THE FIRST AMENDMENT AS KILLER APP

Anupam Chander

INTRODUCTION

It's not just **Black Lives Matter**. It's **#BlackLivesMatter**. The hashtag is silent.

The protests that swept the nation last year began through Facebook and Twitter, organized via a hashtag. The hashtag allowed individuals who did not know each other to learn, share, and debate, without requiring any intermediation by the traditional media. The hashtag brought people to the streets, and national attention to a problem as old as this country—the differential treatment African-Americans can face in our justice system.

The Internet's role in organizing protests is well understood. But it is worth pausing to note that today, civic engagement increasingly occurs online. Even if we are bowling alone, we're doing so while sharing with friends and family across the world—through Instagram, WeChat, Periscope, Twitter, Weibo, and Facebook. Figure 1 below shows a map of my own Twitter follower network, which literally stretches across the globe. Even as we worry about a world in which people increasingly withdraw into their mobile devices, where we are alone together,[1] we should recognize that individuals are connecting to each other in ways that were impossible for the bulk of human history.

Figure 1:

While it is a commonplace that the Internet revolutionized speech, what is perhaps less well understood is that free speech made today's Internet. "The First Amendment played an essential role in configuring the

1. *See generally* Sherry Turkle, Alone Together: Why We Expect More from Technology and Less from Each Other (2011); Sherry Turkle, Reclaiming Conversation: The Power of Talk in a Digital Age (2015).

legal environment that enabled the rise of the Internet as we know it today, and in the process, helped bring the promise of 1789 closer to fruition."[2] This is the **First Amendment/Cyberlaw Dialectic**: the First Amendment made today's cyberlaw, and cyberlaw in turn helped make speech free.[3]

Some will say that speech was free long before the Internet. Didn't we teach courses about free speech prior to the rise of the Internet? Consider the speech that was made free in the case that launched the modern First Amendment, *New York Times v. Sullivan*.[4] The speech in the case consisted of an ad placed in the *New York Times* by civil rights activists. The speakers paid $4,800 in 1960.[5] That was the amount you needed in 1960 if you wanted to reach a national audience, and could not get your message delivered through the op-ed pages. Speech was hardly free (in cost), and hardly equal (as in accessible regardless of one's economic status). Indeed, in his brief before the Court, Commissioner Sullivan ridiculed the *New York Times*' claim to be promoting the "equality of practical enjoyment of the benefits" of free speech and press.[6]

When Governor Jeb Bush tweeted a photo of a gun engraved with his name under the caption "America," Americans responded.[7] Many signaled their approval with a heart. Many retweeted his tweet, though for many, a retweet does not signal an endorsement. Yet others responded with commentary. The cleverest ripostes found themselves repeated thousands of times by strangers.

In recent years, we have seen many arguments for the signal success of Silicon Valley. It was the confluence of money and education that led to a successful agglomeration. It was the culture of Silicon Valley. Indeed, many move to Silicon Valley from across the world to access venture capital and local talent. It was the absence of enforceable non-compete clauses. The traditional explanations are all incomplete. I will argue that it was the First Amendment's disciplining of private law that proved to be the key feature of the success of American Internet enterprises.

As Raymond Ku has described in a highly influential article, the Internet brought about radically different distribution mechanisms.[8] But rather than rely on individuals to put up web servers and web pages themselves, the most successful distribution mechanisms were those that created new social networks. These relied on information intermediaries, creating what came to be known as Web 2.0.[9]

---

2. Anupam Chander & Uyen Le, *Free Speech*, 100 Iowa L. Rev. 501, 505 (2014).
3. *Id.*
4. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964).
5. *Id*. at 260.
6. *Id.* (noting that a full page advertisement cost $4,800).
7. *See* Jeb Bush (@JebBush), Twitter (Feb. 16, 2016, 1:27 PM), https://twitter.com/JebBush/status/699706718419345408
8. *See generally* Raymond Ku, The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology, 69 U. Chi L. Rev. 263 (2002).
9. *Id*. at 301 ("content can now be disseminated to consumers without the need for anyone other than consumers to invest in distribution").

Return to the traditional explanations for Silicon Valley's success in the Internet Age. Certainly, there is no better place to obtain venture capital than Silicon Valley—but this reflects a history of success in prior investments. Venture capital thrived in California because pouring money into loss-making speculative enterprises run by twenty-somethings who might be college dropouts proved successful time and time again.[10] These ventures depended not on large infrastructures, but on individuals across the world contributing labor and content for free. And this in turn depended on laws that made the ventures' activities legal, specifically, insulated them from civil liability for the wrongs of their users.

The culture of Silicon Valley prizes innovation and bold ideas that carry the hubris of changing the world. Failure in a past venture is but prelude to a future success. Again, this boldness in confronting the world and nonchalance about failure arises through a recent history of success. And again, that success would not have been possible without the law.

Finally, the talent pool in Silicon Valley is indeed hard to match anywhere in the world. Walking into the cafeteria at Google is like entering the United Nations. Silicon Valley became a magnet for talent from across the world, again because of its earlier success.

If the companies had failed, venture capital and talent would have dried up, and the culture shifted to one that was more risk averse.

The law provided the foundation for moving from Web 1.0 to Web 2.0 –from a world where everyone puts up her own website to a world where intermediaries provide the platform that allows you to speak and to share.

I. MAKING CYBERSPACE A FREE SPEECH ZONE[11]

"Cyberlaw is today's speech law. Yet, free speech casebooks and texts pay little attention to the ways that cyberlaw configures the principal mechanism for exercising free speech rights today—communication online."[12]

"The First Amendment protected Internet intermediaries from obligations to censor, while at the same time rebuffing efforts to impose stricter privacy obligations on Internet enterprises. The First Amendment thus created the business model of new media, permitting it to publish vast amounts of speech but not be held liable for that speech, while at the same time earning income through advertising based on personal profiling. For the first time, individuals could now speak to the nation—through YouTube, Twitter, blogs, comments, Facebook, and Google—without

10. *See generally* Scott Shane, *Why Venture Capital Deals Stay in Silicon Valley,* ENTREPRENEUR (Nov. 2, 2015), https://www.entrepreneur.com/article/252225. (Nov. 2, 2015)
11. This Part draws in part from earlier work with Uyen Le. Anupam Chander & Uyen P. Le, Free *Speech*, 100 Iowa L. Rev. 501 (2014).
12. Chander & Le, *supra* note 2.

needing either princely sums for national advertising or the permission of editors."[13]

As we move from Web 2.0 to a Platform Economy, we should keep some of these lessons in mind. After all, platforms such as Uber and AirBnB are also search and communications engines, allowing individuals to find and communicate with each other on a spot basis.

A. Section 230—Civil Wrongs

In passing the Communications Decency Act, Congress recognized the Internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[14] The first of this series of statutes, the CDA, proved especially valuable to the new breed of Silicon Valley enterprise. Section 230 established that no provider of an Internet service could be held liable for content posted by its users.[15] In short, the section largely immunized online service providers from secondary liability for most torts committed through their service.

This may seem quite elementary—but consider two alternative approaches assayed in 1995.

In *Stratton Oakmont, Inc. v. Prodigy Services Co*., the New York trial court promised that the market would compensate Prodigy for the increased liability exposure.[16] There is a simple economic logic to this, but it may be that the costs of monitoring in a full liability context are so high as to render the service too expensive to attract sufficient buyers.

A second alternative is more amusing. In the debates over the CDA, Missouri Congresswoman Danner proposed:

> Mr. Chairman, "… Telephone companies must inform us as to whom our long distance calls are made. *I believe that if computer online services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet*."[17]

Zeran v. AOL, Writing for the court, Chief Judge J. Harvie Wilkinson III explained:

13. *Id*.
14. Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. § 2 (1995) (enacted); *see also* 47 U.S.C.A. § 230.
15. *See* 47 U.S.C.A. § 230.
16. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).
17. 141 Cong. Rec. H8470 (daily ed. August 4, 1995) (statement of Rep. Pat Danner) (emphasis added).

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. [18]

The core immunities in Section 230 are to be found in paragraph (c), which carries the title, "Protection for 'Good Samaritan' blocking and screening of offensive material."[19] One might have accordingly concluded that such immunities were limited to websites that had acted as "good Samaritans," trying to clean up the Internet. As Danielle Citron observes:

> The absence of self-screening was antithetical to supporters of the Communications Decency Act, who believed that controlling the volume of noxious material on the Internet exceeded the capacity of public regulatory agencies. 141 Cong. Rec. 22044-45 (1995) (remarks of Rep. Cox). Supporters believed that reducing objectionable material on the Internet depended upon ISPs acting as Good Samaritans, voluntarily screening out as much offensive content as possible. Given this history, courts could have limited § 230's application to intermediaries and websites that engaged in good faith, though incomplete, monitoring. Instead, they interpreted § 230 as absolving intermediaries and website operators of all responsibility for users' actions, even those that knew about and ignored indecent material.[20]

B. Copyright

"Introducing what would become title II,[21] Senator John Ashcroft declared that immunities against copyright liability would serve free

18. Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (4th Cir. 1997).
19. 47 U.S.C.A. § 230 (c).
20. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 116 n.377 (2008).
21. The original versions of the DMCA introduced in the House, H.R. 2281, and the Senate, S. 1121, on July 29, 1997, lacked any copyright liability limitation. See WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997, S. 1121, 105th Cong. (1997); WIPO Copyright Treaties Implementation Act, H.R. 2281, 105th Cong. (as introduced by Rep. Howard Coble, July 29, 1997). Senator John Ashcroft introduced an alternative bill, S. 1146, on September 3, 1997, to amend the provisions of 17 U.S.C. by adding a new § 512 to provide limitations on copyright liability for online service providers. *See* Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. § 102(a) (1997). Representative Howard Coble introduced the House version, H.R. 2180, on July 17, 1997. *See* On-Line Copyright Liability Limitation Act, H.R. 2180, 105th Cong. (1997). To reconcile the differences between the

speech. He observed that online service providers could provide to "those who use the Internet or information in a digital format for education, entertainment, research" and that their—both the online service providers' and users'—"opportunity to speak and to learn needs to be protected."[22] In enacting title II, Congress defied the copyright industry, which believed that the common law liability rule sufficed.

The House report explained that title II "essentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-line Communications Services, Inc.*"[23] In that case, Judge Ronald Whyte of the Northern District of California explicitly used First Amendment concerns to protect web services that had been used for copyright infringement.[24] The case exemplified the risk that excessive copyright liability posed for speech. The copyright holders for the works of Church of Scientology founder L. Ron Hubbard sued those operating a Usenet bulletin board where a "former minister of Scientology turned vocal critic" had posted portions of Hubbard's works.[25]

When the House acted to adopt the conference report on October 12, 1998, Representative Barney Frank spoke of the impact of Congressional action on free speech online: "We have in this country the freest speech in the world, . . . but we are developing a second line of law which says electronically-transmitted speech is not as constitutionally protected. We must reverse that trend or we will erode our own freedoms."[26] Representative Frank believed that title II ensured Internet intermediaries would not act as censors: "In the Committee on the Judiciary, we worked very hard in particular in trying to work out a formula that would protect

---

Senate and House bills, Representative Coble introduced H.R. 3209, which was incorporated into H.R. 2281 (also introduced by Representative Coble), and became part of title II. See On-Line Copyright Infringement Liability Limitation Act, H.R. 3209, 105th Cong. (1998); see also Michelle A. Ravn, Navigating Terra Incognita: Why the Digital Millennium Copyright Act was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement, 60 OHIO ST. L.J. 755, 778–83 (1999). For a full legislative history, *see* S. REP. NO. 105-190, at 2–8 (1998).

22. The Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before the S. Comm. on the Judiciary, 105th Cong. 42 (1997) (statement of Sen. John Ashcroft). Any effort to address the copyright protection of material on the Internet must protect everyone who stands to benefit from the expansion of electronic commerce. The content community has to be highly regarded—and I understand completely the need for the protection—but so do the online service providers, and those who use the Internet or information in a digital format for education, entertainment, research, and others. Their opportunity to speak and to learn needs to be protected.
23. 144 Cong. Rec. E160 (daily ed. February 12, 1998) (statement of Rep. Howard Coble) (emphasis added).
24. Religious Technology Center v. Netcom On-line Communications Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).
25. *Id.*
26. 144 CONG. REC. H10, 618 (daily ed. Oct. 12, 1998) (statement of Rep. Barney Frank).

intellectual property rights and not give the online service providers an excessive incentive to censor."[27]

C. Privacy

Even before the Internet, the First Amendment constrained the common law privacy torts. William Prosser's privacy torts had seen their growth stunted by courts concerned about free speech.[28] As James Whitman writes, "Freedom of expression has been the most deadly enemy of continental-style privacy in America."[29]

Broad privacy mandates on Internet service providers faced the possibility of First Amendment challenges—as in 1999 when the Court of Appeals of the Tenth Circuit declared consumer privacy rules for telecommunications providers unconstitutional. In *U.S. West, Inc. v. FCC*, the appeals court ruled that requiring telephone companies to obtain customer consent before using personal information outside certain specified domains violated the companies' First Amendment rights. The court reasoned that the FCC could have considered an opt-out consent to accomplish the statute's purpose.

"[I]nformation is power," Justice Kennedy declared, in his opinion for the Court in 2011.[30] In *Sorrell v. IMS Health*, the Supreme Court dramatically demonstrated the seriousness of First Amendment constraints on privacy regulations on information intermediaries.[31] The Court struck

27. *Id*.
28. *See, e.g*., Hall v. Post, 372 S.E.2d 711, 714 (N.C. 1988) (holding "that claims for invasions of privacy by publication of true but 'private' facts are not cognizable at law"); Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405, 412 (N.C. 1984), cert. denied, 469 U.S. 858 (1984) (refusing to recognize the false light invasion of privacy tort because it "would . . . add to the tension . . . between the First Amendment and [privacy] torts"). The concern would continue into more recent cases as well. Taus v. Loftus, 151 P.3d 1185, 1204 (Cal. 2007) (declining to recognize an action of public disclosure of private facts because the investigation and publication were "clearly activit[ies] in furtherance of [defendants'] exercise of . . . free speech" (alteration in original) (internal quotation marks omitted)); Denver Publ'g. Co. v. Bueno, 54 P.3d 893, 894 (Colo. 2002) (declining to recognize the tort of false light invasion of privacy because it "raises the spectre of a chilling effect on First Amendment freedoms"); Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1100 (Fla. 2008) (refusing to recognize the tort of false light invasion of privacy because it lacked "the attendant protections of the First Amendment"); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (declining to adopt a false light tort because "claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased"); Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994) (declining to recognize the tort of false light invasion of privacy).
29. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 Yale L.J., 1151, 1209 (2004).
30. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011) (quoting a Vermont physician).
31. *Id*.

down a Vermont privacy law that prevented pharmacies from sharing physician prescription data for marketing purposes without physician consent.[32] Reasoning that marketing was a protected expressive purpose, the Court held that the statute was a content-based restriction on protected expression.[33] The Court extolled the virtues of free information.[34] Justice Kennedy wrote, "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[35] This included anodyne details of prescription practices. Because consumer privacy laws suppress the gathering, retention, or use of typically mundane facts about individuals, the Court's embrace of facts suggests that broad consumer privacy laws would meet stiff First Amendment challenge."[36]

Low civil liabilities for the actions of users, combined with the ability to create individualized profiles for targeted advertising, formed the legal basis for the business model of the new Internet. This created the virtual spaces for conversations and communities to form.

II. WHAT SPEECH HATH WROUGHT

I know full well that to speak rhapsodically about the Internet is to be marked a fool. Consider this description from Jonathan Franzen of MIT technology theorist Sherry Turkle (whom I also admire): "Sherry Turkle is a singular voice in the discourse about technology. She's a skeptic who was once a believer … a grown-up."[37] The implication of this praise of the technology skeptic is as follows: To be a believer is to be a foolish child. To be a skeptic, is to be a grown-up.

Skeptics will point in particular to some of the negative aspects of a free speech-focused Internet. In this part, I consider five critiques of our speech-centered cyberlaw. While there are reasons for caution, I believe that the social, economic, and political benefits of a speech-powered Internet are substantial.

A. Criticism: Slacktivism

In 2014, the Oxford English Dictionary introduced its new word of the year, *slacktivism*, defined as "support of a political or social cause but

32. *Id.*
33. *Id.* at 2672.
34. *Id.* at 2671–72.
35. *Id.* At 2671-72.
36. Chander & Le, *supra* note 2.
37. Jonathen Franzen, *Sherry Turkle's 'Reclaiming Conversation'*, NEW YORK TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/10/04/books/review/jonathan-franzen-reviews-sherry-turkle-reclaiming-conversation.html?_r=0.

regarded as requiring little time or involvement."[38] Evgeny Morozov argues that Internet activism undermines more effective real world activism: "When the marginal cost of joining yet another Facebook group are low, we click 'yes' without even blinking, but the truth is that it may distract us from helping the same cause in more productive ways."[39] Morozov considers such activism a distraction from more effective forms of advocacy. Indeed, "slacktivism" is deployed most often to ridicule. Morozov describes a Facebook group "saving the children of Africa," while boasting 1.2 million members, had only raised $6,000, or half-a-penny per member.[40] (The group is no longer active on Facebook so it is difficult to evaluate it.) Slacktivism, under the skeptics' account, reflects yet another failing of the young generation: while my own generation and the ones before worked hard for change, Millenials can only be moved to press a button or at most add an emoji. (Emoji, as it turns out, was Oxford English Dictionary's word of the year for 2015.)[41]

As M.I. Franklin writes for the Oxford English Dictionary itself, the term becomes an "easy dismissal of the way people use the Internet to call to account power abuses at home and abroad, or to share information and get organized by going online."[42] The reality is far more complex. As I write elsewhere:

> It would be foolish to believe that the circulation of a graphic YouTube video of state sanctioned violence would, by itself, lay a government low. Change comes from brave people marching in the streets, sometimes risking arrest or even their lives. But the videos and the tweets and the online mobilization is increasingly the predicate for the offline activity. That is what we saw in the Arab Spring in 2011—the circulation of information online that led to massive protests organized seemingly from nowhere and by no one.[43] The violent and tragic death of Neda Agha-Soltan in Iran spurred more people to take to the streets as the video of her bloody body circulated online and via cellphones.[44] The fact that they did not immediately overthrow the repressive regime should not lead us to

38. M.I. Franklin, *Slacktivism, clicktivism, and "real" social change*, OUP BLOG, (Nov. 19, 2014), http://blog.oup.com/2014/11/slacktivism-clicktivism-real-social-change/#sthash.T6da5ppy.dpuf/.
39. Evgeny Morozov, *From Slacktivism to Activism,* Foreign Policy, (Sept. 5, 2009), http://foreignpolicy.com/2009/09/05/from-slacktivism-to-activism/.
40. *Id*.
41. *Oxford Dictionaries Word of the Year 2015 is…,* OxfordDictionaries Blog, (Nov. 16, 2015), http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/.
42. Franklin, *supra* note 34.
43. Chander, *Jasmine Revolutions*, 97 Cornell L. Rev. 1505 (2012).
44. Nazila Fathi, In a Death Seen Around the World, a Symbol of Iranian Protests, N.Y. Times, 22, 2009.

> conclude that the protests were useless. Of course, the Internet helped organize protesters who did in fact successfully bring down decades-old dictatorships in North Africa.[45]

Not only are online activities often a prelude for real world change, but they are often dangerous in and of themselves. According to the Committee to Protect Journalists half of the journalists imprisoned for their reporting across the world were reporting online.[46] If Internet activism were harmless, then why do repressive regimes seem to target Internet activism with such frequency? I have argued that the proof of the value of Internet activism can be found in the response of repressive regimes:

> In case after case, authoritarian governments threatened with rebellion have pulled the plug on the Internet. In Burma, China, Egypt, Libya, and Syria, governments faced with rebellion have shut off the Internet. The Internet Democratization Skeptics might read those governments' shuttering of the Internet as proof that Internet activists can be trivially defeated. Just pull the plug, and voil`a, the activists can no longer foment trouble. If the earlier Skeptics' claim is that Internet activists can be easily fooled, this claim is that they can be easily foiled. I suggest that pulling the plug proves a different point: authoritarian governments currently fear the Internet more than they rely upon it.[47]

Indeed, countries often censor the Internet or even stall the deployment of mobile Internet in order to restrict the possibilities of online activism and information sharing. According to the Committee for the Protection of Journalists, "[f]earing the spread of Arab Spring uprisings, Eritrea scrapped plans in 2011 to provide mobile Internet for its citizens, limiting the possibility of access to independent information."[48]

B. Criticism: Merely Echo Chambers, Leading to Greater Polarization

Cass Sunstein and others have accused the Internet of narrowing the media each of us consumes in a way that allows us to become further

45. Wael Ghonim, Revolution 2.0: The Power of the People Is Greater than the People in Power (2012).
46. *See generally 2015 prison census: 199 journalists jailed worldwide,* Committee to Protect Jounalists,(Dec. 14, 2015), https://cpj.org/x/6691.
47. Chander, *supra* note 5, at 1509.
48. *See generally Repressive nations threaten jail terms, restrict Internet to silence press*, COMMITTEE TO PROTECT JOURNALISTS (2015), https://www.cpj.org/2015/04/10-most-censored-countries.php.

entrenched in our worldviews.[49] While there is certainly some truth to this observation,[50] social science research is more equivocal as to whether this is what is actually happening. Researchers at Facebook report that users' see "cross-cutting" in their newsfeeds, and click on it with some regularity:

> While 22 percent of the content seen by liberals was cross-cutting, we found that 20 percent of the content they actually clicked on was cross-cutting (meaning people are 6 percent less likely to click on countervailing articles that appeared in their News Feed, compared to the likelihood of clicking on ideologically consistent articles that appeared in their News Feed). Conservatives saw 33 percent of cross-cutting content in News Feed but actually clicked on 29 percent (corresponding to a risk ratio of 17 percent).[51]

Equally important, the Internet must be compared to the media available before the rise of the Internet. As I have written elsewhere:

> What [the Internet as echo chamber view] neglects is the fact that for many members of minority groups, the shared experiences provided in the traditional mass media consist largely in a portrayal of the majority group, and the occasional, usually grossly distorted portrayal of the minority. For minorities, then, the mass media generally provides the "Daily Them"—a vision of society focused on its dominant members. For minorities, this ubiquitous vision of society confirms their status as marginal and their concerns as irrelevant.[52]

The mainstream media valorizes a few voices, the voices of the privileged and dominant in society. It reifies dominance. The Internet, on the other hand, allows the development of smaller communities, where people can find affirmation for their lives absent in the mainstream media.

49. *See* generally Cass Sunstein, Republic.com 2.0 (2007).
50. *See generally Political Polarization in the American Public*, PEW RESEARCH CENTER U.S. POLITICS AND POLICY, (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.
51. Eytan Bakshy, Solomon Messing & Lada Adamic, *Exposure to Diverse Information on Facebook*, RESEARCH AT FACEBOOK.COM (May 7, 2015), https://research.facebook.com/blog/exposure-to-diverse-information-on-facebook/.
52. Chander, *"Whose Republic?"* (2002). Cornell Law Faculty Working Papers. Paper 12.

C. Criticism: Manipulation Machine

Speech on the Internet is not free, many will argue; it comes at the price of our privacy.[53] There is indeed much truth in this. The business model of much of the Internet is clear:

> Web 2.0 providers earn money through advertising or through selling additional services. If the online provider can tailor advertisements precisely to the interests of the user, then the advertising will be more lucrative. In other words, the more the online provider knows about you, the more it can earn.[54]

We need to assure that data is being used in ways that are appropriate; that companies are not violating the promises they make to us to keep our information private and secure.

D. Criticism: Hate Speech

The Internet has not only made it possible for people to organize and inform, but also to deride and declaim. As Danielle Citron and Helen Norton observe, "The internet facilitates anonymous and pseudonymous discourse, which can just as easily accelerate destructive behavior as it can fuel public discourse."[55]

We need to find mechanisms to ameliorate the problems. Citron and Norton argue for a more proactive, interventionist role among Internet intermediaries: "Intermediaries can foster digital citizenship by inculcating norms of respectful, vigorous engagement."[56] Google and Microsoft have announced that they will de-index nude photos posted without the person's consent.[57] Citron and Mary Anne Franks have also argued for more vigorous engagement—by criminal prosecutors when the hate speech is a cognizable criminal offense.[58] California's attorney general, Kamala Harris, has launched a "war" on the particular scourge of revenge pornography.[59]

---

53. *See*, e.g., Ryan Calo, Manipulation paper.
54. Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639 (2014).
55. Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for the Information* Age, 91 Boston Univ. L. Rev. 1435, 1440 (2011).
56. *Id*. at 1447.
57. Eric March, *If your nude photos are posted online without your permission, Microsoft and Google want to know*, UPWORTHY, (July 24, 2015), http://www.upworthy.com/if-your-nude-photos-are-posted-online-without-your-permission-microsoft-and-google-want-to-know.
58. *See generally* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn,* 49 Wake Forest L. Rev. 345 (2014).
59. Patrick May, *California's attorney general launches a war on 'revenge porn' and other cyber crimes*, SAN JOSE MERCURY NEWS, (Oct. 14, 2015),

CONCLUSION

Let me return to where I began.

The zeitgeist of an age is perhaps more likely to be reflected on Twitter than either the *New York Times* or CBS. The top ten news items trending on Twitter in 2015 were as follows:[60]

1. #jobs
2. #Quran
3. #ISIS
4. #PrayForParis
5. #LoveWins
6. #CharlieHebdo
7. #JeSuisCharlie
8. #BlackLivesMatter
9. #地震
10. #SandraBland

These hashtags summarize the entire year in news. The hashtag serves as a democratizer of speech, allowing anyone to have her thoughts distributed for free around the world.

A First Amendment-powered cyberlaw made speech platforms like Twitter possible. It configured an Internet of services that were paid through advertising rather than fees, enabling individuals of modest means to speak broadly to the world and to learn from the world in turn.

That is a result we should celebrate and also defend.

http://www.mercurynews.com/business/ci_28969241/californias-attorney-general-launches-war-revenge-porn-and.

60. TWITTER, https://2015.twitter.com/top-trends.