

SYMPOSIUM

DOES *RED LION* STILL ROAR? KEYNOTE ADDRESS

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Wow, look at how many people are here. I'm very grateful to be here. I read the *Administrative Law Review* with too much obsessiveness. I'm a little worried about myself. Especially when I'm teaching administrative law, my printer is printing out articles from the *Administrative Law Review* at such a rapid rate that the computer people have to come fix my computer. It's a fantastic journal. It is fantastic to be here and, wow, what a topic you have. And what a time to have this topic.

I have a few epigraphs for you, if you'll permit. The first is from Google: "No one can read all the news that's published every day, so why not set up your page to show you the stories that best represent your interests?"¹ So says Google.

The second is from philosopher and educator John Dewey:

Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . The important consideration is that opportunity be given that idea to spread and to become the possession of the multitude. . . . The essential need . . . is the improvement of the methods and conditions of debate, discussion and persuasion. That is *the* problem of the public.²

The third of my four epigraphs is my favorite, I confess. It's from philosopher Immanuel Kant. Kant writes: "One must take men as they are, they tell us, and not as the world's uninformed pedants or good-natured dreamers fancy that they ought to be. But 'as they are' ought to read, 'as

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1. About Google News, http://news.google.com/intl/en_us/about_google_news.html (last visited Oct. 10, 2008).

2. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 207–08 (The Swallow Press Inc. 1954) (1927).

we have *made them* In this way, the prophecy of the supposedly clever statesmen is fulfilled.”³ I’m going to try to bring Kant’s statement to bear on *Red Lion* today.⁴

The last epigraph of the four is from *Red Lion*:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.⁵

To get at this topic, at Google’s plea for the news that best represents your interests, and at the tension between that and Kant’s suggestion—that men “as they are” is men as social practices make them—I want to tell you about two empirical studies with which I have recently been involved.

One came from Colorado.⁶ We asked people from Boulder, Colorado, together (about thirty of them) to talk about three of the great issues of the day: climate change, affirmative action policies, and same-sex civil unions. We chose Boulder on purpose—it’s a liberal place. We wanted to get liberals talking to liberals; we had a little filter to make sure that we got liberals. We expected we would do that just by geography, but we asked the people a few questions, one of which was, “What do you think of Vice President Cheney?” If the people in Boulder said “he’s great,” they were cordially excused from the experiment. We asked the people in Boulder to record their views on these three issues privately and anonymously, then to speak together for about fifteen minutes. Then, if they could, we asked them to reach a verdict in groups of five or six, and then, after they had spoken together as a little group, to record their views privately and anonymously.

Unbeknownst to the people in Boulder, we were doing, at the same time, the exact same experiment in Colorado Springs. Most Coloradans probably know that Colorado Springs is Republican territory, with an overwhelming pro-Bush vote. We similarly asked the Colorado Springs people if they liked Vice President Cheney, and they almost all said yes. One or two said “I’m not so sure,” and they were excused from the experiment. So we had conservatives in Colorado Springs, and we did the exact same thing. We had the same three stages: private anonymous statements of view; public deliberation to reach a verdict, if they could; and then private anonymous postdeliberation statements of view.

3. IMMANUEL KANT, *The Contest of Faculties*, in *POLITICAL WRITINGS* 176, 178 (Hans Reiss ed., H. B. Nisbet trans., 2d ed., Cambridge Univ. Press 1991).

4. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

5. *Id.* at 390.

6. To read the study in its entirety, see David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 *CAL. L. REV.* 915 (2007).

We were interested in seeing what happens if like-minded people talk to one another. What are the effects of a period of discussion on private anonymous statements of view? That was our question.

Here's what we got: three things happened. First, the people in Boulder liked an international climate change agreement before they talked with one another. After they talked with one another, they *adored* an international agreement to control climate change. Before they talked to each other, most people in Colorado Springs didn't much like affirmative action. After they talked to each other, the people in Colorado Springs *despised* affirmative action programs (and if not, they thought they should be eliminated immediately). For just about all three of our issues, that is, six issue discussions, the conservatives in Colorado Springs became more extreme in their private anonymous statements of view; the liberals in Boulder got more extreme also. Extremism was our first finding.

The second finding was that, while all of the Boulder people were liberal, they had diversity of view on these three issues. Some of the people in Boulder thought climate change was speculative and that maybe we shouldn't spend the resources to have an international agreement. Some of the people in Colorado Springs—and I have seen the tapes, they're intriguing, as I'm sure you can imagine—thought that same-sex civil unions are fine and are part of what freedom permits. They struggled with their fellow Cheney supporters on exactly that issue.

After fifteen minutes of deliberation, the diversity in the private anonymous statements of view within Boulder was squelched. The participants came in line with one another, both in Boulder and Colorado Springs. They came in line, not in their public statements, I'm emphasizing, but in their private anonymous statements of view. Thus, sorting people into like-minded groups squelched internal diversity in both places. As a result of the increase in extremism, the diversity was squelched. Initially, the people in Boulder were more than a little to the left, as it happens, and the people in Colorado Springs were more than a little to the right, as it happens. But as they talked, the gap widened. They started to operate in something like different political universes.

That is the first of the two sets of studies I want to tell you about. This is an experiment I've just described involving ordinary citizens. The second study addresses the second question: Does this apply in the real world?

Well, for the past few years, I have been involved in creating a study of real-world behavior of the equivalent of Boulder and Colorado Springs in a very unlikely place: the federal Judiciary.⁷ What we've done is collected

7. CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

about 30,000 federal judicial votes. So if you see University of Chicago Law School graduates walking around Washington with glazed eyes, it's because they have been reading thousands of courts of appeals opinions, and have been coding them for liberalness or conservativeness. What has happened for many, many decades is the United States has conducted a tremendous natural experiment which is not so unlike the artificial one in Colorado. We have on our courts of appeals many panels that consist of Clinton–Clinton–Clinton appointees (D–D–D panels). We also have panels that are Bush–Reagan–Reagan panels. Because those panels are complemented by more mixed panels, such as Bush–Clinton–Clinton or Reagan–Reagan–Carter, we can see with the sheer number of decisions how judges vote, in terms of liberalness or conservativeness, depending on how many fellow Republican or fellow Democratic appointees are on the panel. We have done this coding in a ton of administrative law cases, as well as in many cases involving abortion, affirmative action, sex discrimination, campaign finance, and environmental law—a very long list.

Here is the finding I want to emphasize: There is a statistically significant difference between the overall liberal voting rate of Democratic and Republican appointees. It's about 12%. Democratic appointees in ideologically contested cases vote liberal 52% of the time. Republican appointees vote liberal about 40% of the time. That 12% difference is significant, but not massive. It approximately doubles when we compare Democratic liberal voting on D–D–D panels to Republican conservative voting on R–R–R panels. So the ideological differences on mixed panels explode once we look at how federal judges vote on R–R–R panels or D–D–D panels.

The Colorado study and the judges study are studies in group polarization, where the group polarization phenomenon—bearing, I'm going to try to suggest, on the Fairness Doctrine—suggests that if you sort like-minded people, or if they sort themselves, into groups that are limited to themselves, they will typically end up in a more extreme position in line with their pre-deliberation tendencies. We know, for example, that if people in France are skeptical of the United States and its intentions, after they talk to one another, boy, are they going to be negative about the United States and its intentions with respect to foreign aid. We have every reason to believe that different positions on the Iraq war will polarize, just as the climate change positions do. If you have a bunch of McCain people thinking the surge is working, after talking together, gosh, is the surge working. If you have a bunch of Obama people skeptical of the success of recent developments, after they talk with one another, they think it is getting more and more disastrous.

What I'm going to try to connect this group polarization finding with is what I'm going to call the positive or affirmative side of the First Amendment. If there is any single point that comes out of this, it should be the difficulties and complexities in the system of self-sorting that *Red Lion's* demise has helped unleash on the country. That is, there is a relationship between self-sorting on the one hand, and the positive conception of the First Amendment from which you can link in a kind of straight line: James Madison, Louis Brandeis, *Red Lion*, and Justice Breyer. This kind of straight line links those four points to what I'm calling the positive side of the First Amendment.

The two things that the positive side of the First Amendment celebrates are, first, the value of unchosen, unanticipated encounter with ideas and experiences that you would never have selected in advance, and, second, the value of shared experiences, especially in a society with our level of diversity. As I look around the room, you know, there is a great deal of diversity here. And if you magnify this level of diversity to the United States, it is overwhelming. That is one of our glories, really. And there is a lot of importance in a heterogeneous society of having shared experiences rather than uniquely held experiences sorted by different social groups. So the two themes are the unchosen, unanticipated encounter—serendipity—and the shared experience.

I want to bring those *Red Lion* or Madisonian values in great tension with what is being celebrated today, in the post-*Red Lion* era, namely the ability to create an informational or communication universe of your own choosing, sometimes described as the "Daily Me." The idea is that each of us can construct—many of us do construct, with the help of the Internet or with the sheer number of other options—a political universe that is limited to topics and ideas that please or interest us. That, I'm saying, is a *problem* from the standpoint of the First Amendment and not a solution. And *Red Lion* points the way toward recognizing why exactly it is a problem.

Red Lion is a culmination of a tradition which I suggest is best and most early located (in terms of constitutional doctrine) in the public forum doctrine. Every tyrant knows that an important way to self-insulate from challenge is not merely to censor disagreeable opinions, but also to close off those arenas in which political expression typically occurs. Accordingly, streets and parks in Cuba, China, and the former Soviet Union were not domains for expressive activity. Instead they were sharply controlled. In a very early case inaugurating the tradition of which I'm speaking in constitutional doctrine, the Court said, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁸

Now, let’s pause for a little bit over what the public forum doctrine is doing exactly. For one thing, it seems to be imposing on taxpayers an obligation to provide some sort of economic support. In that sense it is a positive right, rather than a right against censorship. At the same time, the public forum doctrine seems to serve three functions. First, it allows a protestor who has a beef against, let’s say, the government, an educational institution, or a company, to get some kind of access to the institution against which the protest is being made. It is very difficult, so long as the streets and parks are open, for the object of the protest to self-segregate against the protestor—just because of the importance and salience of streets and parks in American society, traditionally.

The second thing the public forum doctrine does is to allow protestors to get access, not just to the object of their protest, but also to a heterogeneous public, some members of which will see the protest while they walk down the street. So for those who live where I lived in Chicago, at least at some points over the last few years, using the streets ensures encounters with someone who has an objection to something. And this means that the objector has access to a group of people who can potentially be in the protest movement if they can see a situation that may trigger interest.

The third thing the public forum doctrine does, I think, is the most interesting. It imposes on each of us, not exactly a legal responsibility, but something like a civic responsibility to see our fellow citizens when they are disturbed or suffering and different from us, even if we would (in our desire for comfort and peace) want not to be exposed to that. So the street or the park, so long as it is public and so long as we are going to use it, ensures that each of us would have something like a legally unenforced duty to encounter diverse and concerned others.

Look at the nineteenth century and the three social functions I’ve described: the ability to get at an object of protest; the ability to reach a diverse public; and the legally unenforced responsibility. These functions were carried over in the twentieth century both by broadcasters, and to some extent, by newspapers and magazines. The broadcasters were operating under the pressure of the Fairness Doctrine; the newspapers and magazines were operating under a sense of what their democratic obligation was.

Here is what I have in mind: For most of the twentieth century, if you were watching television, and you attended to the evening news, you were going to see some topics and points of view that you would not have put in

8. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

your “Daily Me.” The news might have involved, say, an earthquake in India or a genocide in Darfur. And that would have grabbed your attention, possibly even changed your life, though you never would have chosen it and selected it in advance.

At the same time, under the pressure of the Fairness Doctrine and civic norms for magazines and newspapers, there are going to be shared communications experiences. The headlines on the local newspaper, or the lead story in *Time* or *Newsweek*, will create something salient to so many of us at the same time. Why is this important? Well it works *against* the kinds of fragmentation that we created artificially in Colorado and that the federal Judiciary has created to some extent, just by the lottery-like nature of the composition of appellate panels.

This means that under the twentieth century general interest intermediaries—when they are working well—all of us will occasionally have access to points of view that we despise and abhor (or so we thought) and to topics that we thought didn’t interest us. Broadcasters, partly under the pressure of law, partly under the pressure of the norm, have, within a few decades past, thought that this was part of their civic responsibility. Mark Fowler, President Reagan’s head of the FCC, the one that helped kill the Fairness Doctrine, said television is just another appliance; it’s a “toaster with pictures.”⁹ That’s a colorful statement but one that disregards the historic free-speech-related purposes of television.

Now, what I want to do is suggest a close link between the public forum doctrine and its aspirations. And that conception of the First Amendment has these four historical pointers: Madison, Brandeis, *Red Lion*, and Breyer. When Madison spoke in terms of the First Amendment, he saw the basic idea in terms of democratic self-government. What made the Alien and Sedition Acts¹⁰ intolerable to him was the requirement that people had to get permission from authority to get together collectively and deliberate about what their governors were doing.¹¹ This notion of a civic check on government was closely connected with the notion that a heterogeneous people would get together in their deliberative process.

Brandeis, with a very different vision of the First Amendment from his apparent jurisprudential sibling Holmes, spoke not in terms of free trade in ideas but of republican self-government, insisting that the greatest menace to liberty is an inert people.¹² In that statement, Brandeis suggested the

9. Peter J. Boyer, *Under Fowler, FCC Treated TV as Commerce*, N.Y. TIMES, Jan. 19, 1987, at C15.

10. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798).

11. *See id.* (establishing punishments for persons who conspire against the U.S. government).

12. *See* MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT 79 nn.115–16 (1996)

positive side of the First Amendment. *Red Lion*, with its emphasis on the rights of the public—the listeners—being preeminent, not the rights of producers, signals also the importance of diversity of ideas and information.

Breyer, I think, is the only prominent spokesperson for this view on the current Court. He's right on the ball, invoking the democratic purposes of the First Amendment and noting, in his concurrence in the *Turner Broadcasting* cases from a few years back, the democratic functions of the First Amendment and how they may sometimes argue in favor of, rather than against, regulation.¹³

I said something about group polarization. Let's just notice the relationship between that phenomenon and the emerging communications market, and then try to understand the phenomenon a little bit better. A very recent study of the blogosphere finds that the overwhelming percentage of users of the blogosphere self-sort exactly along the lines specified in the Colorado experiment. Most conservative readers read only conservative blogs; most liberal readers read only liberal blogs. That kind of self-sorting is happening every day. We know also that, in terms of linking behavior from one blog to another, there is a degree of cross-linking from liberal to conservative and vice versa. It is far less than statistical randomness would suggest. It's not a high amount, but it's there. And of the cross-linking that occurs, a very significant percentage consists of links saying "look how contemptible and ridiculous the other side is." We saw that a little bit in the exchanges in Colorado Springs and Boulder where references were made to the view of the opposing side, not in the way of "maybe we can learn something," but in the way of further discrediting the opposing view in question.

We also know that conservatives are more likely to see something if it's on Fox News, and liberals are more likely to see something if it's not. We do know that Fox News beat the networks—and I was intrigued about it—during the last Republican Convention. I, personally, would have been

(indicating that while Justice Holmes believed that the ability of thoughts to permeate a market tests the truth of those thoughts, Justice Brandeis believed that free speech was as essential to republican government because "public discussion is a political duty").

13. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (holding that the appropriate standard by which to evaluate the constitutionality of the must-carry provisions under the Cable Television Consumer Protection and Competition Act of 1992 is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring in part) (concluding that Congress could reasonably believe that the Cable Television Consumer Protection and Competition Act of 1992 "will help the typical over-the-air viewer . . . more than it will hurt the typical cable subscriber" and that Justice Breyer did not "believe the First Amendment dictates a result that favors the cable viewers' interests").

more excited if Fox News had beaten the networks with respect to the Democratic Convention. The fact that they were following the Republican Convention shows the self-sorting that is the concern here from the *Red Lion* point of view.

Group polarization is an extremely robust phenomenon. It has been found in over a dozen nations. White people, who are inclined to show prejudice a fair bit (significantly, but not hugely), are inclined to show a fair bit more racial prejudice after they talk to one another. If you get white people with a degree of racism together in a small deliberating group, the racism starts to jump. If you get white people who are inclined to show only a tiny bit of racism talking to one another during a period of deliberation, the racism is squashed. It disappears because people think it is stupid, or it disappears because people think, even if they have slight racist inclinations, it is unacceptable.

This development in points of view along political lines can be found in almost every domain. If you have people who are starting to protest what they perceive as unfairness but are quiescent and skeptical about the desirability and efficacy of protest, they are like one of the Colorado groups: protest starts to dissipate as an appropriate response. If you have people who are charged up about something, a little outraged, and they think maybe something ought to be done, after they talk to one another, they are very concerned and extremely eager to do something.

Why does this happen? Why do we observe this phenomenon in so many social domains? Why is it making discussion across ideological lines in the United States occasionally difficult? There are two explanations. One you can just see physically by looking at the Colorado experiment. When the Colorado Springs people talked together about climate change, a number of arguments emerged that suggested the problem is small, China is mostly responsible for it, a little heat never hurt anybody, etc. You get a small percentage of arguments in Colorado Springs suggesting that climate change might actually hurt us and that maybe we can approach it in a way that is not economically damaging. The arguments emerged just because the group has a predisposed inclination not to worry. And if people were listening to one another, their views would shift. So information is playing a large role in the changes we observe.

But it is not only that. When I started to get my results in Colorado Springs and Boulder, I talked to a philosopher who works on animal rights about this finding. And his response was

You know, when we animal rights people get together on a Friday for a three-day meeting, we are very sensible. But by Sunday, we've lost our minds. On the Sunday of a three-day meeting, we start saying such things as, "no scientific experiment on animals ever produced useful knowledge for

human beings.” We say it’s never acceptable to eat animals, even if animals lived a very naturally long life and died a painless death. We start losing our perspective.

His account was not that information was exchanged within the group, as in the account I’ve given of Colorado Springs. It was instead something about the way people liked to present themselves and perceive themselves in groups. What he said was, “Animal rights types like to think of themselves as animal rights types.” Once they find themselves surrounded by a group of people who are animal rights types, they think, “Oh, I’m a centrist.” They don’t like that. They move a little bit.

I can say I have seen this in the law world both at the Federalist Society and at the American Constitution Society. When you get the ACS people together, because their self-understanding is left of center, there is a little movement when they find themselves among similarly left-of-center types. And at the Federalist Society, the same thing occurs.

The two ideas, then, have to do with the exchange of information and the reputational pressure that is placed by finding yourself in a group of like-minded people. The *Red Lion* vision of the Constitution, the mixing that some federal courts of appeals panels have, works against this. It ensures a better distribution of information internally within each group so that there isn’t the skewing that inclines each group to one or the other direction. It also weakens the reputational pressure that would occur, for example, when someone you know or someone in the media is interested in a point of view that is different from your own, and the person seems sane and respectable.

With respect to common experiences, I’ve noted that in a society as diverse as ours, it is crucial to create at least some domains in which we experience the same thing, or read the same thing, or have something like a shared narrative. This is important partly because it gives us a sense that we’re engaged in a common enterprise, which many people like to have; they think it is intrinsically good. But it is also a key to helping behavior—to ensuring that when one of us is in trouble, in terms of economic disaster or something, strangers will help. I’m wondering how many of you have had a time in the last ten years where there was trouble, and a stranger showed you surprising generosity. I’m thinking of one myself. But the likelihood that that will occur jumps if people feel across lines of division that we are in it together. National holidays serve that function, at least when there is substance behind them. Martin Luther King Day has that substance still, I think. July Fourth did after 9/11. Probably it still does for most of us; the sense of history and the echo of 9/11 is probably strong enough so that July Fourth still has that sense. But shared communications experiences can do the same thing.

Here is a more particular point, a bit of data. It may be the most

memorable point of data I'm going to tell you, which is that no famine in the history of the world has ever occurred in a nation with democratic elections and a free press. In this history of the world, no nation that has freedom of the press and free elections has ever experienced a famine. Amartya Sen won the Nobel Prize in large part for that empirical finding, which has stood up over time.¹⁴ It's a very counterintuitive finding because we think of famines as a matter of food shortage. Sen shows that this is true in a sense. But whether food is short, and the extent of the shortage, depends on what kind of social pressures there are to make food available. If there are democratic elections and a free press, when food shortages that are going to become famines are on the horizon, government hops to it. Something is done, either domestically or with a plea for international help. The suggestion is that whether people have food depends on what the legal system is doing. And the legal system will anticipate more and do more, so long as there is freedom.

I want to suggest that Sen's finding is a metaphor for the immense value of shared communications experiences in view of the fact that information travels. Each of us is less vulnerable than we would be, not to famine, but to a wide assortment of social ills through mechanisms that are similar to those traced by Sen. If it is the case that the *Red Lion* vision of the First Amendment disintegrates into, let's say, a fully laissez-faire conception of the First Amendment, then that shared communications experience will be endangered.

Many of those who celebrate *Red Lion's* demise note, empirically, that in a sense *Red Lion*, in its demise, has produced exactly what its critics hoped for. There is a flowering, in some ways, of substantive discussion on the airwaves. A reason is that the chilling effect of the obligation to have the dissenting view has reduced to the extent that we have more substantive discussion than we otherwise would. But notice that what *Red Lion* has unleashed is a kind of Balkanized speech market, in a way that replicates the Colorado experiment. So we know that on the blogosphere every day, every hour, something like the Colorado experiment is occurring; it is occurring in the media in the same general way, although in less dramatic fashion.

What should we do about the increasingly Balkanized speech market? We now have something like an assortment of "Daily Mes."¹⁵ And what should we do about the rise in information cocoons or echo chambers?

14. Press Release, Nobel Foundation, The Prize in Economics 1998 (Oct. 14, 1998) http://nobelprize.org/nobel_prizes/economics/laureates/1998/press.html.

15. I looked up, by the way, on Google, the "Daily Me," and I found out there is a *Daily ME*. There is actually a *Daily ME*. But it's a little newspaper in Maine. THE DAILY ME.COM, <http://www.thedailyme.com/>.

It is quite possible that what we should do now is nothing. It will be most intriguing to hear what the panelists have to say about ways of reviving *Red Lion*'s admirable ends in a communications universe where *Red Lion*'s means are most ill-suited. One question is whether a great deal can be done privately, not publicly. Two little ideas with respect to private solutions might emerge spontaneously, or may be encouraged through purely moral suasion by the FCC. They are, first, more and better linking behavior; and, second, deliberative fora. The first idea is that those of us who are engaged in producing material on blogs, or anywhere else, ought to use links much more aggressively as a way of giving kind of a tip-of-the-hat or nod in the direction of those who have reasonable dissenting views. If we find ourselves expressing contempt at those who disagree with us, we should rethink. Links can be used much more respectfully and creatively as a way of creating something like street corners on the Internet. CNN, Fox, and other providers of news can do the same thing.

The second point is that the *Red Lion* vision of something like deliberative democracy could be promoted through public spaces on the Internet and through the media much more effectively than our current practice. Deliberative fora can be created in an instant. There are fascinating experiments starting in this vein, in which we create something like a public space in which lots of points of view are expressed on lots of topics. There is a lot of work to be done by lawyers, people who know how to create websites, and political theorists that would create for our era something like what *Red Lion* was trying to approve for its era.

I am just about done. I have a story for you and then one last quotation. Here's the story: There is a terrific political scientist at Stanford named James Fishkin, who has been interested for many years in the discussion of undiverse people. What Fishkin is trying to create is something that mixes Boulder and Colorado Springs, but much more ambitiously than just Boulder and Colorado Springs. He gets people together who are very diverse and brings them physically into the same space to talk about issues. And he sees what happens.¹⁶

What Fishkin did a few years ago was to get a group of people into Texas to talk about a number of issues, one of which was welfare policy. In one of the small groups there was an African-American woman from New York who was talking about her family and its needs. She was a single mother with kids. And she was talking about the economic difficulty and what was necessary to help her kids eat and have clothing and such.

16. For a detailed view of Professor Fishkin's research, see generally JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995), which discusses how public opinion comes about and its consequences.

There was also a farmer from Oklahoma who was in this small group of four or five people who was getting increasingly agitated as she was speaking. Finally he exploded and said to her, roughly, “You know, in the United States, the country where I live, a family means a father, a mother, and at least one child. You keep using the word family, but you don’t have a family. Don’t you dare use the word ‘family’ in my presence.” She was silenced for a while, but they were in that group for a few days. They didn’t exchange any words, one to the other. There was discussion from her to other people in the group and from him to other people in the group, but it was frozen—worse than icy. As the woman left on Sunday to go home, to leave for the plane, someone tapped her on the shoulder. And she looked up, and there was the Oklahoma farmer staring down at her. She said, quietly but uneasily, “Yes?” And he said to her with some sternness, “What are the three most important words in the English language?” And she said with some trepidation, “I don’t know.” He said, “I was wrong.”

The quotation is from John Stuart Mill:

It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar. . . . Such communication has always been,¹⁷ and is peculiarly in the present age, one of the primary sources of progress.

Thank you.

QUESTION–ANSWER SESSION

Professor C. Edwin Baker:

I always find you persuasive, but I like to needle you every chance I get. When you use the Sen example, it occurs to me that, though everything you said about his report is accurate, when he said we need a free press, it is not at all obvious that there was a free press that met fairness obligations, balance obligations. Certainly the idea of a free press did not imply an administrative state breathing down the neck of the media. So what I wonder is whether or not what was important for his discussion was a press that could take a variety of forms and that *anything* would have been inclined against the type of press that *Red Lion* seemed to be calling for. In the context of that, it also occurs to me that the protestors (who, I agree with you, perform an absolutely vital role in a democracy and that we have to have spaces for) in no way have to be balanced or objective. In fact, to the extent that they are, they may be undercutting what they’re trying to

17. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 581 (Sir William Ashley ed., Augustus M. Kelley Publishers 1987) (1848).

accomplish. And then the final point is—and I think you probably would agree with this, but I think it needs to be noted—that though we may need some in media that talk about common problems that are at least interesting to everybody, it is not at all clear that we don't equally need media that grab up countervailing views. In fact, one might imagine two different candidates for the Democratic nomination: one that thinks that what we need is to highlight class division (he fell by the wayside); and another that wants to transcend the differences. I suspect there's room for both of them. However, if one doesn't make some room for the "Daily Me" or for the people in Boulder to talk to the people in Boulder and the people in Colorado Springs to talk to the people in Colorado Springs, we might not have critique in society. We might just have a "blah," centrist type of democracy.

Sunstein:

Thank you. Professor Baker is maybe the world's best analyst of these questions. I answer him with some self-doubt, but let me give it a try. I used the Sen example of famines to discuss the importance of sharing communications experiences so that information travels. The fear was that if we have a Balkanized speech universe in which a bunch of people are reading about *X*, *Y*, and *Z* and others are reading about *A*, *B*, and *C*, and there's some self-sealing in terms of the narratives and concerns, then the safeguards that Sen's example is a metaphor for will not be forthcoming. Maybe one way to put this is, suppose you have a group of people who are really worried about some natural disaster, like whether there is going to be a hurricane, and that we ought to evaluate whether to exit New Orleans. And suppose we have another group of people who are in a social network that says that we have heard these warnings a million times; we don't have to be concerned about this; the government is always blowing smoke; let's stay here, we'll be fine. Then the first group is going to live and the second group is going to die. You know that I didn't make that up. So Professor Baker is right. The notion of shared communications experiences is not a plea for an administrative state, but it is a plea for a kind of social architecture such that the information travels. If the *Red Lion* apparatus doesn't do that, then we had better think of mechanisms that will.

On the protestors' not being balanced, you could imagine a *Red Lion* vision of the communications of radio and TV in which the particular people who are on are not, themselves, balanced; but they are not going to be the only people who are on. If you listen to Rush Limbaugh, as I do, the fact that he's not all that balanced needn't be alarming. But what might be alarming is if people listen *only* to him and do not listen to other people

with diverging viewpoints who are also unbalanced. A good communications universe, I suggest, includes people who have extreme positions of multiple sorts. The danger occurs (and this is already occurring in the blogosphere) where lots of people self-sort so that they think climate change is a hoax, believed by dupes, and ridiculous fake science. And millions of Americans do believe that in a way that has political consequences. You can think of your own favorite examples. So I agree with you entirely that the protestors needn't be balanced. But we want to create an architecture of free speech for whatever mechanisms are consistent with the best arguments that we like about *Red Lion* and that promote the serendipity and unanticipated exposures on the one hand, and an array of shared experiences on the other.

Your third point is the deepest, I think, which is that we do want some places where people are revved up. That is crucial. I have a friend who played a role in breaking down the Soviet Union. He said what made the breakdown possible was that we anti-Communist types banded together a little bit and charged ourselves up. If we didn't have a little information network that had some self-enclosure, that never could have happened. So surely, those who like *Red Lion* in some ways—or at least its vision—should agree that there is room for associational liberty in which people in Boulder do get charged up and people in Colorado Springs also get charged up.

Law professor Heather Gerken calls this “second-order diversity.”¹⁸ I have been speaking of diversity *within* institutions, and what she is speaking of is diversity *across* institutions. So you could have Massachusetts, which is sometimes a little liberal polarization machine, and you could have Utah, which is sometimes a conservative polarization machine, and then we all benefit from having Utah and Massachusetts. That's true. The only qualification is that it is very good if, at some time, the people from Massachusetts hear what the people from Utah think, and don't just think of them as enemies or foreigners, or as stupid, and vice versa. If this self-sorting occurs, then I would hope that our *Red Lion*—maybe that can be a project of our Symposium, to think of what our *Red Lion* would look like—our *Red Lion* would honor those niches. We want people to come out of their niches once in a while to listen to other niches.

Question:

There's a lawsuit brought by Yale against John Yoo, a law professor in

18. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1108 (2005) (defining “second-order diversity” as seeking variation “among decisionmaking bodies, not *within* them”).

California.¹⁹ He is also considered a law professor who is on the right, a conservative law professor—one of the few. I would just like to know what your thoughts are on stifling real free speech with a lawsuit like that.

Sunstein:

There is a lot there in that short question, so I thank you.

I do agree that the world of law professors is dominated, to the detriment of the profession, by liberals. I don't believe that John Yoo, who is a friend of mine, is one of the *few* conservative law professors. Maybe it is because I have spent so many years at the University of Chicago that I know a lot of conservative law professors. While the percentages are on the liberal side, it is not accurate to say there are only "a few" conservative law professors. Thank goodness there are a lot of them! In terms of suing John Yoo, the question is what cause of action there is against John Yoo. No one is above the law, but I don't like any lawsuits against John Yoo unless he failed to pay his property bill or something.

Question:

One of the things the lawsuit has done is have an effect on a young law professor who didn't want to take a conservative stance. Because who wants come forward if they think they are going to be sued like John Yoo? I think that is frightening for our profession.

Sunstein:

I guess I would say that in terms of social pressures, political correctness in any form is most unfortunate. I agree with that. I don't think that conservative law professors are at risk of being sued. I recently cowrote a paper—some of my best friends hate it, maybe John Yoo likes it—in the direction of being favorable to capital punishment on deterrence grounds. My coauthor and I don't worry about being sued. Basically I'm with you on the principle, very strongly, that pressure to sue people because of their political convictions is intolerable. I also agree that some people in some places, even in the law world, are under pressure not to voice conservative views. But I don't worry that law professors who express conservative views frequently are risking a lawsuit.

19. See Adam Liptak, *Padilla Sues U.S. Lawyer over Detention*, N.Y. TIMES, Jan. 5, 2008, at A9; Emily Bazelon, *If the Yoo Fits: Why Shouldn't Jose Padilla Sue John Yoo?*, SLATE, Jan. 16, 2008, <http://www.slate.com/id/2182262/> (describing the lawsuit brought against John Yoo for writing torture memos that justified detainee mistreatment and for shaping detention and interrogation policy).