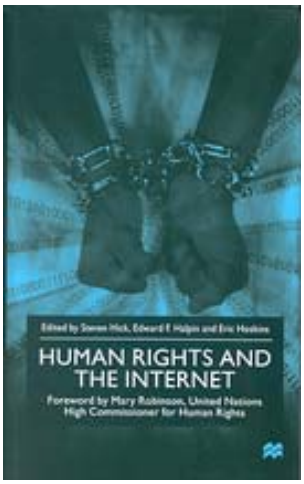

Can the Internet be a Human Right?

By Michael L. Best

Human Rights and the Internet edited by Steven Hick, Edward F. Halpin, and Eric Hoskins. New York: Palgrave Macmillan, 2000. 276pp.

It may seem blasé, or more probably naïve, in this postlapsarian dot-com-bust world to still hold out that "information is power" and, moreover, that the Internet (or "Net," for short) is fundamentally different than any previous information technology. Perhaps I am guilty of such sentimentalities, but allow me at least for the sake of argument to hold on to a small hope that the Internet really is something new. It would then be true, *ex hypothesi*, that information and indeed the Internet—the *Ding an sich* as opposed to the Internet as an enabling tool towards other rights—should be a human right in and of itself.

There is an unexplained asymmetry in commonly accepted formulations of human rights. Freedom of expression is nearly always considered a basic human right; in other words free and unfettered authorship is clearly privileged. However, freedom of readership is not usually accorded an equal footing, without any explanation for its exclusion. In our target book, Human Rights and the Internet, Marshall Conley and Christina Patterson offer a nice turn of phrase for this: "freedom of expression" versus "freedom of impression."

Article 19 of the Universal Declaration of Human Rights[1] does imply some symmetry in information rights when it states that everyone has the right to "hold opinions without interference and to *seek, receive* and impart information and ideas through any media regardless of frontiers" (italics mine). To receive and impart—that sounds like a symmetrical claim of information rights. Internationally, this obligation has been further articulated, expressing the right of all people to communicate freely and effectively, in instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] the International Covenant on Civil and Political Rights,[3] and the African Charter on Human and Peoples' Rights.[4]

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[1] United Nations General Assembly Resolution 217A (III), UN Doc A/810 at 71 (1948).
[2] 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
[3] United Nations General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.
[4] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

Is there any force to a claim of symmetric rights to information if I am cut off from flows of information itself? Like the tree that falls alone in the forest, if there is nobody to hear me, or nobody to whom I can listen, then my information right has no force. Thus there arises a need for access to appropriate information technology if I am to have any hope for securing my right to free expression.

Thus, appropriate information technology is certainly part of my information right. But what, then, privileges the Internet as one such information technology? We know that the Internet is a powerful tool *in the service of* various human rights. The deployment of the Internet has been shown to be a tool for such critical objectives as democracy and empowerment. For instance, RAND researchers have shown that, controlling for economic development, the level of Internet connectivity is a strong predictor of levels of democratic attainment (Kedzie 1997). Or, as Audrey Selian (2002: 22) has put it, "[i]t is a reasonable claim to make that the more enhanced the basic communications infrastructure of a county, the more likely this will be conducive to the assertion and manifestation of liberties and rights for the citizenry."

However, I am making a stronger claim, which is that a symmetric information right to some extent requires the Internet, and thus access to the Internet itself has become a human right. In 2002, Internet traffic volume was 180 petabits per day (one petabit equals 1 million gigabits). This is roughly 30 Megabits per day for every person on the planet. This will increase to 5,175 petabits per day by 2007, according to IDC predictions (IDC 2003). These current and projected volumes indicate how the Internet has become the standard mode of distance communication for all media (voice, video, text, etc.). Thus to be excluded from this information technology is, effectively, to be excluded from information, full stop.[5] Given a symmetric claim to information as a universal human right, and my argument that the Internet is more than just an incrementally useful information technology, we are led directly to the conclusion above: *the Internet should be a human right in and of itself*.

The UN has taken an initial step in this direction when it called for universal access to basic communication and information services. Noting that "[k]nowledge, more than ever, is power," the declaration "embrace[s] the objective of establishing universal access to basic communication and information services for all" (UN Administrative Committee on Coordination, 1997). The 2003 World Summit on the Information Society (WSIS), convened by the UN Secretary General and organized by the International Telecommunication Union (ITU), created another unique opportunity to advance a strong claim for the Internet as a human right. In the lead-up to the Geneva summit, there had been a flurry of preparatory conferences in Africa, Asia, Latin America and Europe. The intended outcome of the Summit, according to its website, is to "develop and foster a clear statement of political will and a concrete plan of action for achieving the goals of the Information Society, while fully reflecting all the different interests at stake."[6] The opening of the WSIS Declaration of Principles, coming out of the Geneva meeting, states a "commitment to build a people-centred, inclusive and development-oriented Information Society" premised on "respecting fully and upholding the Universal Declaration of Human Rights" (UN WSIS 2002). It goes on to

5 The reasons for the tremendous success of the Internet make for a different discussion. The lack of uniform access and the fact that most of these current information flows are from the North to the North is briefly addressed below.
6 This can be found online at http://www.itu.int/wsis/basic/about.html.

reaffirm Article 19 of the Universal Declaration. But neither the WSIS Declaration, nor the general discourse in Geneva, advanced the discussion beyond this simple reference to the Universal Declaration, thus missing the opportunity to bring the Information Society and Human Rights together in the 21st century.

I feel compelled to articulate this argument—that of the Internet as a human right, because the collection here under consideration, Human Rights and the Internet, fails to do so. For this reason, and others to come, I suppose I find this collection a bit conservative: it misses what I think are the most exciting aspects of the Internet's relation to human rights, to wit, that access to the Internet is a basic and universal right and that there are usefully disruptive forms of Internet use. Human Rights and the Internet focuses too much attention on often overly distracting and over-blown issues as Internet hate speech and online pornography.

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Human Rights and the Internet is a collection of 21 essays assembled and published in 2000. Edited by Steven Hick of Carleton University, Edward Halpin of Leeds Metropolitan University, and Eric Hoskins of the Ministry of Foreign Affairs of Canada, Canadian writers are well represented: twelve of the 26 contributors are from Canada. According to the Editor's introduction the book intends "to cover the wide range of issues that form the subject of human rights and the Internet."

The text is broken up into five sections. Section I surveys the problems and promise of the Internet for human rights. Section II and III describe ways in which human rights practitioners have used the Internet in their organization and activities. Section IV gives a review of some of the thorny problems associated with human rights and the Internet, such as child pornography. Finally, Section V previews some of the emerging areas of interest around human rights and the Net. Cutting across all five of these sections are a few important themes that I believe are worth critiquing: privacy and censorship; pornography and hate; human rights information systems; and equity and accessibility.

Censorship, Hate, and Surveillance

Freedom of expression is a fundamental human right and so the censoring of lawful expression is a textbook human rights violation. Related to such a freedom is the need to be able to hold private communications with the expectation that these communications will not fall victim to unreasonable surveillance. The Internet has raised major issues around privacy and censorship that most governments are still struggling with. The three most central issues—which are variously treated in this volume—are: the protections against censorship afforded to communications over the Internet; the responsibilities of Internet providers for the content they carry, and, finally; how can any of this make sense given the global trans-national nature of the Internet?

This book is focused mostly on Canada; I will focus mostly on the USA since this is where my relative expertise lies. In the United States Constitution, the Bill of Rights has been interpreted to directly protect certain "traditional" forms of expression such as print, assembly, canvassing, parades, and associations. These protections are generally strong in the US. However, how these

freedoms have been interpreted as communications move over new media has had a sad history with a mostly steady erosion of various rights. As large volumes of speech have moved from print to new media—for instance over the telephones and via broadcast TV and radio—the basic forms of US free speech protections have often been diminished. Broadcast media's close regulation by the government, for instance, has been justified by the scarcity of radio spectrum and the invasive nature of broadcast—specious arguments in my estimation, but so be it. Given that new media has, historically, suffered from stronger controls and diminished liberties in the US, it is of critical importance and interest how the Internet (the ultimate new media vehicle of our time) will be regulated.

In the US, initial legislative steps, in particular the passage of the Communications Decency Act, indicated that the Internet would be subject to considerable censorship. The good news is that today the Internet is treated more like a newspaper than like a broadcast television station. Under *Reno v. ACLU, et al.*,[7] the Supreme Court of the US ruled that the Internet is "a medium that, unlike radio [a broadcast medium], receives full First Amendment protection." Thus for someone publishing material on the Net protections are in place similar to those for publishing in a newspaper. These are, overall, strong protections meaning that legal forms of expression are protected and that prior restraint, a legal term of art denoting prepublication censorship or licensing of speech, is not allowed. Thus, material over the Internet generally remains protected from censorship in the United States. In the target collection of essays, however, this is mostly positioned as a bad thing rather than a critical uplifting of a basic human right, generally due to anxieties around child pornography and hate material. (Examples from the text advocating this position are below.)

In the US child pornography is not protected speech and therefore it is illegal both online and offline. Sanctions against such expressions are already in place. However, much of "indecent" material, and what would be considered hate material including racist material, is protected speech. This is a key distinction that is made by Hecht and Neufeld in their contribution - we need to distinguish between a communication that is legal yet perhaps harmful (e.g. indecent material and forms of hate speech) and those that are illegal (e.g. child pornography).

One set of restrictions on protected yet harmful expression concerns indecent speech (which is generally protected) reaching minors (which is prohibited in some general cases). You may recall that while indecency can be regulated in some cases it is only obscenity that is outright banned. Under *Miller v. California*[8], the US Supreme Court defined obscenity as "prurient, patently offensive expression, lacking serious scientific, literary, artistic or political value" which has, in practice, been shown to have very narrow coverage. Again under *Reno v. ACLU, et al.*, the Supreme Court found that "currently available *user based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available" (italics theirs). The fact that parents are allowed control over the gatekeeping of indecent material to their children is considered an important privilege and ultimately critical for healthy children. Empowering parents to restrict their children's access to indecent

[7] 512 US 844 (1997), decided June 26. Full text online at http://supct.law.cornell.edu/supct/html/96-511.ZS.html.
[8] 413 US 15 (1973), decided June 21. Full text online at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&navby=case&vol=413&invol=15&friend=oyez

speech supports the legitimate desire of parents to protect their children from indecent material, while still allowing for free legal adult communication without overly onerous restrictions.

Furthermore, a fair bit of space in the collection of essays is spent on concerns around hate speech. One way this argument is formulated positions freedoms of expression against freedoms from incitement to hatred. Karen Mock, in her contribution, states that "Human rights advocates [as opposed to freedom of speech advocates]… give equal weight to the right to freedom of expression and the right to freedom from incitement to hatred." In this essay there is a bit of a bait and switch—while "human rights advocates" may indeed give equal weight to freedom of speech and freedoms from fear and persecution equal weight is not given—under standard formulations of universal human rights—to freedoms from incitement to hatred. So to position freedoms from incitement to hatred as on a par with freedoms of expression is starting from a false premise.

Karen Mock goes on to develop a questionable argument for censoring of hate material when she states that "millions of people (many of whom are students) [are] being exposed to virulent anti-Semitism and hate propaganda at the flick of the switch on their computers." Mock does not back up this claim with any supporting evidence, or reasons to believe it might be true. Indeed, who are these millions of people who are somehow running accidentally into "virulent anti-Semitism and hate propaganda?" I have been online since the 1980s and have never seen such hate material on the net. I am quite certain I can seek it out. But it does not come at the "flick of a switch." I would view this material only because I actively sought it.

In this case, the balance between the two clear human rights—freedom of expression versus freedom from fear and persecution—can be reached given that (perhaps with a rare exception) hate content on the Internet is something that one must actively seek out. The authors and advocates of these hate-mongering sites would not, presumably, be prone to fear and persecution from their own outputs or shared views. Thus, to strike a balance between freedoms of expression and freedom from fear and persecution is quite different from striking a balance between freedom of expression and freedom from incitement to hatred.

Let us now consider cases of *illegal* content, such as child pornography or, in the case of Germany, Nazi propaganda. If it is illegal offline it remains illegal online and sanctions exist against such material. One relevant question, with respect to the Internet and human rights, is who is culpable for such illegal material: the author of the material or the Internet Service Provider (ISP) who might transmit or host the material? In US legal parlance one might ask if the ISP is a publisher itself (and thus possibly responsible under US jurisprudence for its content) or a common carrier such as the post or telephones (and thus only in the business of moving information and not responsible for what that information contains).

In the contribution by Glyn Ford, who is a Member of the European Parliament from the UK, he "completely reject[s] the common carrier defense of Internet service providers who disclaim responsibility for the contents of messages carried on their systems." Packets on the net are like postcards in the mail—little pieces of information traveling along some distribution network. It is certainly conceivable that the US Post service could read and vet for illegal content all postcards it distributes. Similarly, so could ISPs. The classes of networks that fall under common carriage are, in the US, regulated with various forms of rights and restrictions. These include non-discriminatory

carriage (e.g. taxi cabs) or uniform tariffs (e.g. phone networks). It also includes certain rights, for instance freedom from being held responsible for the contents transmitted. Just as the US Postal service could be required to vet its postcards for illegal content, so could an ISP. In both cases it would be onerous and unmanageable.

Finally, considering the case of surveillance, the collection raises a number of interesting and troubling concerns. Valerie Steeves argues that the "[l]aw traditionally seeks to protect individuals from the overwhelming power of the state. When we worry about surveillance and disenfranchisement, it is the state that we have traditionally feared" (190). She goes on to argue that the Net is providing new opportunities for the private sector, in addition and perhaps superior to the State, to surveil users of the Net. What is required is the freedom to use strong encryption and this freedom must be seen as a necessary condition to a freedom of speech. Vigorous activism amongst human rights organizations is required to ensure that strong encryption is widely available and routinely used.

Human Rights Organizations and Information Systems

A sizable portion of the collection is devoted to the uses of the Internet by human rights organizations to further their activities. Since many human rights organizations are singularly involved with monitoring, collecting, and disseminating various types of information, modern information technologies and the Internet in particular are extremely useful. We hear about the use of the web, newsgroups, and email lists as important online tools for human rights organizations—and it is hard to argue with that. Indeed, traditional human rights organizations such as Human Rights Watch and Amnesty International have effectively used the Net to publicize their activities as well as communicate and coordinate amongst their globally distributed field staffs.

Other smaller and more specialized activist organizations have also used the Net effectively. This includes the Zapatista movement from Chiapas, Mexico—about which Steven Hick and Ariel Teplitsky provide a review of their savvy use of the Internet. Sharon Scharfe gives us an account of the use of the Internet in the independence movement of East Timor. Indeed, we learn that East Timor was able to "declare a 'virtual sovereignty' from Indonesia" by registering its Top Level Domain name (.tp) with the Internet Assigned Names Authority. While "virtual sovereignty" might overstate the facts, certainly there was symbolic force to this act, especially as the Timorese independence leader, Xanana Gusamao, was registered as the first top-level domain manager (Taggart 2002).

While it is all very fine that human rights organizations can advantage the Internet to further their operations, it hardly is remarkable—so do most all modern organizations. The question that I am left with is whether there are some special and particular aspects to human rights organizations that allow them to use the Internet in unique ways and for things that are not simply incremental improvements on their previous ways of doing business. This is the very stuff that would intellectually ignite this collection—but by and large, is sadly missing.

I am reminded of an example from the PC sales world. Modern computer systems and the Net have provided considerable efficiencies for supply chain management and inventory control.

Nothing is remarkable about that. Then along comes Dell Computers who use the Net to redefine the whole problem. Rather than making their inventory systems more efficient, to a large degree they simply did away with any inventory, full stop. They found a disruptive and non-incremental use of the Internet, which has redefined a way of doing business.

The collection relates at least one case of disruptive use of the Internet in the context of human rights. A couple of authors describe techniques of online activism and hacking, or "hacktivism,"—that is, using the Net itself as a platform to advance rights. In their contribution to this volume, Katz-Lacabe and Lacabe describe one approach as "the electronic sit-in." An example they cite is when activist groups protest some organization by blocking their website through denial of service attacks, where they flood the site with so many bogus requests that any legitimate requests are blocked. I was glad to read of this innovative way in which human rights organizations are interacting with the Internet. However, in general I am not a fan of this approach. The standard sit-in, for instance where activists occupy some CEO's office, carries clear and very pointed symbolic power. It also may serve to diminish the smooth bureaucratic operations of the organization being protested. In contrast, the electronic sit-in that arises from a denial of service attack has a different outcome. It is more akin to someone cutting the phone lines and destroying the newsletters of an organization. It certainly will impact certain ways that the organization functions. But it does so by limiting the organizations legitimate methods of expression and communication (independent of how distasteful some of those communications may be).

Equity and Accessibility

Finally, the collection spends some time on the important issues of equity of access. It is noted by some contributors that a "digital divide" exists between those that are online and using the Net and those who are not. These divides can exist across racial, economic, political, gender, language, and geographic lines. Lorna Roth, in her contribution, reviews how in the US access to computers and the Internet is highly skewed to white communities. Even after controlling for income, African-Americans by contrast are disproportionably unconnected.

A counter argument is also made in some of the essays. We hear about an "explosion" of Internet access in Africa (Jacques Gauthier), how women's groups are effectively using the Net in the former Yugoslavia (Djurdja Knezevic), and, overall, how "oppressed" people and activist groups are continuing to build their Net presence and sophistication (Wayne Sharpe as well as the contributions of Steven Hick and Ariel Teplitsky). This is a glass-half-full versus glass-half-empty set of arguments and, as such, both the optimism and the pessimism are quite valid.

Thus, some papers in the collection give attention to basic problems of the "digital divide". That is, they discus disparities of access to the Internet between countries and between communities within countries. They also treat the lack of "local content" suffered by many users of the Net. For instance, the majority of content on the World Wide Web is in English, even though this is not the first language of most users of the Web. However, in my estimation there is an additional issue, beyond just access and content, which does not enjoy any attention in the collection. Namely, what aspects of the Internet, as defined by its protocols and technologies, might actually exacerbate or create inequalities in access due to their very nature (as engineered, implemented, and as used within

various milieus). As an example, consider the common desktop personal computer: To what degree does the QWERTY keyboard (the standard keyboard available in most countries) privilege languages which are based on the Roman script or privilege, explicitly, the English language?

A similar question can be put to the Internet, the World Wide Web, and so forth. Asked another way, are there aspects to the Internet itself, as broadly engineered and implemented, that run counter to aspects of human rights including universal freedoms of expression? This question quickly becomes entangled in a more Socratic problem of defining the "Internet." Certainly one can define the Internet by its engineering design philosophies and the protocols that aim to realize these philosophies. At its core, the Internet is a distribution network of some sort implementing TCP/IP protocols and employing a core design philosophy known as the "end-to-end argument" (Seltzer, Reed and Clark 1984). This core principle, and the TCP/IP protocol, seems to embody basic freedoms of expression—they are centered on concepts of best-effort, non-discriminatory routing of information. And the end-to-end argument, which states that as much as possible all "intelligence" to the network sits on its edges, has a strongly democratic quality to it. To cartoon the argument, it means that from the vantage of the network a packet sent by AOL/Time Warner cannot be given any better treatment than a packet sent by the Zapatistas from Chiapas.

However, as we move "up" the set of protocols, applications, governance structures, and appliances that dominate the Internet we begin to encounter elements that might diminish the Net's ability to support equitable access. Earlier I mentioned the registration of Top Level Domains (Tad's) such as East Timor's use of ".tp." The globalization and democratization of this process has received considerable attention lately as the governing body in charge, the Internet Corporation for Assigned Names and Numbers (ICANN), struggles to define itself and to globalize its US centric approaches. Nonetheless, the naming of addresses on the Internet is very US-centric; for example, in effect the US has subsumed the broad top level names (.com, .edu, and so on) while all other countries employ their own country-specific top level domain (.uk, .tp, and so on).

In a sense I am now arguing the mirror image of the argument I opened this essay with. I do believe that the Internet stands as a fundamental human right. However, at the same time, I recognize that aspects of the Internet's architecture, ownership, and governance might be considered antithetical to various human rights. Intellectually, these are the most pressing and compelling issues when considering human rights and the Internet and they are absent from the target collection.

Let me end by tipping the balance back to my opening argument, that the Internet is a fundamental human right in and of itself. Marshall Conley and Christina Patterson do, in fact, gloss this argument when they state that the "Internet has been established as a means for the liberation of communication and information….The media have, in practice, monopolized most of the real opportunities for public communication. However, the Internet has made freedom of expression a practical fact and global phenomenon for anyone with a computer and a telephone."

Yes, but…

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