanctioned legal discourse—creating survivor-centered legislation.

One example of a revenge porn survivor helping to educate other survivors is Bekah Wells, who founded Women Against Revenge Porn (WARP) after an ex-boyfriend published intimate images of her in 2012. The images, Wells says, kept reappearing even after she had them taken down, even as she was in the process of trying to sue her former partner. To help other victims, Wells founded WARP, a simple website containing a list of resources for victims, including how to file a police report, how to get pictures removed from social media, how to

"clean" Google search results of the images, and a list of attorneys who support revenge porn victims pro bono. Wells describes the site as a "labor of love" that she maintains in order to prevent others from experiencing the pain that she experienced when she became a victim of revenge porn.[244] While no longer actively updated, WARP is still a popular site, having been featured on numerous news outlets like *The Huffington Post*, *Forbes*, *USA Today*, and *The Economist*. The Cyber Civil Rights Initiative, the subject of the following section, also link to Bekah's website as a resource for those affected by revenge porn.

One of the primary figureheads in the fight against revenge porn is Holly Jacobs, who was a graduate student in organizational psychology when her ex-boyfriend published nude photographs of her on revenge porn sites in 2009. Her intimate photos and videos appeared on numerous numerous websites alongside her full name, place of work, and contact information. Her ex-boyfriend also sent images to her colleagues and academic supervisors, along with messages in which he claimed that she had intimate relationships with her students.[245] As a result of this, Jacobs became embroiled in a three-year long battle to have the photos taken down and reclaim her online reputation. As an early-career scholar, Jacobs was understandably concerned about the photos haunting her as she moved from graduate school into the professional world. Jacobs hired lawyers, dealt with multiple law enforcement agencies, and seemed to hit a dead end. At that point, inspired by the stories of other victims who had gone public, Jacobs launched

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[244] Bekah Wells, "About WARP," n.d., https://www.womenagainstrevengeporn.com/about.

[245] Holly Jacobs, "Being A Victim of Revenge Porn Forced Me To Change My Name—Now I'm An Activist Dedicated to Helping Other Victims." *XOJane*. 13 November 2013, http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs.

EndRevengePorn.org and began gathering signatures for a petition to criminalize revenge porn.[246]

The Cyber Civil Rights Initiative grew from End Revenge Porn, with the latter now operating as a campaign of the larger CCRI organization. CCRI has emerged as the most prominent organization advocating for laws against revenge porn, and this is due in no small part to Jacobs teaming up with two renowned legal experts—Mary Anne Franks and Danielle Citron. Franks and Citron are both lawyers who have published extensively on the harassment of women online and legal remedies for revenge porn. The CCRI also enlisted the help of Charlotte Laws—a California politician, actress, and animal rights activist who has been called the "Erin Brockovich of Revenge Porn" after her crusade against Hunter Moore, owner of popular revenge porn site IsAnyoneUp. When Moore hired hacker Charles "Gary" Evens to steal nude photos of Laws' daughter Kayla from her e-mail account, Laws involved the FBI, eventually succeeding in removing Kayla's photos and leading to the arrests of Evens and Moore. Since this time, Laws has been an outspoken advocate for criminalizing revenge porn.[247] With a combination of experts (Franks and Citron) and grassroots efforts (such as those of Jacobs, Laws, and other survivors who have become active within the organization), CCRI is the most coalitional of the anti-revenge porn organizations and has also had the broadest impact on revenge porn laws, with Franks and Citron advising lawmakers on all thirty of the revenge porn laws currently on the books, as well as the Intimate Privacy Protection Act, a federal bill that is in committee at the

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[246] "Our Mission | Cyber Civil Rights Initiative," The *Cyber Civil Rights Initiative*, n.d., https://www.cybercivilrights.org/about/.

[247] Carole Cadwalladr, "Charlotte Laws' Fight with Hunter Moore, the internet's revenge porn king," *The Guardian*, 30 March 2014, https://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king.

time of this writing. Franks and Citron have also been aided by Carrie Goldberg, a Brooklyn-based attorney who specializes in helping victims of online harassment and abuse. In turn, Franks, Citron, Goldberg, and a host of other attorneys advise a non-profit called Without My Consent, which is devoted to compiling and sharing educational resources for revenge porn victims (though it is not associated with the CCRI).[248]

The most important function that the CCRI has played has been to center victim experiences and practices in their legal advocacy, pushing for laws that cover the vast array of practices in sharing and spreading revenge porn, as well as the potential harms they can cause. In the following section, I will look to the CCRI's legal advocacy and how it demonstrates what I call survivor-centered legislation—advocacy that has grown out of the vernacular legal expertise of those affected by revenge porn. Revenge porn legislation calls up a tremendous web of legal issues—the First Amendment, privacy, intermediary liability, obscenity, as well as the difference between criminal and civil action. It also calls up tensions between activist groups with particular agendas. For instance, groups like the CCRI advocate to protect victims of revenge porn (largely women)—these arguments hinge on claims about civil rights and the ability of women to be embodied and safe on the internet. Yet, groups like the EFF and ACLU tend to elide these civil rights concerns in favor of a free speech absolutism premised on the open and democratic nature of the internet—they fear that laws criminalizing revenge porn could "break the internet" for other citizens. Underlying each of these sides is a particular set of assumptions about who and what the First Amendment is designed to protect, as well as what the ideal public sphere looks

[248] "Home | Without My Consent," *Without My Consent*, http://www.withoutmyconsent.org. Without My Consent, it is worth noting, is an organization that is composed entirely of expert advisors – thus, it lacks the vernacular origins and character of the Cyber Civil Rights Initiative, which started with Holly Jacobs' End Revenge Porn campaign.

like. This tension invites participation from private governance actors in a way that has the potential to unbalance the feedback loop between law, discourse, and technology.

Consent over intent: Survivor-centered legislation

While all social justice campaigns necessarily begin with the lived experience of those encumbered by systemic injustice and unequal power structures, what is particularly striking about the fight against revenge porn is the prominence of victims in legal advocacy—their experiences, their narratives, and a consideration of the technological specifics of both producing and distributing intimate images. Revenge porn, once considered a private or interpersonal matter, has been placed on the public agenda by advocates who have experienced it personally in coalition with experts who can help them amplify their message on the legislative level. While vernacular efforts to combat revenge porn and offer support have been substantial—as seen in the example of Women Against Revenge Porn, as well as Holly Jacobs' End Revenge Porn campaign—ultimately, many victims who seek long-lasting justice have had to partner with legal experts who can help amplify their experiential expertise. This process is perhaps best illustrated by the Cyber Civil Rights Initiative, who have translated victim experiences and practices into what I call survivor-centered legislation, which blends vernacular legal expertise and practices with formal legal conventions.

While the CCRI is devoted to offering resources to victims, a large portion of their efforts take place on a legislative level. Mary Anne Franks and Danielle Keats Citron have consulted on a majority of the revenge porn laws currently in place in the United States, and are constantly advocating for more revenge porn laws that better protect victims. The model legislation that they have drafted includes a crucial element to many anti-revenge porn advocates—consent.

Many pieces of revenge porn legislation passed prior to the CCRI included the stipulation that one must have an intent to harm or harass to be convicted under revenge porn laws—California's law is an excellent example of this, stating that in order to be held liable "the person distributing the image knows or should know that distribution of the image will cause serious emotional distress."[249] Proving intent is often difficult or impossible. Thus, the element that Franks has stressed most heavily in her model legislation is consent—a reframing that derives from the lived experience of survivors. The CCRI advocates for several specific features to assure that revenge porn laws protect victims as well as possible—features that they underscore in all of their published materials, whether those materials are targeted towards a lay or expert audience. These features are:

1) a focus on the consent of the individual pictured rather than the intent of the individual distributing the image
2) the inclusion of self-taken photos or "selfies"
3) strong punishments (ideally felony convictions combined with fines or the forfeiture of profits)
4) no requirement that the photos depict nudity to be covered, liability for those who share and further distribute images, narrow tailoring to protect the First Amendment
5) protection for victims who are doxxed (who have personal information released alongside their photos).

As Franks noted in an interview with *The Daily Dot*'s Kevin Collier, the nonconsensual framework is crucial—it moves beyond the intent of the individual who distributed the images,

[249] California Penal Code 647(j)(4) PC.

and refocuses the law's protection on the victim whose privacy was violated.[250] Hasian calls upon us to consider that the person who experiences racism may have as much to say about law as the judge who hears cases about racial discrimination.[251] In the case of revenge porn activism, lawyers like Franks and Citron are taking victim experiences as the starting point for suggested changes to the law.

The Cyber Civil Rights Initiative published an infographic on January 22, 2015 entitled "Anatomy of an Effective Revenge Porn Law." The infographic was partially a celebration of Illinois' recently-passed revenge porn bill, which Franks and Citron consulted on, but it also detailed the aforementioned qualities of an ideal revenge porn law alongside illustrations and statistics. For instance, the infographic states that 83% of intimate images are "selfies."[252] This centers user practice by demonstrating that selfies are commonplace, and also underscores the importance of a revenge porn law that will cover these images, as they make up a majority of the intimate images shared. The fourth feature of a good law according to the infographic is that it does not just include nudity, as (in the words of the infographic), "victims can be deeply harmed by non-consensually distributed sexual images regardless of nudity. For instance … when the victim is depicted performing oral sex or has been ejaculated upon, even if 'sexual parts' are not visible."[253] In emphasizing the importance of liability for downstream distributors, the CCRI

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[250] Kevin Collier, "Meet Mary Anne Franks, the lawyer behind U.S. revenge porn laws," *The Daily Dot*, April 15 2014, http://www.dailydot.com/layer8/mary-anne-franks-revenge-porn.

[251] Marouf Hasian Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder: Westview Press, 2000), 3.

[252] "Anatomy of an Effective Revenge Porn Law," *Cyber Civil Rights Initiative*, January 22 2015, https://www.cybercivilrights.org/anatomy-effective-revenge-porn-law/.

[253] Ibid.

notes that the Illinois law "considers whether a reasonable person would know or understand that the image was to remain private and that the person depicted has not consented to the dissemination."[254] This, again, centers the consent of the individuals pictured. In noting that the law includes doxxing, the CCRI emphasizes that when a victim's name, place of employment, and more are released alongside their pictures, they "lose control over their online presence." As I will discuss shortly, one of the most important arguments for revenge porn legislation is that it allows those affected to reclaim their online presence and participate in the online public sphere. Considered in its totality, the infographic shows that the CCRI is advocating for re-centering the experience of those affected by revenge porn, both by emphasizing consent as well as rooting the law in how everyday people take and share intimate images with one another, protecting a broad class of user behavior.

In addition to the infographic, Franks also penned a guide in 2014 entitled "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators." The first half of this report consists of a brief history of revenge porn laws as well as the features of a strong revenge porn law. Many of these features are those previously discussed—privileging consent over intent, for instance. Other features Franks suggests are an exception for "sexually explicit images voluntarily exposed in public," so that, for instance, one could not be prosecuted under a revenge porn law for filming a flasher on the subway.[255] Each of these suggestions is supported through reference to existing laws, clearly indicating that there is legal precedent for the suggested features. Following this section, Franks lays out her vision of a model revenge porn law. In this law, words like image, sexual act, and nudity are clearly defined. In addition, exemptions to the law

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[254] Ibid.

[255] Franks, "Guide for Legislators," 5.

are also clear, such as the aforementioned voluntary public exposures as well as items in the public interest.[256] This section echoes much of the content of the aforementioned infographic, though it is formally written and targeted towards and audience of legislators, grounded in legal precedent and written with an awareness of potential objections. In this sense, we see how the CCRI's work spans not just public outreach efforts but legislative ones—they have taken up the experiences of revenge porn victims and translated them into suggested laws.

While the first half of the guide is formal and legalistic in nature, the second half of the guide contextualizes revenge porn more deeply in the experiences and narratives of its victims. Franks also shares statistics about revenge porn, such as the fact that 59% had their full name posted alongside their images, 49% had links to social media profiles published. As a result, 93% suffered severe emotional distress, and 51% reported suicidal thoughts.[257] Franks also includes four victim narratives in the report. The first of these is the story of Holly Jacobs, the aforementioned revenge porn advocate who helped found the CCRI.[258] The second case study is Alecia Andrews-Crain, a woman whose abusive ex-husband used intimate images of her to take revenge after she filed for an order of protection.[259] The third case study is Adam Kuhn, who was chief of staff for Republican Representative Steve Stivers of Ohio when his ex-girlfriend tweeted an intimate image of him in order to, in her words, "teach the pompous asshole a lesson." As a result, he was forced to resign from his job.[260] The fourth narrative is that of a woman named

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[256] Ibid.

[257] Ibid., 7-8.

[258] Ibid., 8.

[259] Ibid., 10.

[260] Ibid., 11.

Sarah, who was forced to perform sexual acts on video by a sex trafficker, who used the video as leverage to keep her in servitude.[261] These four narratives help contextualize the breadth of revenge porn experiences. They make clear that there is no singular profile of a revenge porn victim, that intimate images are often used as a tool of abuse and manipulation, and that the fallout from revenge porn can decimate careers and lives.

As Hartelius writes, narratives of personal experience can serve as rhetorical proofs, equalizing "experts and laypeople by positing them as discursive partners."[262] Integrating Fisher's narrative paradigm with her own work on expertise, Hartelius demonstrates the manner in which everyday people have, through their experiences, become experts, and in turn, how sharing their narratives can help them reach out to laypeople who do not understand what their experiences are. Her case study is those with clinical depression. Of this group, Hartelius writes: "identification with the depressives' trauma is achieved, even when we cannot identify with the experience of depression itself. We can imagine a rupture of normalcy because we understand normalcy."[263] In the context of the "Guide for Legislators," each narrative is a glimpse into one facet of the issue of non-consensual pornography—and through this wide array of experiences, Franks provides a lens through which those without experience with revenge porn can understand the experiences of those who have endured it. Furthermore, when combined with the first half of the guide, they serve as expert testimony that supports the legal suggestions being made. For instance, Adam Kuhn's case both illustrates an instance of a male revenge porn

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[261] Ibid., 11.

[262] E. Johanna Hartelius, *The Rhetoric of Expertise* (New York: Rowman and Littlefield, 2010): 121.

[263] Ibid.

victim, as well as a case where, despite a victim's career in politics, the revenge porn images are of no "public interest" and thus are not protected by the First Amendment. This supports the argument for public interest exemptions within revenge porn laws, but also demonstrates that, with a revenge porn law in place, Kuhn would have likely received just treatment in court.

The objection is coming from inside the house: First Amendment arguments against revenge porn laws

While revenge porn laws have been successfully passed in thirty states as of the time of this writing, many civil libertarian groups, legislators, and legal thinkers have opposed revenge porn legislation on the grounds that it is a content-based restriction with the potential to limit free speech. In particular, groups associated with the fight for digital rights, like the ACLU and EFF, have been particularly outspoken against revenge porn legislation. The ACLU, for example, permanently halted the passage of an Arizona revenge porn law with a lawsuit alleging that it infringed upon the First Amendment, bringing together a broad coalition of journalists, librarians, and booksellers who brought suit against the state.[264] David Greene, staff attorney for the EFF, wrote that "under First Amendment law, someone who publishes truthful information that is a matter of public concern must be protected … I'm always very skeptical of laws that restrict free speech. That's regardless of whether you have a really good reason to restrict that speech."[265] This point of view, that revenge porn constitutes a "factual truth," has been echoed

[264] "First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images," *ACLU*, September 23 2014. https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images.

[265] Mary Emily O'Hara, "The ACLU is fighting to keep revenge porn safe and legal for pervs," *VICE*, 12 Nov 2013, https://www.vice.com/en_us/article/why-the-aclu-is-fighting-to-keep-revenge-porn-safe-and-legal-for-pervs.

by constitutional scholars.[266] In total, these groups espouse a sort of free speech absolutism encapsulated within a civil liberties approach that privileges the ability to speak over more civil rights-centered approaches that take the unique experiences of disempowered groups into account. Thus, these groups reject anti-revenge porn legislation as a threat to free speech that can be abused by unscrupulous institutions to suppress items of public interest. In the objections put forth by groups like the EFF and ACLU, we see arguments grounded in many of the same topoi that appeared in cases like net neutrality and the DMCA rulemaking—free speech as an essential value baked into network architecture, for instance—yet, in this case, they are deployed against those fighting for expanded protections for one area of digital rights. Thus, in this case, groups like the EFF and ACLU are not so much amplifying the voices of the grassroots as they are performing an institutional discursive function—upholding a status quo to which the vernacular voices of revenge porn survivors serve as a corrective.

As the positions expressed by the ACLU and EFF might suggest, those on the civil liberties side of the argument—whose primary goal is to protect the First Amendment, and thus the freedom from government intervention in speech—have very strong feelings that criminal revenge porn laws are not constitutional and have the potential to be abused. According to civil libertarians, content-based restrictions are incapable of the neutrality expected of civil liberties laws.[267] As the ACLU's case in Arizona suggests, many of the First Amendment concerns with contemporary revenge porn laws center around the laws' potential to be overbroad, and thus potentially applied not specifically to non-consensual pornography but to other types of images

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[266] John Humbach, "The Constitution and Revenge Porn." *Pace Law Review* 25 (2014): 225.

[267] Thomas C. Grey, "Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment," *Social Philosophy and Policy* (Spring 1991): 498.

and content. Lawyer Mary Adkins wrote in *Slate* that some state laws are so overbroad that journalists could be jailed for publicizing photos like those of the abuse at Abu Ghraib, or of the famous photojournalistic depiction of a naked Vietnamese girl, Phan Thi Kim Phuc, running from a napalm explosion in the village of Trang Bang after being severely burned.[268] As EFF lawyer Matt Zimmerman has said, "frequently, almost inevitably, statutes that try to do this type of thing overreach … The concern is that they're going to shrink the universe of speech that's available online."[269] The civil libertarian position on revenge porn law points towards a particular set of beliefs that persist among many digital rights advocates—a belief that the networked architecture of the internet in its ideal form is designed to facilitate a robust public sphere and unimpeded freedom of speech. Thus, according to this view, efforts to alter content or the means of accessing such content online constitute censorship.

The topoi present throughout the EFF and ACLU's arguments about revenge porn indicate a set of assumptions about the value of free speech to the public sphere. These topoi, in turn, create a competing understanding of free speech and the public sphere that bolsters civil liberties groups' arguments against advocates for revenge porn law. As Sarah Jeong has claimed, the exploitation of women and children has always been the "Trojan horse" of internet policy, used to usher in overbroad law.[270] The First Amendment argument against revenge porn laws, on the other hand, seems to be a Trojan horse of its own—carrying hidden and potentially destructive baggage. Groups like the Electronic Frontier Foundation frequently invoke free

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[268] Ibid.

[269] Steven Nelson. "New Federal Legislation Could Take a Nip Out of 'Revenge Porn.'" *U.S. New & World Report*, 21 November 2013.

[270] Sarah Jeong, *The Internet of Garbage* (Forbes Media, 2015).

speech as a near-sacred concept on the internet. While there is little doubt that free speech is important, the notion of free speech as invoked by these groups contains some unstated assumptions. For instance, it seems easy to say that free speech, taken as a guiding principle, protects all speech equally. However, this becomes complicated when considering areas where the free speech of one may suppress the free speech of another.

The EFF and similar groups often evoke notions of the public sphere or public square when speaking of the importance of free speech, which indicates that there is some sense that free speech plays an important role in maintaining these spaces. For instance, on their introductory page to their free speech advocacy, the EFF website says: "Speech thrives online freed of limitations inherent in traditional print or broadcast media that are created by corporate gatekeepers. Preserving the Internet's open architecture is critical to sustaining free speech. But this technological capacity means little without sufficient legal protections."[271] Contained within this statement are several assumptions that reveal how the EFF as an organization sees the internet, as well as the role of speech online. The first of these is that the internet allows for speech "freed of limitations" from print and broadcast media. While it is no doubt true that gatekeepers imposed limitations on speech in the age of print, the notion that online speech is freed of limitations is worthy of further interrogation. Furthermore, the EFF posits a direct connection between the networked architecture of the internet and free speech, and beyond this the importance of a legal structure that upholds what seems to be the natural openness of technology. In this, we see the same feedback loop that was introduced earlier, between technology, law, and discourse. The EFF's site illustrate the organization's view that the link between technology and free speech is simultaneously under threat from but also preserved by

[271] "Free Speech," *Electronic Frontier Foundation*, https://www.eff.org/issues/free-speech.

legal interventions. However, within this framework, the link between network technology and free speech is a given—the law modifies an already-existing relationship in which technology fosters free speech.

While many revenge porn laws, such as the one passed in California, specifically include exemptions for "items of public interest," so that, for example, the distributor of a nude image that has journalistic value or is essential to revealing some matter of public concern would be exempt from prosecution under revenge porn laws. Still, these exemptions have done little to placate those in the civil libertarian camp, because of the possibility that journalists who publish intimate images with the belief that they have public interest value could end up in legal trouble if, later on, a judge or jury rules that the images have no legitimate public interest. The ACLU made this argument in opposition to Rhode Island's revenge porn law, which did include such exemptions.[272] The ACLU cites the example of Anthony Weiner, a former New York congressman who, it was revealed, had repeatedly sent intimate images of himself to women on Twitter, including one underage woman. Given the increased prevalence of social media use among journalists, public figures, and citizens, the ACLU is concerned that not only could journalists be jeopardized by these laws, but so too could individuals who shared the images on their personal social media accounts (for example, by retweeting a journalist), or even those who searched for or viewed them online.[273] Thus, in the view of civil libertarian groups, even public interest exemptions are insufficient to protect free speech and freedom of the press from revenge porn laws.

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[272] "NEFAC, ACLU, and RI Press Association Urge Gov. Raimondo to Veto Revenge Porn Bill," RIACLU, 16 Jun 2016, http://riaclu.org/news/print/nefac-aclu-and-ri-press-association-urge-gov.-raimondo-to-veto-revenge-porn.

[273] Ibid.

Zimmerman suggested that criminal law was a "dangerous" way to legislate this type of behavior, advocating instead for civil measures which seek redress rather than punishment, which is the goal of criminal law. Other legal scholars have agreed with this viewpoint, claiming that the precedent for revenge porn law as a civil issue is more robust than as a criminal issue.[274] The argument that criminal revenge porn law is not necessary because revenge porn is a private issue, best addressed by civil litigation recalls many historical fights for civil rights in which issues that were previously believed to be private matters were later encoded in civil rights laws—issues like domestic violence and workplace harassment. The insistence by opponents of revenge porn laws that conflicts over the release of intimate images should be handled in civil court relegates revenge porn to a dispute between two individuals—an ostensibly private matter, rather than an issue that is intimately linked to systemic gender biases and the destructive power of online shaming. It is true that the frames of argument used by advocates for revenge porn laws do not comport with many previously-held legal standards. This is perhaps one reason that, when weighed against First Amendment doctrine, revenge porn laws do seem to be a potentially unconstitutional departure from previous decisions. However, as many social movements have demonstrated, a law that seems unfathomable at one point in time may be accepted in another. Citron writes that laws like Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion, were vehemently opposed in their time but have now been accepted. Citron writes: "we can say with confidence that accommodating equality and speech interests of all workers

[274] See Mark Bennett, "Are Statutes Criminalizing Revenge Porn Constitutional?" *Defending People.* 14 October 2013. It is worth noting that Bennett has made something of a career of opposing Franks and Citron specifically, devoting numerous blog posts on his website to attacking their work.

(including sexually harassed employees) did not ruin the workplace."[275] Still, the law was controversial prior to its passage, with many saying that these instances of alleged discrimination were private issues that did not require specific legislative protection.

Thomas C. Grey notes that as one thinks through the problem of regulation on harassing speech it is virtually impossible to hold both the civil rights and civil liberties approaches in tension with one another—a policy against discriminatory speech, for instance, is a content-based restriction, the type that judges and legal scholars have long held will not withstand strict scrutiny.[276] Yet, allowing discriminatory speech to continue harms the civil rights of those in targeted groups, who are often also part of marginalized groups within society at large. However, when considering the same quandary with regard to revenge porn, the terms of debate change quite significantly. While in each case the victim suffers harm, and in each case there is generally some intent to cause distress on the part of the perpetrator, in the case of revenge porn the harms wrought are much more public, longer-lasting, and potentially injurious. First, the release of images has long-lasting repercussions as the images overwhelm search results for the victim's name, harming employment and interpersonal opportunities. Furthermore, and most importantly, one of the hallmarks of revenge porn is that images are often released alongside a victim's name and contact information, with the intent being that this information will lead to both online and offline harassment. In this sense, revenge porn has the potential to cause physical harm and threat to the victim not just at the moment images are released but as long as the information persists online. The harms wrought by revenge porn are much more serious than harassing

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[275] Danielle Keats Citron, *Hate Crimes in Cyberspace* (Cambridge: Harvard University Press, 2014): 192.

[276] Grey 487.

speech more generally, as the images amount to a calculated smear campaign directed at one person, and because harassment often persists offline, potentially to the point of causing physical harm to the victim.

Self-governance and the civil rights approach to revenge porn legislation

One potential remedy that is capable of drawing a clearer path through the mire of the civil rights and civil liberties approaches to revenge porn legislation is the notion of self-governance, which presents an alternative way of valuing free speech. Many legal scholars have attempted to paint a more nuanced picture of First Amendment protections through self-governance, which Robert Post defines as "the notion that those who are subject to law should also experience themselves as the authors of law."[277] As Citron claims, those who can "speak freely and listen to others who speak freely make more informed decisions about the kind of society they want to live in."[278] Thus, cyber harassment like revenge porn poses a grave threat to self-governance. This is because those who experience revenge porn are both more likely to withdraw from online spaces entirely, and also because they are not often afforded the ability to defend themselves against the allegations made against them online. In this sense, victims of revenge porn are silenced when their photos are released—even if they choose to defend themselves, their defense is unlikely to filter through the crowd of harassing commentary, and more often than not they are driven offline entirely as a result of ongoing harassment. This, I claim, is what makes revenge porn a digital rights issue—if the goal of digital rights is to protect

[277] Robert Post, *Democracy, Expertise, and Academic Freedom* (New Haven: Yale University Press, 2012): 17.

[278] Citron 194.

the rights that allow individuals to access and participate in online space, then revenge porn has a disproportionately negative effect on its victims. With this in mind, the civil rights approach to revenge porn privileges the importance of narrowly-tailored laws that prevent harassment and permit vulnerable groups to participate in the online public sphere.

Citron cites the case of Zoe Yang as an example of this effect. Yang wrote a blog about sex and dating during college, including many details about her own life, and as a result endured frequent harassment even after she graduated and was no longer writing about sex and relationships. As a result, Yang withdrew entirely from social media, saying that the repeated attacks "intimidated her from participating as a 'citizen' in our digital age."[279] In an age where participation on social media strengthens social bonds and, perhaps most importantly, opens up professional opportunities, having no online presence (or an online presence marred by hateful harassment and intimate images) can be severely detrimental to a victim's ability to participate in the public sphere.[280] In this sense, self-governance is essentially linked to the public sphere, and conceptualizations of the ideal public sphere are ever-present in discussions of self-governance.

According to those who approach First Amendment issues from the perspective of self-governance, the purpose of the First Amendment is to protect political action, which follows from public opinion. In order to see themselves as the "authors government," citizens must be able to participate in forming public opinion.[281] When individuals are shut out of the public sphere, it becomes more difficult for them to participate in public opinion formation. In this same vein, others have claimed that self-expression made for the purpose of extinguishing others' self-

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[279] Citron 193.

[280] Ibid.

[281] Ibid.

expression should receive no First Amendment protection. This is an alternate system of value, where the goal of regulation is the maintenance of respect among those deliberating. Thus, hate speech does not have a place in the system. Heyman writes that "while specific forms of respect differ from one community to another, the requirement that individuals recognize one another as human beings and community members is not simply a contingent or conventional one but is inherent in the very idea of a community."[282] Here, as in many other conceptualizations of the First Amendment, the purpose of speech is geared towards maintaining a community in which public opinion can form—a public sphere in which self-governance is preserved and maintained through community standards.

The problem with free speech absolutism, as well as the boundless faith in open networked architecture, is that it fails to take into account the lived experience of those acting online. Specifically, public sphere theory as it is often applied in legal thought is a consideration of how marginalization plays out in actuality. However, rhetorical considerations of the public sphere are rife with examples of multiple publics as well as alternative formulations of the public sphere that account for resistance and power in a way that the idealized model does not—and provide room for alternative valuations of free speech. These publics are fragmented, but this fragmentation allows the development of different opinions and "goal-oriented political struggles" aligned with life experiences and common interests.[283]

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[282] Steven J. Heymann, "Hate Speech, Public Discourse, and the First Amendment," *Extreme Speech and Democracy*, eds Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009): 176.

[283] Rita Felski, "The Feminist Public Sphere," in *Beyond Feminist Aesthetics* (Cambridge: Harvard University Press, 1989): 169. See also Nancy Fraser, "Rethinking the Public Sphere."

Importantly, these rhetorical reimaginings of the public sphere do not cast the autonomy of citizens as a miracle of neutrality that will ensure the proper formation of public opinion. Marouf Hasian has written that the more law is viewed as a deductive, logical process, the less important "practical wisdom" or *phronesis* becomes.[284] In Hasian's view, the notion that legal quandaries can be solved solely through deductive logic has the potential to elide the everyday experience of individuals confronted with the failings of the law. Instead, a more expansive view of jurisprudence—in combination with a notion of the public sphere that allows for multiple and counterpublics—allows more room for the lived experiences of the subjects of the law. Focusing on Hasian's call to look at the myths present in legal rhetorics, it is essential to look at the myth of the First Amendment as a neutral mandate—and, instead of accepting idealized formulations of the public sphere as they relate to free speech protections, to look at First Amendment jurisprudence in concert with the lived experience of individuals who are cast out of public life by the speech of others.

Critics have noted that the free speech absolutism espoused by many civil libertarian groups online can lead to cultures in which women and other marginalized groups online are alienated or cast out. As Astra Taylor writes, "openness, when taken as an absolute, actually aggravates the gender gap" due to the ability of a small number of voices to disproportionately affect the group under the guise of free speech. [285] In other words, the structures—both technological and cultural—that underpin much of online space can contribute to a culture of

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[284] Marouf Hasian, *Legal Memories and Amnesias in America's Rhetorical Culture*. Boulder: Westview Press (2000): 7.

[285] Astra Taylor, *The People's Platform: Taking Back Power and Culture in the Digital Age* (New York: Metropolitan Books, 2014): n.p. See also Joseph Reagle. "Free as in sexist? Free culture and the gender gap." *First Monday* 1, no. 7 (2013): 4.

uninterrogated sexism. Indeed, the very notion of free speech as a sacred value has its roots in liberalism—the same power structure that "enshrines a public/private divide that contributes to women's political exclusion."[286] In the case of revenge porn, privileging the free speech of those who publish intimate images makes those they target less inclined (and in many cases unable) to participate in the online public sphere.

In this sense, openness fails the victim of revenge porn. Without standards that assure civil debate and respect among the members of a discursive community, free speech can often be used as a sword rather than a shield, driving out individuals who do not conform to the normative values of a particular community or counterpublic. Thus, open architecture and debate are not failsafe remedies for sexism, racism, and harassment. In this sense, groups like the EFF and ACLU who argue for online space as a space that should, ideally, welcome all types of speech fail to consider the ways in which offline inequalities exist online. Given that these injustices are transposed to the online environment, some protections should be built in to online space, as they are into the law, to make room for society's most vulnerable members—in fact, as Robert Post notes, this is the democratic view of the First Amendment.[287] This alternative way of valuing free speech may hold the answer to some of the central tensions in the debate over revenge porn legislation.

In 2013, feminist activism group Women, Action, and the Media (WAM) took social media sites Twitter and Facebook to task for not doing more to protect women from online hate speech. WAM called for better reporting and flagging options, as well as more comprehensive

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[286] Sky Croeser, "Thinking Beyond 'Free Speech' in Responding to Online Harassment," *ada: A Journal of New Media & Technology* 10, http://adanewmedia.org/2016/10/issue10-croeser.

[287] Post 24.

takedown policies for harassment and hate speech. In response to this campaign, Jillian York—Director of International Freedom of Expression for the EFF—wrote a piece for *Slate* claiming that U.S. law in fact protected all of the speech that the protesters had flagged as hate speech, and denounced those who suggested that Facebook and other social media sites should consider removing it.[288] York employed the free speech absolutist point of view, claiming that giving Facebook more leeway to take down what it determined "hate speech" would create a slippery slope whereby freedom of speech could be compromised in other situations. While she was addressing privatized governance (the subject of the next section), York also deployed a vision of an idealized public sphere as it relates to online communities more broadly. She wrote:

> …while Facebook may be private, many of its users treat it like the new town square, making it more of a quasi-public sphere. While the campaigners on this issue are to be commended for raising awareness of such awful speech on Facebook's platform, their proposed solution is ultimately futile and sets a dangerous precedent for special interest groups looking to bring their pet issue to the attention of Facebook's censors.[289]

Here, York employs both the notion of the idealized public sphere where individuals can gather to deliberate, while also considering the danger to speech posed by Facebook's status as a private platform. The framing of WAM as an organization with a noble goal, but ultimately a cause that amounts to a "pet issue" is troubling, eliding the fact that women are often alienated in online spaces. However, more interestingly, York notes that users "treat [Facebook] like the new town square" and that social platforms are "quasi-public spheres." Here, we see a consideration of user praxis as perhaps a better guideline for policy than the technological and economic structure

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[288] Jillian C. York, "Facebook Should Not be in the Business of Censoring Speech, Even Hate Speech," *Slate* May 30 2013, http://www.slate.com/blogs/xx_factor/2013/05/30/facebook_and_hate_speech_the_company_should_not_be_in_the_business_of_censorship.html.

[289] Ibid.

underpinning Facebook (i.e. those structures that make it quite clear that Facebook is a "private" space). This emphasis on user-centered protections is not at odds with the anti-revenge porn protests that take aim at the way users actually employ technology in their everyday lives when formulating legal protections. Thus, while the two sides may diverge where free speech is concerned, the role of the user in regulation is an essential part of both sides' arguments.

While the notion of an idealized public sphere has been long put to rest by many public sphere scholars, the notion persists both within legal thought as well as civil and cyberlibertarian views of online space. Yet, as shown by revenge porn but also by recent controversies such as Gamergate, in which online mobs spent months harassing and releasing personal information about high profile women gamers, there is no one unified online public sphere.[290] Rather, just as in real space, there are different publics vying to have a say in swaying public opinion (and creating, within their individual publics, opinion of their own). First Amendment absolutists, while they no doubt have a noble goal in mind, are complicit in the silencing of marginalized voices if these voices are not given space to self-govern and participate in the online sphere that is so essential to modern public life. For victims of revenge porn and online harassment, this sphere is all but foreclosed to them. In these instances, the greatest relief may not come in the form of laws—which are slow to pass and arduous to enforce, especially in the face of vigorous opposition from civil libertarian groups—but in the form of privatized governance. This, I claim, has the potential to unbalance the feedback loop between law, technology, and discourse, giving large corporations more power to affect the day-to-day lives of marginalized individuals online.

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[290] See Torill Elvira Mortensen "Anger, Fear, and Games: The Long Event of #GamerGate," *Games and Culture* (2016): 1-20. See also Caitlin Dewey, "The only guide to Gamergate you will ever need to read," *The Washington Post*, 14 Oct 2014, https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm_term=.4dcb0a46ebf3.

The role of privatized governance

Literature on the online public sphere is rife with claims that corporate-owned platforms can exploit individual users, take over vernacular spaces and discourses, shut out everyday voices, and cave to political pressures. The "blogosphere" can be colonized by market forces—aggressive copyright regimes, corporate blogs masquerading as vernacular discourse—or be threatened by corporate and government censorship.[291] The general concern across these studies seems to be that corporations may be invisible puppeteers guiding discourse online. This is especially dangerous when corporations both own the public sphere and act within it—providing platforms for users to share and connect with one another while also setting policies for those spaces that affect which content may and may not be distributed. In the case of revenge porn, this privatized governance became an issue when search engines Google and Bing announced in 2015 that they would remove revenge porn search results by request. While this would not remove the content from the sites entirely, it solved one of the primary problems faced by revenge porn victims: the fact that their online presence was overrun by their intimate images rather than their professional accomplishments. This intervention was widely celebrated by advocates for revenge porn survivors. However, it also points to a dangerous point of intervention in the revenge porn debate, one that has the potential to unbalance the feedback loop between law, technology, and discourse in favor of technology platforms.

Generally speaking, Google has upheld a strict policy of non-interference with search results. For instance, when a search for "Jew" displayed an Anti-Semitic website within the top

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[291] Bart Cammaerts. "Critiques on the Participatory Potentials on Web 2.0." *Communication, Culture & Critique* 1 (2008): 358–377.

two results, Google appended a disclaimer to the search page that contained the following: "Google views the comprehensiveness of our search results as an extremely important priority. Accordingly, we do not remove a page from our search results simply because its content is unpopular or because we receive complaints concerning it."[292] This sentiment speaks to the underlying topoi of freedom of speech as a value that cannot be trampled either by technological architecture or overbroad regimes of civil rights. By appealing to the broad and comprehensive dissemination of information as a value that must be upheld above unpopularity or disagreement, Google echoes the free-speech absolutism that accompanies the civil libertarian ethos of the internet. Beyond this, as Siva Vaidhyanathan notes, Google's position contains strong threads of techno-fundamentalism—the belief that technological invention is the best possible solution to all problems.[293] This boundless faith in innovation and technology, again, harkens back to the topoi that internet architecture is sacrosanct—the notion vehemently adhered to by groups like the EFF, who increasingly argue against policies that limit the availability of speech, access to technological features, and argue for user control over devices (as in the case of the DMCA rulemaking).

Techno-fundamentalism and a belief in the unencumbered network supports the idea of both a tech-savvy public and an internet that serves as a forum for open discourse. However, where Google re-enters this equation is somewhat more complicated. Google's search algorithm is a classic example of a "black box"—users do not know exactly what informs the display of information on the page, the experience rendered seamless by Google's speed and minimalist

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[292] Siva Vaidhyanathan, *The Googlization of Everything (and why we should worry)*, (Berkeley: University of California Press, 2011), 36.

[293] Ibid., 76.

interface. However, as Vaidhyanathan notes, Google's algorithmic biases "valuing popularity over accuracy, established sites over new, and rough rankings over more fluid or multidimensional models of presentation … affect[s] how we value things, perceive things, and navigate the worlds of culture and ideas."[294] Thus, information displayed in a Google search result is far from neutral—rather it carries with it the biases of the people who built the black box.[295] Thus, Google's desire to display content "as-is" has the potential to reinforce cultural systems of oppression that can have very real offline effects (as in the case with the search results for "Jew").

In June of 2015, Google announced that it would, upon request, remove revenge porn links to individual photos and profiles from its search results (as opposed to removing entire sites from its listings). In their statement, Google said that "our philosophy has always been that Search should reflect the whole web. But revenge porn images are intensely personal and emotionally damaging, and serve only to degrade the victims—predominantly women."[296] They classify the narrowness of their policy and the types of actions they will take to remove content as similar to those employed with regard to the removal of links to bank account numbers and signatures, establishing a familiar comparison in discussions of revenge porn—the likening of intimate images to financial data. Interestingly, Google framed their departure from their prior policy in terms of a change in the decision that "search should reflect the whole web." This assertion is rooted in the same assumptions undergirding the early-internet mandates that

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[294] Ibid., 7.

[295] Langdon Winner, "Do Artifacts Have Politics?" *Daedalus* 109 no. 1 (1980).

[296] Amit Singhal "'Revenge porn' and search," *Google Public Policy Blog*, June 19, 2015, http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html

"information wants to be free" or that "the web interprets censorship as error and routes around it."[297] Thus, Google's decision to remove revenge porn content at the request of victims marks a departure from their traditional way of thinking of their role online—as an allegedly neutral purveyor of information or truth—adding an additional mandate that they should protect their users from the most malicious forms of online violence. This utilitarian view of Google's role in the online public sphere contrasts with the role that civil libertarian groups such as the EFF believe corporations should play, as evidenced by York's assertion that Facebook should not be in the business of regulating speech on its platforms.

Reaction to Google's decision was swift and overwhelmingly positive. Carrie Goldberg, in a blog post for the Cyber Civil Rights Initiative, described her elation at being able to finally tell victims of revenge porn that "it will all be okay" as opposed to "we can get through this."[298] This shift from the publication of revenge porn being something that could be endured to something that would eventually end implies that Google's policy is an effective solution to revenge porn. Indeed, many victims have said that their primary wish was for the content to go away—above even bringing the individual responsible for distributing the pictures to justice. Goldberg has been vocal in activism for revenge porn legislation. Yet, what is touted as a major victory by those advocating for revenge porn laws is, ultimately, a change in *corporate* policy that betters the lives of revenge porn victims.

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[297] "Information wants to be free" is attributed to Stewart Brand, as recorded by Steven Levy in *Hackers: Heroes of the Computer Revolution* (Norwell: Anchor Press, 1984).

[298] Carrie Goldberg, "The IRL impact of Google's new revenge porn policy," *End Revenge Porn*, June 23 2015.http://www.endrevengeporn.org/the-irl-impact-of-googles-new-revenge-porn-policy.

The ACLU, in contrast, loudly objected to the change in Google's policy. As Christopher Soghoian, principal technologist at the ACLU's Speech, Privacy and Technology project, said in an interview with VICE: "If you want Google and Twitter to police what people are posting, you're creating the infrastructure for a surveillance state … Once Google has the ability to recognize and remove any image on the internet, these are not the only requests that they receive. You're going to have the government coming along and saying that they want something removed."[299] The potential for unscrupulous actors certainly exists wherever there is a tool that can be used to remove content—this potential was observed with SOPA/PIPA and other copyright related legislation, which was often used as a way to limit free speech rather than for legitimate copyright purposes. However, as of the time of writing, there have been no reports of government utilization of Google's revenge porn takedown system.

In July 2015, just a short time after Google's announcement, Microsoft also announced that it would be removing revenge porn from Microsoft products such as search engine Bing, cloud engine OneDrive, and Xbox Live.[300] The company announced that they would remove links from Bing, and would remove access to the content when it was posted to their proprietary sharing platforms, OneDrive and Xbox Live. Moving beyond Google's announcement, which merely described the policy and how users could take advantage of it (with a passing mention that women were the demographic primarily affected by non-consensual pornography), Microsoft's blog post contained a description of revenge porn and its harms, as well as a call for further regulation. Jacqueline Beauchere, Microsoft's Chief Online Safety Officer and the author

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[299] O'Hara.

[300] Jacqueline Beauchere, "'Revenge porn': Putting victims back in control," *Microsoft on the issues*, July 22 2015, http://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control.

of the post, wrote that revenge porn could "damage every aspect of a victim's life," even leading to suicide. She closed her post writing that "It's important to remember… that removing links in search results to content hosted elsewhere online doesn't actually remove the content *from the Internet*—victims still need stronger protections across the web and around the world." The post closed with a link to the Cyber Civil Rights Initiative and Without My Consent.[301]

Carrie Goldberg reacted in a similarly enthusiastic manner to Microsoft's announcement, describing it as "by far the greatest display of activism on this issue we've seen from any major social media or search engine company."[302] The choice to describe this post as a "display of activism" is particularly interesting, and a departure from her reaction to Google's decision. While the removal of revenge porn content from the web is no doubt cause to celebrate, the framing of their decision (and blog post) as activism separates the act from the capitalist motivation that corporations are generally assumed to have when making policy changes—and also positions Microsoft less as a technology company and more as a discursive actor in the feedback loop between law, discourse, and technology.

This conflation of business and social justice agendas opens up a fraught discourse with regard to justice, a conversation that civil libertarian organizations have a history of placing on the agenda. In positioning corporations as activists, Goldberg brings up a complicated relation between protecting victims and seeking justice for them. Recall Jillian York's comment on the Women Action and Media campaign encouraging Facebook to amend its policies regarding hate speech—that the solution was "ultimately futile and sets a dangerous precedent for special

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[301] Ibid.

[302] Carrie Goldberg, "How to Report Revenge Porn on Social Media," *C.A. Goldberg Law*, November 11, 2015, http://www.cagoldberglaw.com/how-to-report-revenge-porn-on-social-media.

interest groups looking to bring their pet issue to the attention of Facebook's censors."[303] While the EFF has not released any statements about Google and Microsoft's new policies as of the time of writing, the same logic would seem to apply—putting corporations in charge of deciding what does and does not constitute hate speech is a slippery slope. Yet, as the article also notes, companies are well within their rights to regulate what happens on their platforms. Undoubtedly, removing Google search results has a tremendous effect on victims' everyday lives—they can once again submit their name for a job without worrying that a Google search will turn up intimate images, or date without worrying that their prospective partner will be surprised by their search results. Thus, positioning corporations as activists in this fight in some sense centers the protection of victims, as the removal of search results is one of the most tangible results in the fight against revenge porn. However, it also puts a lot of power into the hands of corporations and faith in their just actions.

As Siva Vaidhyanathan notes, the increased trust in corporations such as Google that provide innumerable seemingly essential services like web search and e-mail can elide the fact that, in the end, we are Google's product and not its customer. While it is a remote possibility that Google may begin caving to every takedown request regardless of validity, if Google's statement is to be believed, their mission is to represent the web as best as possible. However, that definition is still up to Google—and their famously opaque and ever-changing search algorithms. Thus, perhaps the more concerning and immediate fact that arises from Google's policy is the implication for data collection and storage. By indicating what should be taken down, information is given to Google with little to no indication of how it might be catalogued. The celebration of Google's policy also evinces a conflation of corporate and governmental

[303] York, "Facebook Shouldn't."

regulation. Some online commenters even expressed concern that Google would retain a database of these requests alongside the images that the user wished to have taken down.[304]

Furthermore, an uncritical celebration of policies like Google and Microsoft's can downplay the importance of legislation in cementing long-lasting protections for vulnerable communities. If corporate interventions into the regulatory space are touted as victories on the scale of legislation, this has the potential to elide the fact that corporate policies are mutable, opaque, and not always the result of solely altruistic intent. While these policies are commendable, casting technology companies as activists means that not only are they intervening in the feedback loop between law, technology, and discourse through technological means, but that their arguments are being given substantial weight within the discursive sphere. Thus, it is important to look critically at the effect that these corporations can have in the total picture of revenge porn discourse. Revenge porn legislation advocacy is an area where vernacular legal formations have had a tremendous and measurable effect in shaping the law—largely because these points of view did not face discursive competition from other, more empowered actors. Yet when companies set the agenda for revenge porn advocacy, vernacular viewpoints may be silenced, leading to debates much like those for net neutrality, where empowered groups and individuals set the agenda for grassroots actors. In the case of revenge porn, which is an act of intimate violence with devastating consequences, this can have a deleterious effect on the ability of vernacular voices to be amplified to the level of the law.

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[304] The top-voted comment on a reddit thread about Google's announcement was "Google announces plans to create world's largest database of people indexed with their nude photos." "Google to shut the door on 'revenge porn,'" *r/technology*, https://www.reddit.com/r/technology/comments/3agixr/google_to_shut_the_door_on_revenge_porn.

Ideological tensions within digital rights advocacy

Revenge porn is without a doubt one of the most troubling examples of the ways in which law, technology, and discourse can become inextricably tangled—calling up ideological commitments from the birth of the internet as a way to tamp down on attempts to prevent harassment and humiliation online. The civil liberties perspective holds that revenge porn laws (regardless of public interest exemption) will pave the way towards reduced First Amendment rights. In contrast, the civil rights perspective holds that revenge porn is an issue of harassment and needs to be criminalized due to the effects that it can have on a victim's ability to participate in public life both online and off. These two points of view, rooted as they are in fundamentally different views of the value of free speech, argued through similar and yet incommensurable topoi, will likely never be satisfied by a law or policy. However, as this chapter has shown, revenge porn represents an issue where everyday individuals, in coalition with empowered advocates, have been able to affect the law through the translation of vernacular legal expertise into model legislation. Through this, we can see how a legal regime that takes practical wisdom and everyday practice into account is possible. What this requires, in this case, is that we hold in tension the notion of the First Amendment as a neutral mandate that protects all individuals equally with the notion that everyday individuals do not always feel that they are subject to the law in the same way as their neighbor.

It is essential to consider the dangers posed by allowing private companies to lead the vanguard in the fight against revenge porn. Without legal remedies, victims of revenge porn will be more apt to look to companies like Google to help them salvage their online lives—given that an online presence is essential to professional and personal development. While companies like Google and Microsoft have espoused commitments to social justice in the past, and have

implemented policies that protect revenge porn victims, corporate decisions have the potential to be capricious in a way that law does not. Beyond this, questions of data storage and what companies like Google will do with the information gleaned from revenge porn takedown requests have gone unanswered. Coming from a civil liberties perspective, it seems far less threatening to free speech to allow judges and juries to adjudicate matters of guilt in revenge porn cases, as opposed to entrusting that responsibility to the employees of Silicon Valley corporations. This preserves balance in the feedback loop between law, technology, and discourse, without empowering companies as both technological and discursive actors.

While there are certainly multiple points of divergence between those who advocate for civil liberties from a First Amendment standpoint and those who are concerned primarily with civil rights, these viewpoints do share one common foundation: the belief that the internet is an important space for personal, professional, and political development. Through allowing unprecedented levels of connection, web platforms have also allowed more injurious and pervasive forms of harassment. In a world where it is newly possible to harm others by releasing their personal information and intimate images to a wide audience, new legal protections are in order—and victims of revenge porn have been outspoken and successful in asking for protections from the government. The current revenge porn laws will certainly be tested in the coming years, and the contemporary political situation does not make clear what the result of these tests will be. Hopefully, by proceeding forward with a framework that centers individual practice and experience while preserving the value of self-governance in the public sphere, it will be possible to arrive at a legal solution where both civil rights and civil liberties are in appropriate balance.

Conclusion

Mapping a Future for Digital Rights Advocacy in Uncertain Times

Almost two years to the day after he helped to spearhead the Internet Blackout Day against SOPA and PIPA, and a little more than six months after his keynote at the Freedom to Connect conference, digital rights activist and technologist Aaron Swartz took his own life in his Brooklyn apartment. While, as is the case with suicide, there may never be a clear picture of what Swartz's state of mind was in the time leading up to his death, the most likely factor contributing to his tragic decision was the fact that Swartz was in the midst of a federal investigation for allegedly violating the Computer Fraud and Abuse Act. His crime: accessing the computer network at MIT (which is open to all on campus, regardless of whether they are an MIT student or not) in order to download thousands of articles from the academic database JSTOR. Swartz was indicted by a federal grand jury on charges of computer fraud, wire fraud, unlawfully obtaining information from a protected computer, and recklessly damaging a protected computer. To these charges, nine more felony counts were eventually added, meaning that, at maximum, Swartz faced up to fifty years in federal prison and one million dollars in fines. JSTOR had withdrawn from the case early on, and asked the government to follow suit. The government declined.

As many wrote in the days and months following Swartz's passing, this was a case of government overcharging, throwing the book at a high-profile figure in order to make an example of him. In this sense, these many claimed, Aaron was hounded to death by the

government.[305] All for, it seems, reaching beyond the intended use of an open computer network in order to access (and allegedly share) academic articles, protected behind a paywall. And, beyond this, for refusing to accept plea deals that would have made him a convicted felon. Swartz's case, while extreme, illustrates what is at stake in fights for digital rights—the drive to share and access information is a political thing. Swartz represented this in the extreme—a maker of civic technologies, co-creator of the reddit platform, developer of the Creative Commons open licensing standard for cultural works. In the feedback loop between law, technology, and discourse, Swartz worked on all fronts—developing platforms to share information, working with friend and mentor Lawrence Lessig to develop an alternative to traditional copyright (Creative Commons), and engaging in public advocacy in order to try to shift the tide of thought about digital rights. His use of the MIT network to download JSTOR articles was a tactical act, a diversion of institutional resources for subversive purposes. While we cannot know what he intended to do with the articles, it is clear from Swartz's public statements that he believed that information, as goes the early-internet adage, wants to be free—and that digital citizens deserved to access it. He had a faith in "the people, the people themselves" to cause a sea change in politics.[306] For this, he faced fifty years in prison.

Swartz's story demonstrates, in part, that nobody fighting for digital rights can do so alone. The internet, far from a monolith, is a vast ecosystem encompassing individuals and groups of every conceivable ideological stripe. Within this vast environment, vernacular

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[305] John Naughton, "Aaron Swartz stood up for freedom and fairness—and was hounded to his death," *The Guardian*, Feburary 7, 2015, https://www.theguardian.com/commentisfree/2015/feb/07/aaron-swartz-suicide-internets-own-boy.

[306] Aaron Swartz, "How We Stopped SOPA," (keynote, Freedom to Connect Conference, May 21 2012) https://www.democracynow.org/2013/1/14/freedom_to_connect_aaron_swartz_1986.

communities develop—the technologists who envision a network structure that preserves neutrality in the face of private governance, the remixers who educate one another about fair use, the revenge porn survivors who find legal workarounds to have their pictures removed, the automobile tinkerers who find themselves running afoul of the law when trying to fix their cars. The internet provides both a gathering place and environment for the development of expertise among these communities, as well as a staging area for the legal battles ahead. Through digital connections, these vernacular actors can connect with empowered advocates, for just as one opinion rarely has an effect in a vacuum, this vernacular legal expertise requires some degree of translation to wend their way from the grassroots to the court. Still, as I hope I have demonstrated in the preceding pages, these vernacular reimaginings can work upon the law, reforming legal norms and eventually the law itself. Indeed, in Swartz's speech at the Freedom to Connect conference, he celebrates the power of everyday people in fighting unjust laws—something that happened in the case of SOPA/PIPA and also several times since his death.

A belief in the power of everyday people to intervene in law depends on the ability of these same people to see the flows of power that attend both governmental structures that order daily life, as well as those more private and insidious flows of power that move between corporations and governments online. Network technology has enabled unprecedented visibility, allowing for the flows of power on and offline to be visible to everyday individuals, particularly those in vernacular communities who feel the effects of these flows most intimately. This, in turn, helps to reveal the feedback loop between law, technology, and discourse—technology alters the legal landscape, law governs technology, and discourse is constantly engaged in a push and pull with both law and technology. In an internet ecosystem where everyday people can gain unprecedented knowledge about the laws and policies that affect them, and also see how these

policies are created through an interlocking chain of technological and regulatory power, citizens can both develop vernacular legal expertise and use the platforms provided by the internet to speak out on issues that are important to them. Often, however, these citizens require advocates with more legal or technological expertise to boost their signals or translate their vernacular reconfigurations into institutional language. This is not a failure of the system, but does indicate that the organs of the state should be receptive to vernacular legal opinions in order to better serve and protect citizens. As I have shown in the preceding case studies, this happens largely through the coalitions formed between vernacular communities and empowered advocates. Still, there is little doubt that everyday people have the power to shape and shift both legal norms and law itself.

In the case of net neutrality, an issue emerged that made the interactions between the law and the technological underpinnings of the internet visible to everyday people in a new way, as citizens saw the effects that decisions made by technology companies could have both on their experience as consumers of commercial internet and their access to information on the web. While net neutrality began as a wonkish concept at the intersection of technology and policy, it grew to encompass a much broader set of arguments and assumptions about the way the internet should be—an in turn, grew to such an extent that individuals without particular expertise or technological literacy joined in the chorus calling for strong net neutrality. In this sense, while the agenda of net neutrality was not set by the grassroots, vernacular actors certainly helped to make net neutrality advocacy what it was—sending in multiple millions of comments to the FCC, leading to their decision to reclassify broadband internet providers as common carriers.

The DMCA rulemaking, in contrast, is structurally similar to the public comment period on net neutrality—an open web-based hearing allowing everyday people to weigh in on a

regulatory issue—but the makeup of the discourse is significantly different. In the case of the DMCA rulemaking, empowered advocates set the agenda, but also help to translate vernacular reimaginings of copyright law into legalistic language. This, over time, has resulted in particular groups gaining quite a bit of power in the overall rulemaking discourse. The EFF's compilation of interviews with remixers, for instance, took the norms and values of the remix community and translated it into an argument based in legal precedent. However, these remixers were recruited by the EFF. In the case of automobile exemptions, the majority of these comments were collected through the Digital Right to Repair website. In this sense, the DMCA rulemaking illustrates many of the same features of the feedback loop between law, technology, and discourse seen in the case of net neutrality, but also illustrates the role that vernacular legal expertise can play in establishing regulatory norms. For instance, the EFF translated the values of remixers into legal arguments when assembling their comments for a request for exemption. This resulted in the Register acknowledging the remixers' concerns and passing the exemption.

In the case of revenge porn, the law initially had no direct process through which victims could remove their pictures, with many resorting to copyright takedowns or other adjacent measures. Because of the support networks, resources, and campaigns created by victims, those affected by revenge porn were able to team up with lawyers and other empowered advocates. Unlike the DMCA rulemaking, where the agenda was set and actions spurred largely by groups with more power, in the case of revenge porn legislation the vanguard was led by those personally affected by non-consensual pornography. This led to what I have called survivor-centered legislation. Moreover, debate around revenge porn legislation revealed deep-seated differences between those arguing for digital rights from a civil liberties viewpoint and those arguing for it from a civil rights viewpoint.

Discursively, the topoi that crop up in digital rights debates tell us a lot about the lineage of particular ways of thinking and seeing the digital world. Many arguments seem to take their root in the early internet, which in turn takes its roots in the 1960s counterculture that birthed many early computer communities. These arguments rely on the assumption that the internet is a liberatory technology that, by its very design, gives all voices equal weight and allows equal participation. Many arguments derive from this assumption that "information wants to be free," which naturally leads into arguments that attempts to change net architecture, limit particular types of speech, or shift the balance of power online from the people towards governments and corporations can lead irrevocably into censorship. To a certain extent, the concerns of the early internet utopians about this potential have been born out by large companies like Facebook and Google, who now supply the central portals into the internet for so many people—especially with recent trends such as zero-rating in developing countries (in which Facebook, for example, provides access to their platform at low or no cost, but not extending this to the rest of the internet).

Still, utopian visions of the connection enabled by the internet persist—and for good reason. In recent years, internet movements have supplemented on-the-ground revolutions throughout the Middle East (during the so-called "Arab Spring"), helped to publicize widespread NSA surveillance of U.S. citizens (through the leaks of former government contractor Edward Snowden), and helped to spread awareness about topics all the way from sexism at tech companies to the police mistreatment of members of the Standing Rock Sioux tribe as they protested the Dakota Access Pipeline. The internet does connect people in unprecedented and politically important ways—and it has also come under threat from corporate and government interests. While by necessity this study has focused solely on digital rights advocacy within the

U.S. legal framework, these battles play out on a global scale, and future research should consider the digital rights of individuals on a global scale, taking into account divergent levels of online access, literacy, and also ways of valuing concepts like privacy and freedom of speech.

In digital rights discourse, the topoi of freedom and uninhibited sharing of information frequently run up against conflicting topoi of citizenship and government responsibility when the digital rights in question are litigated through regulatory and legal proceedings. This is visible in both the net neutrality and DMCA rulemakings. In net neutrality, citizens appealed to the government to better regulate ISPs, while at the same time mistrusting the government due to a perceived revolving door between the FCC and telecommunications lobbying firms. In the case of the DMCA rulemaking, automobile mechanics and farmers appealed to the Copyright Office to protect their rights to tinker with the computer systems in the cars and farm equipment. These arguments were linked both to an argument about property ownership that was tied to a distinctly American notion of citizenship, but also to values and priorities that held true in smaller vernacular communities, such as the agricultural community's emphasis on self-reliance and the ability to do repairs on one's own. These groups mistrusted the corporate rights-holders, feeling that they did not have consumers' best interests in mind, and thus they appealed to notions of ownership tied to the nation-state to remedy these problems. In the case of revenge porn victims, many felt betrayed and left behind by local law enforcement as they discovered that the legal systems in place were inadequate to ensure their protection—which in turn has led to survivors lobbying for revenge porn legislation. Thus, what appears throughout the discourse on digital rights is an uneasy tension between freedom and regulation, and between government orders and privatized governance that emanates from within technology companies. This indicates that many online are simultaneously holding the internet as an unbounded space in tension with the

reality that the internet is regulated in increasingly more insidious ways. In order to protect digital rights, it often becomes necessary to balance government and corporate interests with the potential of a free and unimpeded network.

Perhaps most troublingly, the overall discourse of digital rights shows that the commitments to openness and neutrality can sometimes be used in a manner that pushes vulnerable voices further into the margins. While online publics are, by their nature, disconnected and fragmented, the continuous deployment of the notion of the internet as an idealized public sphere ignores the many ways in which this idealized sphere has been proven to be exclusionary. The imagined public sphere often involves the bracketing of difference, the ability of individuals to come together in dialogue without the ties of race, class, or sex. Yet, as has been demonstrated at length, these inequalities cannot be bracketed and ignored—they both constitute the worldview of the actors that they affect, and systemic injustice and bias seep in even to spheres of alleged equality and neutrality. This happened in the bourgeois coffee shop as much as it does on Facebook or Twitter. This is not to say that online networks should not operate in a neutral way, privileging all traffic equally without preferential treatment. What this does point to, however, is that the suturing of free speech to internet openness has had consequences for marginalized groups online. As the continued harassment of women in instances like Gamergate have shown, to perform a female identity in online space can still be a risky endeavor. In the case of revenge porn, the civil liberties approach has contributed to a culture in which misogyny and harassment thrive under the banner of free speech. The civil rights approach, which values free speech as an essential part of self-governance—that through which the public sphere is truly protected for all actors—presents, perhaps, a more sustainable alternative.

Still, the civil rights approach to regulating online space is, without a doubt, on the fringes of the mainstream. As my case studies have demonstrated, the digital rights battles that win the most popular support—situations like SOPA/PIPA and net neutrality that recruited massive grassroots support and opposition—pit citizens against a monolithic enemy aiming to restrict their speech. Digital rights issues like the DMCA Section 1201, which pit smaller groups against rights holders, as well as revenge porn, which primarily affects women and takes place on a more individual scale, have not recruited the same level of support nor agreement amongst digital rights advocates. This is, in the parlance of the tech community, perhaps a feature rather than a bug. As history has demonstrated, laws—especially those that protect marginalized and vulnerable populations—often originate on the fringes of society. Yet, these laws are often accepted over time and the ideological foundations that underpin them taken as foundational, despite initial opposition.

Ideological differences aside, all digital rights cases have to contend with a legislative structure that moves at an often glacially slow pace when compared to the speed of both technological innovation as well as online discourse. In the feedback loop between law, discourse, and technology, the latter two often expend most of their efforts trying to get the law to catch up. This, I believe, makes vernacular legal expertise one of the most centrally important aspects of digital rights discourse. Just as bloggers can generate copia—multitudinous arguments on a current event—that the mainstream media is unable to, vernacular legal interpretations are a rich resource to look to when imagining alternative ways of regulating online life and preserving digital rights.

The civil rights approach to free speech, then, can be seen emanating from the grassroots in a number of cases. As revenge porn victims advocate for laws that protect the ways that they

use technology and preserve their ability to participate in online space, they propagate a reimagining of the role of free speech online. Similarly, the women game developers and journalists targeted during the GamerGate harassment campaign have advocated both for legal protection but also for better technological governance to address online harassment and abuse. However, the legal response to victims was lacking—in a report released early in 2017, FBI investigators repeatedly misspelled Twitter, interviewed men who admitted to phoning and e-mailing death threats to women online and declined to bring charges or investigate further, and left out significant amounts of information that GamerGate victims report supplying. In the words of one woman involved—tech CEO and Massachusetts Congressional candidate Brianna Wu—this indicated a massive structural failure on the part of the FBI.[307] The legal infrastructure to prosecute online harassers did not exist, nor did the understanding required to assess harassment and threatening behavior online. In one instance, the same court that dogged Aaron Swartz until the end of his life declined to pursue a case against one of the instigators of the GamerGate harassment, citing First Amendment concerns.

So where does this leave us? As digital rights battles are won in the form of greater regulation of internet service providers, exemptions to the Digital Millennium Copyright Act, and laws that better protect those victimized by revenge porn, new digital rights struggles begin anew every day. As of the time of this writing, a new FCC Chairman has been appointed who has staunchly opposed net neutrality. In the spring of 2016, the government ordered Apple to circumvent their encryption on an iPhone used by a shooter in San Bernardino, CA, only to withdraw their demand at the last minute as a private consultant was able to gain access to the

[307] Molly Fosco, "GamerGate Target Is Running for Congress and Criticizing the FBI," *Seeker*, February 1 2017, http://www.seeker.com/gamergate-target-is-running-for-congress-and-criticizing-the-fbi-2230364295.html.

phone. As we move into a more and more uncertain political time—one in which the President of the United States has spoken out openly against the media and limited press access to his administration, where Silicon Valley billionaires bankroll court cases designed to drive online media out of business—digital rights are more important than ever.[308] The ability of citizens and vernacular actors, journalists and activists, to access the wealth of information available online and to share their own discoveries is essential to nurturing a well-informed public as uncertainty takes hold in the global environment. A robust set of digital rights can protect this ability.

What I hope I have shown in the preceding pages is that digital rights are far from a monolithic construct. Rather, just as any issue of social justice, especially one whose primary battles take place online, digital rights are a fragmented issue, drawing from many different groups and sectors of society. While those with higher degrees of institutional sanction and power may be some of the most influential parties in these debates, their arguments mean little without attending to and amplifying the voices originating from vernacular communities. Digital rights touches all of us, whether we notice it or not. The ways in which everyday people access and use the internet have political implications—and our political landscape will shape and be shaped by online actions in the years to come. Thus, what we must focus on now is advocating for the digital rights landscape that best protects and supports all voices. Digital rights are a moving target, constantly pushed and pulled by law and by privatized governance. However, by putting an ear to the ground and listening for the voices of the grassroots, we can build an electronic frontier that is both free and just.

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[308] Andrew Ross Sorkin, "Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker," *The New York Times*, May 25, 2016, https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html.

Bibliography

Aristotle. *On Rhetoric: A Theory of Civic Discourse*, 2nd ed, trans. George A. Kennedy. New York, Oxford: Oxford University Press, 2001.

Asen, Robert. "A Discourse Theory of Citizenship." *Quarterly Journal of Speech* 90 (2004): 189–211.

-----. *Invoking the invisible hand: Social Security and the privatization debates*. MSU Press, 2009.

-----. "Reflections on the Role of Rhetoric in Public Policy." *Rhetoric & Public Affairs* 13, no. 1 (2010): 121-143.

Aufderheide, Patricia and Peter Jaszi. *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Chicago: University of Chicago Press, 2011.

Barbrook, Richard, and Andy Cameron. "The Californian Ideology." *Science as Culture* 6, no. 1 (January 1996): 44-72.

Benkler, Yochai, Hal Roberts, Robert Faris, Alicia Solow-Niederman, and Bruce Etling. "Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate." *SSRN Electronic Journal* (2013). http://papers.ssrn.com/abstract=2295953.

Benkler, Yochai. *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven: Yale University Press, 2006.

Berlin, Isaiah. "Two Concepts of Liberty" in *Four Essays on Liberty.* Oxford: Oxford University Press, 1958.

Berry, David. *Life in Code and Software: Mediated Life in a Complex Computational Ecology*. Open Humanities Press, 2012.

Bitzer, Lloyd. "The Rhetorical Situation," *Philosophy and Rhetoric* 1, no. 1 (1968): 1-14.

Black, Edwin. *Rhetorical criticism: A study in method*. Madison: University of Wisconsin Press, 1978.

Bogost, Ian. *Persuasive Games: The Expressive Power of Videogames*. Introduction. Cambridge, MA: MIT Press, 2007.

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. New Haven: Yale University Press, 2008.

Braman, Sandra. *Change of State: Information, Policy, and Power*. Cambridge: The MIT Press, 2009.

Brouwer, Daniel C., and Robert Asen. *Public modalities*. University of Alabama Press, 2010.

Brown, Ian and Christopher T. Marsden. *Regulating Code: Good Governance and Better Regulation in the Information Age*. Cambridge: The MIT Press, 2013.

Burgess, Jean and Joshua Green. *YouTube: Online Video and Participatory Culture*. Digital Media and Society Series. Cambridge; Malden, MA: Polity, 2009.

Burk, Dan L. "Materiality and Textuality in Digital Rights Management*." Computers and Composition* 27 (2010): 225–234.

Burke, Kenneth. *A Rhetoric of Motives*. Berkeley: University of California Press, 1950.

Cammaerts, Bart. "Critiques on the Participatory Potentials on Web 2.0." *Communication, Culture & Critique* 1 (2008): 358–377.

Castells, Manuel. *Communication Power*. Oxford: Oxford University Press, 2009.

de Certeau, Michel. *The Practice of Everyday Life*, trans. Steven F. Rendall. Berkeley: University of California Press, 1984).

Choi, Ben F. and Lesley Land, "The effects of general privacy concerns and transactional privacy concerns on Facebook apps usage," *Information & Management* 57 no. 5 (2016): 868-897.

Citron, Danielle Keats. *Hate Crimes in Cyberspace*. Cambridge: Harvard University Press, 2014.

Cohen, Julie E. "Privacy, Visibility, Transparency, Exposure." *The University of Chicago Law Review* 75, no. 1 (2008): 181-201.

Coleman, Stephen and Jay G. Blumler. *The Internet and Democratic Citizenship: Theory, Practice and Policy*. New York: Cambridge University Press, 2009.

Coleman, Gabriella. "Code is speech: Legal tinkering, expertise, and protest among free and open source software developers." *Cultural Anthropology* 24, no. 3 (2009): 420-454.

Conti, Olivia. "Disciplining the vernacular: Fair use, YouTube, and remixer agency." *M/C Journal* 16, no. 4 (2013).

-----. "Political Remix Video as a Vernacular Discourse," in *Routledge Companion to Remix* Studies, eds. Eduardo Navas, Owen Gallagher, and xtine burrough (New York: Routledge, 2014): 346-357.

Cover, Robert M. "Foreword: Nomos and narrative." *Harvard Law. Review* 97 (1983): 4.

Croeser, Sky. "Contested technologies: The emergence of the digital liberties movement," *First Monday*, 17 no. 8 (2012).

-----. *Global Justice and the Politics of Information: The Struggle Over Knowledge*. Routledge: 2015.

-----. "Thinking Beyond 'Free Speech' in Responding to Online Harassment," *Ada: A Journal of New Media & Technology* 10 (2016). http://adanewmedia.org/2016/10/issue10-croeser.

Dahlgren, Peter. "The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation." *Political Communication* 22 (2005): 147–162.

DeLeuze, Gilles. "Postscript on the Societies of Control," *October* 59 (1992): 3-7.

DeNardis, Laura. *The Global War for Internet Governance*. New Haven: Yale University Press, 2014.

DeNardis, L., and A. M. Hackl. "Internet governance by social media platforms." *Telecommunications Policy* 39, no. 9 (2015): 761-770.

Dewey, John. *The Public and its Problems*. Henry Bolt and Company, 1927; reprint, Athens: Swallow Press, Ohio University Press, 1991.

van Dijck, José. "Users Like You? Theorizing Agency in User-Generated Content." *Media Culture Society* 31 (2009): 41-58.

Dryzek, John S. *Foundations and Frontiers of Deliberative Governance*. Oxford: Oxford University Press, 2010; reprint Oxford: Oxford University Press, 2013.

Ekstrand, Victoria Smith, Andrew Famiglietti, and Suzanne VL Berg. "Birthing CLA: Critical Legal Activism, the IP Wars and Forking the Law." *Cardozo Arts & Entertainment* 31 (2012): 663-681.

Eschenfelder, Kristin R., Robert Glenn Howard, and Anuj C. Desai. "Who posts DeCSS and why?: A content analysis of Web sites posting DVD circumvention software." *Journal of the American Society for Information Science and Technology* 56, no. 13 (2005): 1405-1418.

Ewick, Patricia and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life.* Chicago: The University of Chicago, 1998.

Farina, Cynthia R., Mary Newhart, and Josiah Heidt. "Rulemaking vs. democracy: Judging and nudging public participation that counts." *Michican Journal of Environmental and Administrative Law* 2 (2012): 123-172.

Felski, Rita. “The Feminist Public Sphere,” in *Beyond Feminist Aesthetics*. Cambridge: Harvard University Press, 1989. 164-175.

Foucault, Michel. *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith. New York: Pantheon Books, 1972.

-----. *Discipline and Punish: The Birth of the Prison* 2nd ed. New York: Random House, 1992.

Fraser, Nancy. “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” In *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge: The MIT Press, 1992): 109-142.

Galloway, Alexander R. *Protocol: How Control Exists after Decentralization*. Cambridge: The MIT Press, 2004.

Gangadharan, Seeta Peña. "Public participation and agency discretion in rulemaking at the Federal Communications Commission." *Journal of Communication Inquiry* 33, no. 4 (2009): 337-353.

Gillespie, Tarleton. *Wired Shut: Copyright and the Shape of Digital Culture*. Cambridge, MA: The MIT Press, 2007.

Golumbia, David. “Cyberlibertarianism: The Extremist Foundations of ‘Internet freedom,’” Talk delivered at Clemson University, September 5, 2013.

Goodnight, G. Thomas. "The metapolitics of the 2002 Iraq debate: Public policy and the network imaginary." *Rhetoric & Public Affairs* 13, no. 1 (2010): 65-94.

Gray, Mark. “New Rules for a New Decade: Improving the Copyright Office’s Anti-Circumvention Rulemakings,” *Berkeley Technology Law Journal* 29, no.1 (2014): 759-798.

Grey, Thomas C. "Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment." *Social Philosophy and Policy* 8, no. 02 (1991): 81-107.

Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Cambridge, MA: MIT Press, 1989.

Harlow, Rachel Martin. "Topoi and the reconciliation of expertise: A model for the development of rhetorical commonplaces in public policy." *Journal of Technical Writing and Communication* 45, no. 1 (2015): 57-75.

Hård af Segerstad, Ylva and Mathias Klang, “The Depths of Shallow Networks,” *Selected Papers of Internet Research* (2013).

Hartelius, E. Johanna. *The Rhetoric of Expertise*. New York: Rowman and Littlefield, 2010.

Hasian, Marouf Jr., *Legal Memories and Amnesias in America's Rhetorical Culture.* Boulder: Westview Press, 2000.

Herman, Bill D. and Oscar H. Gandy, Jr., "Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings," *Cardozo Arts & Entertainment* 24 (2006): 121-190.

Hess, Aaron. "Resistance Up in Smoke: Analyzing the Limitations of Deliberation on YouTube." *Critical Studies in Media Communication* 26, no. 5 (December 2009): 411–434.

-----. "Democracy Through the Polarized Lens of the Camcorder: Argumentation and Vernacular Spectacle on YouTube in the 2008 Election." *Argumentation & Advocacy* 47 (2010): 106–122.

Heymann, Steven J. "Hate Speech, Public Discourse, and the First Amendment," *Extreme Speech and Democracy*, eds. Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.

Hindman, Matthew. *The Myth of Digital Democracy*. Princeton: Princeton University Press, 2008.

Howard, Philip N. *Pax Technica: How the Internet of things may set us free or lock us up*. Yale University Press, 2015.

Howard, Robert Glenn. "The vernacular web of participatory media." *Critical Studies in Media Communication* 25, no. 5 (2008): 490-513.

-----. "Electronic Hybridity: The Persistent Processes of the Vernacular Web," *Journal of American Folklore* 121 (2008): 192-218.

-----. *Digital Jesus: The Making of a New Christian Fundamentalist Community on the Internet*. New York: New York University Press, 2011.

Isin, Engin and Evelyn Ruppert. *Being Digital Citizens*. London: Rowman & Littlefield, 2015.

Jasinski, James. "The status of theory and method in rhetorical criticism." *Western Journal of Communication (includes Communication Reports)* 65, no. 3 (2001): 249-270.

Jenkins, Henry. *Convergence Culture: Where Old and New Media Collide*. New York: New York University Press, 2008.

Jeong, Sarah. *The Internet of Garbage* (Forbes Media, 2015).

Kelty, Christopher. *Two Bits*. Durham: Duke University Press, 2008.

Kimball, Danny. "What we talk about when we talk about net neutrality: a historical genealogy of the discourse of 'Net Neutrality'" *Regulating the Web. Network Neutrality and the Fate of the Open Internet* (2013): 33-48.

-----. *Policies, Pipes, and Publics: The Politics of Net Neutrality Discourse and the Regulation of Internet Infrastructures*. Dissertation, University of Wisconsin-Madison, 2014.

The Knight Foundation, "Decoding the net neutrality debate: An analysis of media, public comment and advocacy on open Internet," *The Knight Foundation*, http://www.knightfoundation.org/features/netneutrality.

Koberidze, Maryna. "The DMCA Rulemaking Mechanism: Fail or Safe?" *Washington Journal of Law, Technology & Arts* 11, no. 3 (2015): 211-284.

Lantis, Margaret. "Vernacular culture." *American Anthropologist* 62, no. 2 (1960): 202-216.

Leff, Michael. "Commonplaces and argumentation in Cicero and Quintilian." *Argumentation* 10, no. 4 (1996): 445-452.

-----. "Up from theory: Or I fought the topoi and the topoi won." *Rhetoric Society Quarterly* 36, no. 2 (2006): 203-211.

Lessig, Lawrence. *Code Version 2.0*. New York: Perseus Books, 2006.

-----. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. New York: Penguin Books, 2008.

Levy, Steven. *Hackers: Heroes of the Computer Revolution*. Norwell: Anchor Press, 1984.

Lippmann, Walter. *The phantom public*. Transaction Publishers, 1927.

Lucas, Stephen E. "Coming to Terms with Movement Studies." *Central States Speech Journal* 31 (1980): 255–266.

Lyons, Daniel A. "Internet Policy's Next Frontier: Usage-Based Broadband Pricing," *Federal Communications Law Journal* 1, no. 66 (2003): 1-45.

McCarthy, Kevin E. "OLR Backgrounder: Appellate Court Decision in Net Neutrality." Connecticut Office of Legislative Research.

Manovich, Lev. *Software Takes Command*. Bloomsbury Academic, 2013.

McGee, Michael Calvin. "Text, context, and the fragmentation of contemporary culture." *Western Journal of Communication (includes Communication Reports)* 54, no. 3 (1990): 274-289.

McKerrow, Raymie E. "Critical rhetoric: Theory and praxis." *Communications Monographs* 56, no. 2 (1989): 91-111.

Medhurst, Martin J. "The contemporary study of public address: Renewal, recovery, and reconfiguration." *Rhetoric & Public Affairs* 4, no. 3 (2001): 495-511.

Mendelson, Nina A. "Rulemaking, Democracy, and Torrents of E-Mail." *Geo. Wash. L. Rev.* 79 (2010): 1343.

Meyers, Brette G. "Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content," *Cardozo Arts & Entertainment* 26 (2009): 935-956.

Michael, Gabriel J. "Politics and Rulemaking at the Copyright Office." *Journal of Information Technology & Politics* 11, no. 1 (2014): 64-81.

-----. "'To Promote the Progress'? Explaining the Global Diffusion of Intellectual Property Law." Dissertation, The George Washington University, 2014.

Miller, Carolyn R. "The Aristotelian *Topos*: Hunting for Novelty," in *Rereading Aristotle's* Rhetoric, eds. Alan G. Gross and Arthur E. Walzer. Carbondale: Southern Illinois University Press, 2000.

Miller, Joseph M. "Fair Use Through the *Lenz* of § 512(c) of the DMCA: A Preemptive Defense to a Premature Remedy?" *Iowa Law Review* 95 (2009-2010): 1697-1729.

Mortensen, Torill Elvira. "Anger, Fear, and Games: The Long Event of #GamerGate," *Games and Culture* (2016): 1-20.

Ong, Walter J. *Orality and Literacy: The Technologizing of the Word*. New Accents. London ; New York: Routledge, 1991.

Ono, Kent A. and John M. Sloop, "The Critique of Vernacular Discourse," *Communication Monographs* 62 (1995): 21-22.

Padmanabhan, Sachin, Leon Yao, Luda Zhao, and Timothy Lee. "Topic Analysis of the FCC's Public Comments on Net Neutrality." unpublished manuscript, Stanford University, 2014.

Papacharissi, Zizi. *A Private Sphere: Democracy in a Digital Age*. Cambridge: Polity, 2010.

Papacharissi, Zizi, and Maria de Fatima Oliveira. "Affective news and networked publics: The rhythms of news storytelling on# Egypt." *Journal of Communication* 62, no. 2 (2012): 266-282.

Pariser, Eli. *Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think*. New York: Penguin Books, 2012.

Pfister, Damien Smith. *Networked Media, Networked Rhetorics.* College Park: Penn State University Press, 2014.

Post, Robert. *Democracy, Expertise, and Academic Freedom*. New Haven: Yale University Press, 2012.

Postigo, Hector. "Capturing Fair Use For The YouTube Generation: The Digital Rights Movement, the Electronic Frontier Foundation, and the User-Centered Framing of Fair Use." *Information, Communication & Society* 11 no. 7 (2008): 1008-1027.

-----. *The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright*. Cambridge: The MIT Press, 2012.

Powell, Michael K. "Preserving Internet Freedom: Guiding Principles for the Industry," Address, Silicon Flatirons Symposium, February 8 2004.

Quintilian. *Institutio Oratoria*, Books I-II, trans. by H. E. Butler. Cambridge: Harvard University Press, 1920.

Rainie, Lee and Barry Wellman, *Networked: The New Social Operating System*. Cambridge: The MIT Press, 2012.

Rawls, John. *Political Liberalism*, Introduction and Lecture I. New York: Columbia University Press, 2005.

Reagle, Joseph. "Free as in sexist? Free culture and the gender gap." *First Monday* 1, no. 7 (2013).

Reyman, Jessica. *The Rhetoric of Intellectual Property: Copyright law and the regulation of digital culture*. New York: Routledge, 2010.

Sørensen, Eva, and Jacob Torfing. "The democratic anchorage of governance networks." *Scandinavian political studies* 28, no. 3 (2005): 195-218.

Striphas, Ted. *The Late Age of Print: Everyday Book Culture from Consumerism to Control*. New York: Columbia University Press, 2009.

Sunstein, Cass. *Republic.com 2.0*. Princeton NJ: Princeton University Press, 2009.

Taylor, Astra. *The People's Platform: Taking Back Power and Culture in the Digital Age*. New York: Metropolitan Books, 2014.

Thompson, John B. "The new visibility." *Theory, Culture & Society* 22, no. 6 (2005): 31-51.

Thomson, John Crawford. *The Social Construction of Copyright*. Dissertation, University of Wisconsin-Madison, 2013.

Turner, Fred. *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism.* Chicago: University of Chicago Press, 2008.

Tsing, Anna Lowenhaupt. *Friction: An ethnography of global connection*. Princeton University Press, 2011.

Vaidhyanathan, Siva. *The Googlization of Everything (and why we should worry)*. Berkeley: University of California Press, 2011.

Warner, Michael. "Publics and counterpublics." *Public culture* 14, no. 1 (2002): 49-90.

Warnick, Barbara. *Rhetoric Online: Persuasion and Politics on the World Wide Web*. New York: Peter Lang, 2007.

Weber, Rolf H. "The Enhancement of Transparency in Internet Governance" Presentation, GigaNet: Global Internet Governance Academic Network Annual Symposium, 2007.

White, James Boyd. "Law as rhetoric, rhetoric as law: The arts of cultural and communal life." *The University of Chicago Law Review* 52, no. 3 (1985): 684-702.

Winner, Langdon. "Do artifacts have politics?" *Daedalus* (1980): 121-136.

Wu, Tim. "Network neutrality, broadband discrimination." *J. on Telecomm. & High Tech. L.* 2 (2003): 141.

-----. "A Proposal for Network Neutrality," (2003).

Yackee, Jason Webb and Susan Webb Yackee, "A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy," *The Journal of Politics* 68, no. 1 (2006): 128-139.

Zarefsky, David. *Public Speaking: Strategies for Success* (7th ed.) Pearson, 2014.