Against Honor and Liberty of the Press

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Good morning, ladies and gentlemen. It's a great honor and a privilege for me in my first visit in Uruguay to find myself in such very distinguished company. I want to thank the Rector and the Dean of the Faculty, my colleagues here, the Embassy of my imperial government which graciously has provided support for this activity, and my colleagues, both American and Uruguayan, from whom I have learnt so much already this morning. At this point, after such learned talks as you have heard, it is best if I make a few very simple remarks.

I submit to you that both the liberty of the press and the right of honor are, in the 21st century, entirely dead conceptions of no importance whatever, and that this is a very good thing. I shall further suggest that the only subject of importance is freedom of information, a cause which requires us not only to be satisfied with the death of liberty of the press and the right of honor, but also to kill them if they are not dying fast enough. I want to begin by explaining what I think is the proper way of approaching such questions, which is from some simple sociological propositions about the world into which we are inevitably moving.

In the 21st century all inhabitants of the developed economies will be living in what I call the Internet Society. I don't mean "cyberspace" (not a particular place at all), nor a thing (not "the Internet") but rather a social condition: the condition in which everyone is connected to everyone else everywhere, all the time, without any intermediaries. This is the primary context of social action in the 21st century and forever after—a condition fundamentally unprecedented in human history. Every structure of governance, regulation and law is now subject to fundamental re-examination in the light of a single urgent question: what happens when there are no

*These remarks were originally delivered at the Law Faculty of the University of Montevideo, at a Workshop on The Right of Honor v. Liberty of the Press, on May 3, 2001. I want to thank the Dean and Faculty for their kind invitation, and the American Embassy for its support. My special thanks to Dr. Juan Manuel Gutierrez Carrau for his thoughtful comments and limitless hospitality.

necessary intermediaries to all acts of human communication?

Now, liberty of the press—as is shown by the way it is described in all the modern languages—begins from a quite different proposition: that the structure of information flow in society depends upon the maintenance of certain capital intensive facilities. The printing press is the archetype, but the modern broadcast television station and all the other technologies of mass communication that dominated the 20th century worked in the same way: A few people, by right of investment in certain capital goods, had privileges of speech—the rest were listeners. This is the structure upon which all legal regulation of the information flow in society has been based, both in those apparently regressive societies in which communication was under direct state control, and in those apparently progressive societies which devoted the use of those communications facilities to the discipline of what they were pleased to call "the market."

But both systems—the apparently regressive dictatorial and the apparently progressive capitalist systems of information flow regulation—are now becoming obsolete. Instead, we find ourselves in a world in which the intermediaries, the traditional possessors of specialized rights to speak, desperately seek to retain a power which is no longer legitimately theirs. The liberty of the press, then, becomes a form of special pleading for the maintenance of privileges previously regarded as essential to civic freedom. In the new technological circumstances they instead act to impose upon society a series of intermediaries with specialized privileges of speech or broadcast, creating a class with the privilege of telling everyone else what to think.

The 21st century will therefore see unremitting conflict between civil society's desire to reflect the technological reality of universal interconnection and the attempts by globally powerful organizations with special communications privileges to retain the social powers they gained from those privileges in the course of the 20th century. For this reason, liberty of press will turn out in the 21st century environment of the Internet Society to be directly in conflict with freedom of information. And it will become the responsibility of legal thinkers to subdue those doctrines of liberty of press and of intellectual property, which will only serve to reinforce the privileges that intermediaries possessed when they were socially necessary, and which they will desperately claim at all costs in a world that doesn't need them anymore.

So we need to be clear how to construct an alternative to those intermediaries. In a society where everyone is connected to everybody else, it becomes possible to eliminate the conception of the press altogether from the legal and social analysis of the patterns of communication. There are some speakers whom more people want to listen to, and there are speakers whom fewer people want to listen to. No further distinction is necessary or appropriate. The specialized producers whose goal was to render passively receptive the non-producers of information, opinion and culture are an artifact of the past.

But we have become so used to the idea of the broadcaster as an indispensable part of our culture, that we find it hard to escape the mental habits of our history. In the early part of the 20th century, when the use of the electromagnetic spectrum for broadcasting information first became technically feasible, governments assumed that it was necessary to control who used the airwaves—in which frequencies, with how much broadcast power, at what times of day—for the purpose of avoiding technical chaos. So regulation of the right to speak was justified, in the end, on the ground that it was technically unavoidable.

Some governments avidly embraced this justification, for the more-or-less hidden purpose of controlling all broadcasting directly, while some governments preferred instead to hand out fixed exclusive pieces of the communications rights to favored individuals who—in all systems, without exception—found ways to corrupt politics in order to maintain their exclusive rights.

But by the end of the 20th century the technical case for such regulation had vanished. The cell phone is a good example of the new technological reality: as machine intelligence moved outward into one's pocket, newly intelligent devices learned to share those frequencies previously used exclusively by a single broadcaster, so that each person might be in communication wirelessly with the rest of the world without interfering with anyone else.

At that moment, broadcasting—that is, the conveyance of certain fixed privileges of communication to favored organizations or individuals—became normatively sickening and legally unacceptable in every society committed to freedom of information. A simple principle, of course unrecognized, because those who owned the privileges of communication and who have had generations to corrupt everyone's politics have no stake whatever in our exploring those social possibilities. But now we're about to find ourselves in a world where the choices are no longer so extremely limited. Because the technology of digital communication has also permitted each of us to publish, the remarks that I give this afternoon could appear this evening or tomorrow on a Web site in New York and would be read the day after that, I have no doubt, by someone in the Philippines or in Malaysia, or in any one of the 65 countries from which people touched my website last month. There were, last month, 87.000 of them, discrete individuals choosing to read something I had published not on a slice of a dead tree but on an infinitely renewable resource from which nobody is at any time excluded, and for which nobody has to pay.

This—our right, each of us, to an unlimited publication of anything (be it text or sound or, ultimately, video) that we may care to distribute to the world—is the real 21^{st} century condition of freedom. The press—that is to say, the social structure of the control of those privileges by others—is essentially unimportant. Now, you will say: "But this is not correct. There are tens of millions of people who will listen to the news broadcast this evening, there are billions of people who will watch World Cup football on the broadcasts every time that the Cup is fought, and plainly, therefore, there is a continuing role for the press." But the broadcasters in that situation are primarily acting as distributors, and thus their importance is directly related to whether they possess superior distribution power. Their powers of creation, on the other hand, are no greater than yours and mine. In fact, their powers of creation currently substantially underwhelm them. The "all news all the time" broadcasters find themselves compelled to make news in order to have something to say 24 hours a day. The privileged controllers of global distribution find themselves ever in a search for content, because they're simply the possessors of specialized pipes, but they do not make water.

We, the people of the world, create ideas, music, thoughts, opinions, and it is our right as well as our human nature to express anything we please anywhere, anytime. The possessors of exclusive distribution structures must justify themselves, not by their superior judgement, not by their wisdom, but simply by their ability to get the bus from one terminal to another better than anybody else. A valuable skill, I don't deny, but one which is not of constitutional status, one which is not intrinsic to human freedom, and one which deserves no particular legal respect.

So much, for the moment, for the liberty of the press. I shall come back to it.

I now want, with regret, to say some bad words about honor. And it is here my unfortunate responsibility to differ with Professor Cassinelli. I have not the slightest idea what honor is, and I see no reason whatever to suppose that it is in any respect inherent in the human being . Even if I did understand what it was I would be out of luck, because it's gone.

Professor Esteva I think gave the reason: "Honor," whatever that may mean—whether Calderon's conception or that expressed by the offended human being whose private life has been disclosed in a newspaper—honor is an aspect of privacy. And privacy, my dear friends, is a thing of the past.

Every time you use a credit card for anything, the fact that you have used it, what you have bought with it, where and when, are captured. In the world of the Net nothing is ever destroyed, nothing ever goes away and nothing is ever forgotten. There's nothing that remains to you which is not known to someone else. In the age of the credit card, the cell phone and all the other technology of connection and convenience, the secret commission of what many of us are pleased to think of as "adultery" is implausible. You may maintain a second establishment or enjoy an occasional weekend away and keep it secret from your spouse, but not, under any circumstances, from your banker. And your banker—merely a commercial entity engaged in the selling of information far more than it is engaged in the making of loans—is like any other party in this fine liberal market of ours: busy making a dollar in any way it can.

If you give me the list of what you bought at the supermarket for the last six months I can tell you much indeed about what is going on in your life. They will be surprising things, that nobody was supposed to know, but that you gave away in an instant in order to receive a small discount on milk or a few airline miles or whatever it is that your supermarket is promising you in return for giving them the power to associate your groceries with your identity.

It's not uncommon for me to find myself in conversation with a student dubious about the extent of transparency in the Internet Society. To him or her I say: "Well, let's figure out what it is that's happened at the supermarket this past month. Your consumption of toilet paper has gone up: ergo, somebody's living with you. Your consumption goes back down: ergo, he or she has moved out. Chocolate is suddenly being bought, or whatever is the local cultural solace for the abandoned lover, and next thing you know you're receiving junk mail from a dating service." No United States parent currently escapes the discovery, as soon as a new infant is brought home from the hospital, that a large number of people have been informed and are mailing free supplies of baby goods which they hope you will continue to buy thereafter. It is very simple: hospitals sell birth records to the companies that want them. And the fact of the birth of the child, which might be regarded as something within an intimate sphere—if there was such a thing as an intimate sphere—is now a matter of the utmost publicity.

So I ask you to speculate on what it means to continue to maintain rules, whether of 14^{th} , 15^{th} , 19^{th} , or 20^{th} century provenance, which assume that the village is the most public place in the world. The village was nothing, in its comprehensive surveillance of the population, compared to where you live now.

Conceptions that depend upon the maintenance of the self as a contained space are useless. It is therefore the responsibility of thoughtful lawyers to stop using them.

So far I have tried to suggest in the simplest way a few basic propositions with respect to the liberty of the press and the right of honor. I should also point out that infringement of honor in the global Internet Society is merely a taboo, a local cultural prejudice, subject—in the world of universal interconnection—to the same inevitable erosion as all other local taboos. The problem begins to express itself in the context of international enforcement of rules about speech, currently happening all over the place. Is there a local taboo in France against the selling of Nazi memorabilia? Is there, in Germany's supposedly militant defense of democracy, a rule against the circulation of the book called *Mein Kampf*? Is there in the United States a peculiarly harsh legal distinction between nude photographs of 17-year-olds and 19-year-olds? All of these legal propositions, as you see, are relentlessly subjected to the difficulty that the net is a global entity and that the local rules are substantially unenforceable. Will the French attempt to prevent Yahoo from doing business in France because it also does business in places where Nazi memorabilia may be freely traded? Will the United States attempt to close its borders to photographs arising in places where it is permissible for 17-year-old people to have sex with one another in front of a camera? Will we find ourselves watching once again as the government of the United Kingdom tries to prevent the publication of a book about its espionage system by somebody who knows something about it? And so on.

The difficulties presented for the courts are quite simple. They have insufficient power, because they depend upon the reach of the State and the reach of the State in the Internet Society weakens moment by moment. Moreover, as the network grows more mature, the communications that occur within it are encrypted—that is to say, they are mathematically scrambled, so that no one except the originator of any message and its intended recipient knows what it means. The government of my empire played a leading role in attempting to prevent the spread of that technology for more than thirty years, in pursuit of what it was pleased to regard as its sovereign right to listen to every telephone conversation everywhere in the world (except in the United States, where of course, it never, ever, ever listened, because its listening would have been against the law). At any rate, the government of the United States, through the National Security Agency, attempted to prevent the distribution of strong encryption in the Internet for 15 years, litigating very hard in cases in which I was intimately engaged on the other side, and then with the suddenness of enlightenment surrendered completely. At the outset of that campaign, we were constantly told that under no circumstances would we ever find ourselves living in a society where strong encryption might be freely exported to the world. That remained the official position until the moment when the greatest secret agencies in the strongest empire in the history of the world gave up. We will now live in the 21st century in a world in which no government will routinely know what anybody is saying to anybody else unless invited to learn. It is true that such invitations will be routinely extended, in the very same way in which your credit card routinely extends to the world the permission for your life to become as a pane of glass: You will undoubtedly reveal to lots of people, lots of the time, everything you think and everything you do. But when you don't want to, you won't.

In such an environment, speech taboos of any kind—against the purchase or sale of particular digital commodities, against the revelation of certain government secrets, against the disclosure of pertinent private details about someone else's life, or, for that matter, disclosures regarded as obscene by a particular society's sexual taboos—will be unenforceable and unreachable by law.

In such an environment, it is not merely the right of honor that is dead. I didn't come down here to trespass on your hospitality by announcing that some local prejudice I don't understand is gone. I came instead to point out that your "honor" is a species in a genus of dead conceptions—rules about what must not be said—that have no practical reality in a world where you can't tell what anyone else is saying.

So the Internet society is a place of generally unlimited transparency alongside pockets of complete secrecy. For us to speak of the right to control others' discourse there is to give the word "right" a most unusual meaning: We might better describe it as a "wish."

Whether, therefore, one has a wish for "honor" to be respected is merely a matter of personal concern. I don't have much to say about that, one way or the other, except to point out that to dignify the wish with the weight of constitutional authority is ludicrous.

So, where do we find ourselves? The liberty of the press in the 21st century actually means continued subsidy of private powers, illegitimate in their present use, though once justified by adequate public purposes. The right of honor, like other attempts at enforcement of local speech taboos in a global and secrecy-protective network, is just another unenforceable wish for the continuance of obsolete social values in a modern society.

What counts as then, if these concepts don't? Freedom of information counts. The practical ability of all our people to be connected to the social network counts. The removal of the privileges previously accorded to particular parties to control or overwhelm the speech of others counts. This recognition demands of us a completely different approach to questions of the information flow in the Internet Society. We must cease to be concerned with the issues we have previously talked much about: they no longer have anything meaningful to contribute to our thoughts. We must become concerned instead with new questions:

1. Does the State facilitate everybody's connection to everybody else or interfere with it?

2. Does the State resist attempts by the owners of obsolete communication privileges to continue their hold, or does it facilitate the continuance of their unjust control in return for one form or another of concealed bribe?

3. Does the State practice a politics that consists of concealing from people the reality that their taboos are no longer enforceable, and that their lives have become transparent? Or does the State instead engage in teaching people how to use the new technologies to live fruitful and politically participatory lives, with real purpose, in the new conditions?

These are not questions that are necessarily well addressed by rights talk. Particularly not rights talk of the US variety, which tends to be about what one can keep the State from doing. And as Professor Isaacharoff noted, that's not even really the problem most of the time in the law of defamation, let alone in the more complicated problems of media structure and access to the common fund of knowledge, problems which will become primary social policy issues in the 21st century.

Rather than the traditional US question of how to restrain the State, the new questions are about the State's positive obligation to undercut its own traditional behavior by reining in those delegates in the private economy to whom it once upon a time wisely gave what it now can only wisely recoup.

The primary obligation of the 21st century State is to assure the broadest possible access to the system of pervasive interconnection. This will imply a responsibility to adopt and support minimum-cost technology for wireless communication between and among all persons all the time.

The society in which everybody may talk to everybody else using the public airwaves, and may transmit data to anybody who wishes to receive it through the same airwaves, at no cost, shows us the old State pursuing a normatively just public policy in the 21^{st} century. No other system of State intervention in the use of communications functions meets even a loose test of justice in our new technological conditions.

Every State currently fails that test, mine worse than most.

It is the responsibility of the State to show people what life in transparent social conditions means. To educate them on what it is that the market now does with the information that they disclose. To avoid hasty and only apparently functional controls over the movement of that information, and to avoid imposing on private parties oppressive responsibilities to control the flow of that information, which the State is by no means strong enough to enforce.

Every State currently fails that minimum test of justice, mine worse than any other.

It is the responsibility of the State in the 21^{st} century to weaken the hold of particular cultural taboos locally, and to resist the intervention of privilege in politics—through bribery, campaign contributions, party ownership and all the other forms of corruption that the 20^{th} century introduced into the media structure—for the purpose of eliminating the aristocracy of information, which governs now as surely as the proprietors of physical land resources governed in the *ancien régime*.

Every state currently fails that minimum test of justice, mine more than most.

We find ourselves now in a world in which the legal discourse we have been using is almost completely without meaning and entirely without utility in securing justice. The new issues are poorly understood, and they're certainly not on the public policy agenda as defined by the owners of current communications privileges. Human aspirations may now be met in entirely new, unprecedented ways. To lead a more fulfilling life people aspire to be able to learn everything, anytime, anywhere; to have access to the whole of human culture, all music, all art, all literature everywhere, all the time; to be free to express any opinion to anyone in perfect security, anywhere, anytime, regardless of the opinion of the State as to whether those opinions privately held are right, wrong, offensive, shocking or deleterious to human order. The role of the new technology in making all those aspirations achievable is becoming clear to young people in all of the advanced societies. They relate to the technology of human interconnection differently from those of us who grew up before technology reshaped society, or who still live in places where that reshaping has not yet reached critical mass.

So our societies are beginning to experience rising expectations, new social demands. We have a ruling class—the proprietors of communications privileges, governmental and non-governmental, throughout the world—determined to resist the force of those expectations. We have a process of modernization going on throughout the developed societies, which is reshaping the lives of people in advance of the doctrines of State control, feeding the very expectations that the ruling class determines upon suppressing for the maintenance of its own power. The new social arrangements that are demanded challenge previously sacred judgements about the levers of social order and the maintenance of stability in society.

This is not an unfamiliar story: The next chapter is revolution. Always. It's coming, don't worry, it's coming. What kind it will be depends upon our ability to recognize the new conditions and respond to them, depends upon our flexibility in rejecting old notions and our willingness to disempower old leaders and to smash old idols. Those societies which can transform themselves will sustain a peaceful revolution, more liberating than any that has ever occurred in human history. Those societies which can't will be swept away by a force greater than any failing régime has ever faced. Such unlucky power structures will lose more completely, more horrifyingly, and in a cataclysm more triumphant for the interests of freedom than any we have ever seen before.