

## THE IDEA INCUBATOR: WHY THE INTERNET POSES UNIQUE PROBLEMS FOR THE FIRST AMENDMENT

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Thank you very much. I appreciate the opportunity to be here. When I was asked what I wanted to speak about, I took a look at who the other speakers were, and said "anything but the law, for God's sake." Speaking here is like being back in law school with all these intimidating law professors perched waiting for you to slip up. Fortunately, the organizers were gracious enough to let me talk about something a little non-legal as an introduction to the rest of today's presentations. So, I'm going to talk to you about some of the characteristics of the Internet that I think are responsible for the problems that I'm sure you will hear very insightfully addressed through the remainder of the day.

Two years ago I sat down to begin a book mostly freedom of expression on the Internet. Two years later I'm still writing it. When I started, I was very excited about getting into the issues that I felt like I knew something about: defamation law and the battle over obscenity and pornography on-line, hate speech, the tension between privacy and free speech, and so on. Before I did that, though, it occurred to me that in each of those areas, in each of the places where free speech issues arise on-line, there was this seemingly knee-jerk reaction on the part of the regulators and judges to get in and meddle with the Internet. There was what looked like an unusual propensity toward regulation. I stopped to ponder why that was. I learned that there were a couple of explanations that other commentators just take for granted as to this phenomenon.

The first is that regulators want to attack the internet because it represents a power vacuum. It's a new medium. People perceive that there aren't rules to govern it, and the legislators jump down upon it wanting to impose a rule set. I think that's one possibility. You also hear people claim the regulators are just ignorant. They don't know anything about the net, and they have these preconceptions that are wrong about how it might be dangerous. They see local TV stations hyping computerized child pornography and similar dangers of the Internet, and they feel they have to get in and do something.

I think that both of these explanations are partly right, but that there is something else going on here as well. Civil libertarians concerned about protecting free speech on the Internet need to own up to the fact that this something else is happening. I think that the very things that we all praise about the

Internet are also things that in some respects call out for people to want to regulate. What I want to do this morning is talk to you about what those things are. Anybody who wants to protect free expression online needs to recognize what they're up against. It is not, I think, enough to brush off legislative attempts to stifle speech on the Internet with the argument that "these guys don't know anything about it and they should just leave it alone." It's a disingenuous approach and undermines the validity of an argument that I think you'll momentarily hear articulated more clearly than I could: that the Internet shouldn't be regulated when it comes to expression issues. What is it about this Internet thing that is causing all the hubbub? Why are people so concerned about stifling expression on the Internet and the dangers that expression on the Internet poses?

I think there are two things that come into play that make the Internet a fundamentally different medium, and those are (1) that the Internet facilitates the creation of new ideas in a way we haven't seen before and (2) the Internet promotes propagation of those ideas, and I don't mean this in the simple sense that users of the Net already recognize. I think it was somewhat prescient of the Dean to start the conference with the reference to leafleting in the *Abrams* case, where Justice Holmes talked about the marketplace for ideas. The Internet is a truly powerful marketplace for ideas, but there's more going on here than the introduction of a more robust way to leaflet. There is in fact, I think, a substantive change in the ways ideas are created online and propagated online that gives rise to unique concerns.

Let's talk first about idea creation. What happens here? A number of factors come together on-line that I argue causes the creation of controversial and socially problematic ideas on the Internet that would not, and in fact in many cases, I think, can be empirically shown, do not get created in other media. Concepts and ideas and ideologies arise on the Internet that are not as prone to arising in regular non-electronic communication. Why is that? The first thing that comes into play is the concept what I call "speaker burden." Speaker burden is that set of hurdles that people have to overcome before they can get an audience. With traditional media, speaker burden is quite high. If, for example, you want to get a large audience, you first have to find one, and then you have to get access to the means of communication that's going to allow you to get your idea disseminated out to that group. In fact, it is usually the case that the better and more effective the means of communication, the higher the speaker burden. So if you want to address ten people on a street corner, it's not that tough. If you want to address ten thousand people with your idea, it becomes much tougher. You need more money and, usually, have to have the right connections. As the intended audience number reaches into the millions, it is almost impossible for someone who's not properly connected, or part of a large economic construct, to get their ideas expressed. With the Internet, that's no longer the case.

In fact, the formula has turned around with the Internet in a way we haven't seen before. This is, I think, clear when you focus on the steps you needed to take with traditional channels. Imagine what it takes to get your ideas expressed in a book. You have thoughts you think should warrant dissemination to a large group of people and want it done in book form. You have to be able to find someone to publish your book, and distribute the book—these aren't trivial things. But you can reach equally large audiences by getting on-line without the traditional logistical and economic barriers that kick in. I think another interesting thing that happens is when you finally realize that you have this alternative channel to a large communication medium that you didn't have before, you don't face one of the traditional constraints on what people say, that is editorial control. Editorial control is pervasive in other media and is not existent in most of the ways that people communicate to the public on the Internet. You want to reach large audiences with the web site, you don't have to go through an editor. Editorial control is such an established part of the traditional media, the Supreme Court recognized it as part of the speech. In *Miami Herald v. Tornillo*, the court said that the right to edit your speech and right to control what's in it and what's not is an essential part of your First Amendment right. This is something, in all other mass media, that you just have to live with. Make a movie and you'll encounter horror stories about what got left on the cutting room floor. If you've ever written something for publication and seen what comes out of the editing room, you know that it's not your unfiltered ideas that make their way to the larger audience. On the Internet all that changes.

There's also something that's going on that is very different than in the traditional media, and that is that there are factors that decrease the risk for people who have controversial ideas that they want disseminated. There are a number of these that I'll touch on briefly and we'll hear more about later on. The first is the ability to communicate anonymously. While you can do so with traditional media, the ease of anonymity on the Internet on a mass channel truly makes this a less risky proposition if you're concerned that your ideas will not be well received by others. It's very hard to anonymously publish in the New York Times. Someone will likely figure out who you are. It is very easy to reach an audience of equal magnitude anonymously on the Internet. You also have an equally easy way of communicating under a pseudonym which is in some respects more effective in some situations than communicating anonymously, as it allows you to garner reputational trust among your audience through repeated communications that you might not get through anonymous communication. So if you publish over and over your manifesto of ideas under some pseudonym, people begin to listen and recognize who you are even if they don't really know who you are. As such, you can't suffer the adverse ramifications to your ideas in the physical world.

I think there's also something that really drives the issue home and that is

that speakers with controversial ideas have access to friendly forums on the Internet that they never had access to before. Take, for instance, Usenet with its public discussion arenas on the Internet devoted to all kinds of bizarre things that you might not even have thought people were talking about. If you're from some small town in North Dakota and wake up some morning and find yourself fascinated with women's shoes, you don't have a lot of places to go to talk about that in your hometown. Imagine walking down Main Street and stopping at the general store and saying "I'm really interested in women's shoes in a way I never have been before." It doesn't work. At dinner parties in your hometown, that topic is not one that you're necessarily real excited about bringing up. I looked last night, I will admit, for places where you could find out about people's interests in women's shoes (and I do mean that kind of interest), and I found six sites. It took me about fifteen minutes. There are forums for people out there regardless of how controversial ideas are, and I think that's a new phenomenon on the Internet that we've never seen in history before.

And, finally, there's a buffer from your audience that is derived from the physical isolation that you have on the Internet. If you want to espouse extremely offensive or controversial opinions, it's safer to do it from the comfort of your living room than it is facing an audience who might react adversely.

These factors combine to make the Internet more conducive to controversial idea creation than any media we've seen before. Just to illustrate this a touch more, it's helpful to look at what communication theorists call "the spiral of silence." This is a social process that drives people to popular viewpoints and ultimately singular homogenous viewpoints. The idea is that before people express a viewpoint, they tend to canvass the public in their mind and assess how the public's going to react to that idea. So before I say XYZ to a crowd, I think about how people are going to react. And what does my canvassing encompass? Often, it is looking at my audience and seeing what they have said in the past. Imagine I have some crazy idea regarding impeaching the president over a sex scandal in the White House. If I hear Ted Koppel talking about it the night before, my confidence is bolstered that this is a socially acceptable idea to disseminate amongst my peers. Unfortunately, when there are few ideas to canvass, people end up feeling less confidence about airing controversial ideas because they haven't got any social confirmation that those ideas are going to work. But if you canvas the Internet for confirmation, it's pretty hard to find an idea that you're not going to find someone else out there espousing already. If it's close enough to your unique controversial idea, you're reinforced and you are more likely to take the plunge and express yourself. The spiral of silence turns upside down on the Internet. It encourages contributions to the social debate rather than discouraging them like it has in previous, more homogenous mass media like television.

So you've got all these new factors that I think contribute to more expres-

sion and more ideas and more diversity on the Internet, and I think that alone would cause people to want to regulate this medium. But I think there's more to the story as well, and that is that once these ideas get introduced to the Internet, they propagate in a way that we've never seen in traditional media. They disseminate, they spread out. And that's what I want to talk about now.

Several factors go into propagation of new ideas on the Internet that relate to the characteristics of the media itself. One is that the Internet tends to be an asynchronous media path. That means that the listener doesn't have to be contemporaneous with the speaker in order to be exposed to the idea. If you want to hear what I'm saying right now, you have to be here right now. On the Internet, because it's not necessarily a real-time interaction, I can post my controversial thoughts in the morning, and later at night when you feel comfortable reading them, you can be exposed to them. Asynchronicity bolsters the ability for ideas to be disseminated online.

Of course, on the Internet, there are larger audiences with more and more access out there, which means more people who can read the ideas, and that number is exploding. You can look at all kinds of statistics to show that. There are also some of the same types of things going on that I talked about with idea creation that help ideas get disseminated, propagated, modified and ultimately help them evolve. One of these is the feedback cycle. Not only do you canvas a prospective audience before you utter your controversial comment, you also canvas the audience's response before you expand upon it. So, if I were to say something that everyone in the room disagreed with, and boos and hisses resulted, I'd stop at that point and wouldn't go on to the more controversial comments. If I find myself in a friendly forum uttering my controversial or socially questionable idea, and instead of boos and hisses I hear people saying things like "that's great," "tell me more" or "I feel the same way about women's shoes" (or whatever it might be), I feel the confidence to go to the next step. "Let me really tell you what I feel." "Let me be more explicit and direct than I was the last time." So the idea propagates and evolves and becomes more controversial than I had the inclination to make it in the first place.

Richard Dawkins, the evolutionary biologist, calls ideas memes. He talks about the fact that memes propagate and spread in the idea arena in very similar ways that biological organisms propagate and spread and evolve. I think that there's something to be said about that theory, and had Dawkins thought about the Internet when he was devising it, he would have talked a good deal about it. The Internet is probably the best petri dish memes could ever find. They spread on the Internet in ways they never could before, and they evolve into things that they never could before. It's worth talking about what Dawkins had to say about memes in order to shed light on what happens on the Internet.

Dawkins says there are three factors that go into creating a successful meme. In my opinion, these factors are magnified on the Internet to make Internet memes more successful memes than other media. One of them is lon-

gevity. If I scream out my meme on a street corner, people might remember it for a few days but it's nowhere nearly as effective as if I write it down on paper. But even paper disintegrates and paper doesn't have an indefinite lifespan. On the Internet, there's a possibility, at least in theory, for your idea to move from one outdated magnetic media to another. *Deja News*, an Internet start-up in Austin, Texas, keeps USENET archives reaching back years. USENET posts shot off in a moment of anguish remain in the archives potentially forever.

Dawkins also talks about fecundity thresholds. That is: what's the capability of this meme to duplicate itself. Magnetic memes duplicate really well, and are easy to copy from one area to the other. If you run across a particularly intriguing idea in one electronic forum, you can cut and paste into another one. It's much easier than any other way of replicating traditional memes.

Memes also need to keep somewhat consistent from one forum to the next. This reminds one of the old grapevine game. If I start my idea and whisper it to you and you whisper it to the next person, by the time it makes it around the room, it's lost its original meaning. That sometimes happens on the Internet and I'll show you an example. But the fact is that if you want your meme to survive in your particular interpretation, in your particular rendition, the Internet is a very good place for that to happen. You see a particular thought or joke or what have you, copy from one person to the next. Through e-mail systems it remains identical in each version. Nothing gets lost in the translation because it's the same thing moving along.

Internet memes have characteristics that make all of these three meme survival factors give them more viability in the marketplace than non-Internet memes. Need an example? Take the fascinating case of Craig Shergold.

Craig Shergold was a seven-year-old boy in Britain about a decade ago who was dying of a brain tumor. Craig's dying wish, which was handled by an organization called the Children's Wish Foundation in the U.K., was to receive more get-well cards than anyone ever had in history. So, a plea was put out—not through the Internet but through traditional media—to do a dying kid a favor and send him a get-well card. It worked. Shergold received thirty-three million get-well cards. This was a very successful publicity stunt for the organization. It also presumably made the kid feel great. But when Shergold fortunately recovered from his brain tumor, the cards didn't stop coming. In fact, they came at increasing rates because the meme of sending young Craig a get-well card had circulated, not necessarily through the Internet alone, although certainly through the Internet, but through all kinds of other media. Soon, it became a problem. The Make a Wish Foundation in Arizona, which had nothing to do with Craig Shergold, was receiving thousands and thousands of get-well cards. One class in Oregon heard a variation on this meme. They thought they had to send somebody business cards. They weren't exactly sure why, but they collected thousands and thousands of them. How bad did it get?

It got really bad. People started posting messages on the Internet, sending e-mail to their friends, and writing things in the New York Times reminding people to stop sending them. They didn't stop.

What about the Craig Shergold meme today? You'll be happy to know it is alive and kicking on the Internet. A Deja News search for Craig Shergold came up with some interesting hits. How about this: a post in one news group on the Internet for Greg Serold (phonetic) who wants the "greatest amount of business cards." Or how about Craig Shirgold, spelled totally wrong, from New Hampshire who's dying from an inoperable brain tumor who wants you to send him playing cards. Variations on the Shergold myth still circulate. And I think that they circulate, although it's pretty hard to assess this, more on the Internet than anywhere else now. This is a perfect example of the type of thing I'm talking about with idea propagation. The Shergold meme may never die. Craig Shergold may grow to be a healthy old man and die before the business cards stop coming.

It's disingenuous to say the Internet is not different. You can't write off the legislators that easily. Something is going on that has never happened before, and if we don't adapt old outdated laws in some way to recognize this technology, then they're going to pass laws that force us to revert to old outdated technologies and that would be the real shame because all of these things are ultimately more positive than negative. But, I'll leave it to this distinguished group of speakers to do a good job of pointing that out. Thank you.