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HEADLINE: Twitter Jitters: Can What You Tweet About Police Land You in Jail?

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BODY:

"SWAT teams rolling down 5th Ave. ... Report received that police are nabbing anyone that looks like a protester. ... Stay alert watch your friends!" Pennsylvania State Police arrested New York social worker Elliot Madison last month for being part of a group that posted messages like those on Twitter. The arrest took place in a Pittsburgh motel during protests at the Group of 20 summit. In all, almost 5,000 protesters demonstrated throughout the city during two days, and about 200 were arrested for disorderly conduct.

But Madison wasn't among those protesting on the street. Instead, published reports say he was part of a behind-the-scenes communications team using Twitter to "direct others, specifically protesters of the G-20 summit, in order to avoid apprehension after a lawful order to disperse." A week later, FBI agents spent 16 hours in Madison's home executing a search warrant for evidence of federal anti-rioting law violations.

This "Twitter arrest" comes at a time when Web-based social networks are becoming the favored forums of political engagement. According to a September 2009 Pew Internet & American Life Project study on Internet and Civic Engagement, almost 20 percent of all Internet users have posted material about political or social issues on a social networking site for a civic or political engagement.

The likely cause is that social networks empower a citizenry to raise awareness openly and vigorously about any topic. These same features, moreover, make them useful during public demonstrations, where information about police or

other opposing forces often plays an essential part. Messages, typically shared as events unfold, allow protesters to react quickly to police mobilizations and arrests. Taking these elements together, can authorities limit or criminally sanction those who share information online about police movements during a public protest?

HINDERING APPREHENSION OR HINDERING SPEECH?

Pennsylvania authorities charged Madison with hindering apprehension or prosecution, criminal use of a communications facility, and possession of instruments of crime (telecommunications equipment). Under Pennsylvania law, a person commits the crime of "hindering apprehension or prosecution" when he:

1. Harbors or conceals another;
2. Provides or aids in providing a weapon, transportation, disguise, or other means of avoiding apprehension or effecting escape;
3. Conceals or destroys evidence of the crime, or tampers with a witness, information, document, or other source of information, regardless of its admissibility in evidence;
4. Warns the other of impending discovery or apprehension, except that this paragraph does not apply to warning given in connection with an effort to bring another into compliance with law;
5. Provides false information to a law enforcement officer.

Presumably, officers believed that Madison violated this statute when he warned other protesters on Twitter about "impending" police apprehension. But this prohibition assumes that the warning is given to fugitives or others committing a crime. Can we make this broad assumption about an entire group of protesters? Not likely. And, even so, the statute specifically allows warnings to bring that individual into compliance with law (e.g., a motorist warning a speeder about a speed trap).

Still, it seems this arrest is really about speech -- what you can say to others during a public protest. Can you warn others online by saying, "Hey, don't go down that street because the police have issued an order to disperse"?

THE RIGHT TO PEACEABLY ASSEMBLE

It is well established that, over the years, the U.S. Supreme Court has dealt sternly with governmental entities interfering with speech and the right to peaceably assemble to petition the government for redress of grievances.

"Although a municipality may enact regulations in the interest of public safety, health, welfare, or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion." *Schneider v. New Jersey* (1939).

"There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley* (1981).

"The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.* (1982).

"The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. ... So long as the means are peaceful, the communication need not meet standards of acceptability." *Organization for a Better Austin v. Keefe* (1971).

"Neither energetic, even raucous, protesters who annoy or anger audiences, nor demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest." *Cox v. Louisiana* (1965).

TWEET AT YOUR OWN PERIL

In a statement, Pittsburgh police explained that Madison "used legal devices for illegal acts." What exactly those illegal acts were, however, remains unclear. What is clear is that Madison's arrest for sharing information with other protesters online presents broader public policy concerns. Broader because it matters not what medium or Twitter-like technology you use to convey a controversial message. What matters -- and what Madison's arrest here potentially threatens -- is the underlying right to say it.

No doubt, law enforcement has every right to leverage social networking technology to protect the public within the confines of the law. Earlier this year, in fact, Maine police made national headlines when they posted on Facebook images from a surveillance video showing three teenagers vandalizing a Hilton Hotel spa. Facebook members soon provided tips, and the suspects were charged with burglary and criminal mischief. But law enforcement's efforts must never result in unduly stifling democratic freedoms. And any restrictions imposed on what we say on Twitter must be viewed with the same skeptical lens as any other form of constitutionally protected speech: strict scrutiny.

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