

The Continuing Saga of Thomas Jefferson and the Net

by David Post
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This post is part of "[CDT Fellows Focus.](#)" [1] a series that presents the views of notable experts on tech policy issues. This month, CDT Fellow [David Post](#) [2] writes about the Internet and the recent revolutions in the Middle East. David Post is the author of the [book](#) [3] "In Search of Jefferson's Moose: Notes on the State of Cyberspace." Posts featured in "CDT Fellows Focus" don't necessarily reflect the views of CDT; the goal of the series is to present diverse, well-informed views on significant tech policy issues.

The Internet is a very different thing today, in April 2011, than it was even just a few short months ago. Something new, and astonishing, and very profound has happened, *is* happening, in the world, something profound concerning the global network and the relationship of the network to the society in which it is embedded, our society and the global society. We are, now, living through a truly important moment, I believe, in the history of the world – although just *how* important we won't know for years – and the Internet has played and is playing a very important part in it.

I refer, of course, to the events transpiring in the Middle East – the so-called Facebook Revolution(s). It is too important *not* to talk about it – even if none of us can be sure yet exactly what it means. I took it as a challenge: If all this Jefferson stuff really *works*, if it really yields an interesting and useful window onto the Internet and what it means, then surely I have something to say about these events and the role the Net has played in them.

Now, scholars and commentators of all kinds have debated, over the last decade or so, just how significant the Internet was and is for human society. Is this (as many of us have been saying for years) truly *transformative*? Or is it fundamentally just a toy, a gee-whiz object, a wonderful new way to shop for clothes or music, a clever way to stream movies and TV shows into the home, but nothing more than that? Will it change the world (like the invention of printing changed the world)? Or is it more like, say, CB Radio?

Those debates, I suggest, are now over. Without the Internet – without Facebook, and Twitter, and Youtube – Hosni Mubarak is still the President of Egypt.

Nobody saw this coming – this wave sweeping over the Arab world from Tunisia to Egypt to Libya to Yemen to Bahrain to Syria and beyond. With all the commentary and blogging and bloviating and opinionating, not a single person on the planet, as far as I can tell, saw this coming, foresaw that the Arab world would soon be convulsed and overtaken by this remarkable contagion, a youthful grass-roots revolution demanding an overthrow of, and freedom from, the old order. Think about that the next time you read someone trying to predict the world in 2020, or some such. Many people have compared what is happening in the Middle East in magnitude to the fall of the Berlin Wall – but that one we *did* see coming; years earlier it became clear that the Soviets were having dire problems holding their empire together, and cracks – Solidarity in Poland, the Velvet Revolution in Czechoslovakia – pointed the way.

But this Facebook Revolution came, seemingly, out of nowhere.

The Internet, of course, *alone* is insufficient; many other factors had to come together to produce this tsunami. The Net didn't cause this uprising, except in the (very important) *but-for* sense; *but for* the Net, the protesters in Egypt could not possibly have organized as effectively as they did; but-for the Net, they didn't know and it's not clear how they would have known that there was a constituency to be organized.

If the scholars and commentators don't see it, the dictators, the autocrats, and the authoritarians do. And they are terrified. Hosni Mubarak, of course, was so terrified that during what turned out to

be his last days in power, he ordered a complete Internet shut-down for several days. I'll address that more below, but he was not the first, and he will not, unfortunately, be the last. They've done it before; in China, Belarus, Kyrgyzstan, Tajikistan, Bahrain, Uganda, Yemen Nepal, Burma . . . they've all blacked-out the Net for their own citizens for a time.

It's worth asking: What are they afraid of?

The Internet? That's odd, when you think about it. I always have to smile when I hear all of things "the Internet" has done - destroyed newspapers, killed books and bookstores and perhaps reading, made people stupid ("Is Google making us stupid?"), crippled or eliminated whole industries (travel agents, the recording industry), etc.

But the Internet is not some kind of death ray, or magic device that transports you into space, or to a new planet or a new world where magical events can take place. It doesn't shoot off rockets, or light up the night sky.

It's just a *language*, a platform, a series of rules about how to encode messages so that they can be transported to others around the globe and understood once they get there. That's not a fancy law professor's *metaphor*, it's a description. That's all it is and that's all it does - it moves messages, strings of 1s and 0s, reliably from one place to another, enabling people to exchange information and ideas with one another in new ways: one-to one, one to many, many to one, many to many. "The Internet" isn't the wires and the cables over which the communications flow - they're no more "the Internet" than the air in this room is "English." They're just the medium - and the medium, it turns out, is *not* the message.

It's so bloody simple, this Internet - and yet. Precisely because it is so simple, it makes clear some things that might have been obscure before. To begin with, it makes clear just how powerful simple human communication can be. To be afraid of a language, of course, is to be afraid of what might happen if your citizens *use* it to communicate freely with one another. *That's* what they are afraid of: They are afraid of Facebook, and Twitter, and Youtube. For the *first time* in a recorded history that goes back over 5,000 years, Egyptians were able to communicate freely with one another. Using Facebook, and Twitter, and Youtube, they could assemble together in a virtual place - one to one, one to many, many to many, many to one - to exchange information and ideas with one another. And look what happened. The Internet doesn't produce the ideas - people do that. The Internet just moves them around, as directed. But for the young Egyptians who were suddenly connected to one another, who suddenly found that they were part of a *community* of thousands, hundreds of thousands, millions of like-minded fellow citizens, a community nobody even knew *existed* - don't tell them that the Internet is not something new and something transformative.

And because it is so simple, because it is just a common language that does nothing more than enable people to communicate with other people, it reveals that there are, fundamentally, two kinds of governments in the world: those that permit (and even encourage) their citizens to communicate freely with one another, and those that do not. To be afraid of the Internet . . . to be afraid of Facebook!

We sometimes fail to appreciate how remarkable it is that most governments in the world today actually *pass* this test, and quite handily. They're *not* afraid of Facebook, because fundamentally they're built on the principle that their citizens can freely communicate with whomever they choose and however they choose about whatever they choose.

But just two and a half centuries ago, the United States stood pretty much alone, the first government based on the principle that people could say damned near whatever they pleased - including whatever they pleased *about the government itself* - to pretty much anyone. A principle that now covers much (though not yet all) of the globe.

Nobody, of course, would be more pleased about that, and nobody did more to make it happen, than Jefferson. Freedom of expression is a central tenet - really, *the* central tenet - of the Jeffersonian creed.

To preserve the freedom of the human mind & freedom of [expression] and the press, every spirit should be ready to devote itself to martyrdom; *for as long as we may think as we will, and speak as we think, the condition of mankind will proceed in improvement.* . . . Diffusion of knowledge among the people is the only sure foundation that can be devised for the preservation of freedom and happiness. Were I faced with a choice between a government without newspapers, and newspapers without government, I would not hesitate *for a moment* to prefer the latter.

The United States, he wrote, was "an experiment" – an experiment "that will demonstrate to the world the *falsehood* that freedom of [speech, and] the press are incompatible with orderly government." *That's* what the election of 1800 was about – the triumph of *those* principles, Jefferson's principles, over the Alien and Sedition Acts, under which newspaper editors were tossed in jail simply for criticizing the government of the U.S. Having produced "the first legislature that had the courage to declare that its citizens may be trusted with the formation of their own opinions . . . *the first object of that government is therefore to leave open to all the avenues to truth,*" and freedom of expression and freedom of the press are the "most effectual hitherto known" for doing that.

While the global triumph of this principle was not – and still *is* not – foreordained, the Net, happily, may well help to accelerate the spread of the principle still further around the globe, as more of the dominoes fall. It is becoming increasingly difficult – *not* impossible, unfortunately, but *difficult*, more difficult than before – to *have* a government that doesn't permit its citizens to communicate freely with one another. It's true that Mubarak shut down the Net in Egypt for several days. But *that's* not the big story. The big story is that he turned it back on. Why? Because Egyptian society, like most societies around the globe, simply cannot function without the Internet. The banks, the credit card processors, the airports, businesses of all kinds from small shops to multinational corporations, the military, the government itself – they all rely on the global network to function. You *can* shut it off – but you will pay a high price if you do. Burma, and North Korea, may be willing to pay that price; Bahrain and Syria and perhaps even Iran will not. They won't be turning off the Internet in Egypt again anytime soon – at least, not if the people of Egypt have anything to say about that, which, for the first time in their history, they now do.

So, that's a big story.

What does it mean? What are its implications or consequences?

We won't know that for many years. To those who think (correctly) that it all might turn out badly, I give you Jefferson's motto: *Malo periculosam libertatem quam quietam servitatem.* (I prefer the tumult of liberty to the quiet of servitude.)

One thing these events should do is that they should make it easier for people to see that this Internet that we have built is something very precious and very important. And that we need to protect it, and to defend it.

Now I know what you're thinking: "Huh? Protect and defend the Internet? What does that mean? What *could* it mean? Guns to the ramparts? Where are the ramparts?"

I'm not sure I know what it means, either. Not yet. We're going to have to figure that out. Like a lot of things about the Net, its "defense and protection" will probably mean something that looks a bit like what it means in the real world, and something that looks entirely new and different.

So let me finish up with a story about that, about how law – and therefore about how we, as lawyers, and law professors, as people with an interest in the way that *law* works and develops – helped to protect and defend the Internet, and therefore helped – in a small but substantial way – to bring about the democratic revolutions now sweeping the Arab world.

When the Internet first became "*the* Internet," and a fixture in our collective consciousness, in the early-mid 1990s, there were two big debates on the national stage about how law would and should apply here: one was about indecency and obscenity, and one was about copyright infringement.

The U.S. Congress passed two laws during this early period directed to these issues, the first federal statutes dealing specifically and expressly with activities online - the Communications Decency Act (CDA) of 1996, and the DMCA (Digital Millennium Copyright Act) of 1998.

In each, Congress gave providers of Internet services an immunity against legal claims arising from the activities of their users. Section 230 of the CDA, said: providers of Internet services will not be liable for their users' *speech* - thereby protecting service providers against claims for libel or defamation arising from their users' comments.

Section 512 of the DMCA has proven to be even more important: Providers of online services will not be liable for the *copyright infringements* of their users - at least, not in certain specified circumstances laid out in the statute.

(It's more complicated than that, but that is the basic idea.)

Without the DMCA immunity, you wouldn't get a Facebook, or Myspace, or Twitter, or Youtube, or Craigslist, or Tumblr, or Blogger, or Flickr, or . . . the hundreds, thousands of other sites like them, the explosion of Internet sites based on "user-generated content" (or "Web 2.0") services and applications. These sites all share one common characteristic: they provide no "content" of their own, but rely entirely on their *users*, who are charged with making the site valuable and engaging and attractive for other users.

They wouldn't exist. Why not? Because at the *scale* at which these sites operate - Internet scale - their potential liability (without an immunity) for copyright infringement from their users' activities would be astronomically large.

Scale's a really interesting thing to think about, when thinking about the Internet (another thing I learned from Jefferson). To give you an idea of scale on which these sites operate, here are some facts I learned recently about YouTube:

- YouTube uses about 800 petabytes of storage - that's 800 million gigabytes, the equivalent of a pile of iPods stacked 9,000 miles high, just for YouTube videos;
- 40 hours of video are uploaded to YouTube every minute; it would take you 10 years to watch the videos uploaded by users each day;
- every week, users upload the equivalent of over 170,000 full-length movies; every month, they upload more content than the combined output of all U.S. TV networks since their inception;

If Facebook (or YouTube, etc.) were liable for even a tiny fraction of that user-initiated activity, their copyright liability for a single *day's* worth of uploaded content would be measured in the hundreds of millions or billions of dollars. Without the immunity from infringement claims, allowing users in these numbers to freely exchange content with one another is unthinkable; no rational investor would have provided financing for, say, the Facebook business plan without some assurances on that score, some protection against the outsized risk.

That's why virtually *all* of the UGC/Web 2.0 sites (including all of those I mentioned a few minutes ago, all of which are now household names around the world) are located in the United States - because United States law gave them protection.

This is an amazing success story for the law. We law professors spend a lot of time (as we should) criticizing our law-makers for the (many, many) mistakes they make. But we should also acknowledge when they've done something quite valuable and foresighted - as they did here.

There's a direct line, in other words, connecting U.S. copyright law - and a little, hidden-away provision of U.S. copyright law, at that - and the uprising in Egypt.

Helping to forge and maintain that line is not, I realize, as sexy as manning the barricades; but it is part of what it means to protect and defend the Internet.

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