

The Wednesday luncheon session of The American Law Institute convened in Salon III of the Ritz-Carlton, Washington, DC, and was called to order at 1:19 p.m. by President David F. Levi.

President Levi: Good afternoon. We're very, very fortunate to have Alberto Ibarguen as our speaker this afternoon. He went to Wesleyan. He's surrounded by Wesleyan people here. He got his law degree at Penn. Before law school, he was in the Peace Corps in Venezuela and Colombia.

When he graduated from law school, he worked for Legal Aid in Hartford, and then he went into private practice. Eventually, he migrated to the news business. He was at the *Hartford Courant*. Then he joined the Knight Ridder company. He was the publisher of *El Nuevo Herald* and then the publisher of *The Miami Herald*.

He's won many honors. He is a very, very accomplished person. He's president and CEO of the Knight Foundation, and he will be speaking to us about trust, media, and democracy.

Alberto? Thank you. (*Applause*)

Mr. Alberto Ibarguen (FL): Thank you, David. I should tell you that David and I first met years ago when he was dean of the law school at Duke, and Knight Foundation supported a conference he organized there on media and law. I later sought his counsel, and he gave me really good advice. It didn't turn out to be an endowment at Duke, but it was really good advice, which tells you what a good counselor he was that I took his advice and then put the money someplace else.

But really, those conversations led to the endowment of the Knight First Amendment Institute at Columbia, which is a \$60 million endowment that was begun for the purpose of representing free speech in the digital age. Knight also established a \$15 million litigation fund at the Reporters Committee for Freedom of the Press. And I tell you those two bits of information just to let you know that at Knight Foundation, we really do take our law and media very seriously.

So thanks, David, for your friendship and guidance, and thanks for inviting me to talk about the crisis of trust in American institutions and, more specifically, about the role in that crisis played by the decline of reliable news at the local level and the rise of social media.

The bedrock of any healthy democracy, any healthy democratic republic, is informed and engaged communities. That bedrock has begun to crack, leaving our citizenry less informed and our democracy weakened. And I want to be clear that I'm not here to lament the loss of an industry, however proud I am of what newspapers have contributed to American democracy.

It isn't the paper I worry about. It's the news. By that, I mean the dual role of watchdog and the consistently reliable, middle-of-the-road report that chronicles our lives and is vital to any community's sense of itself.

Nothing is ancient, of course, in this country, but one of the closest things we have to ancient is a tradition of local and free press, and it's disappearing. We need to consider the consequences. That work is just simply not being done.

In his book *The Quartet*, the historian Joseph Ellis makes the case that the Second

Continental Congress was among the most consequential events in our nation's history, right up there with the Revolution and the Civil War because, among other things, it helped propel an American identity. Whereas before, people were Virginians or New Yorkers, it helped propel an American identity with a sense of national loyalty balancing the more diverse interests of states.

One of the primary drivers of that new American identity was local news. For most of our history, the structure of government and the reach of an active local media has overlapped. The circulation of a local paper or, later, the reach of a local TV station signal extended to roughly the same as a few electoral districts. Unlike European and other information systems, the American model was decentralized, firmly decentralized, and as diverse as the country itself.

While we've now become accustomed to equating news with national affairs, the truth is that for most of our history, news was local, and local news has been an essential part of the sense of community and stability that we've enjoyed. For all its many faults, the advertising-supported news model effectively informed the public. Internet had permanently altered the landscape of power and information with a phenomenally more efficient business proposition, reaching more consumers at less cost. In hindsight, it wasn't anywhere near a fair fight.

The social consequence, however, is that for the first time in the history of the Republic, the main purveyors of news are not tied to the basic geographic units on which our democratic structures are built. Quality news has become too expensive to produce at scale. And not to sound too Marshall McLuhan about it, the warm paper on which cool writing stood out has been replaced by a cool medium feeding us a steady diet of hot national news.

While Americans have more sources of information and news than ever before, they sense something is amiss. Almost 70 percent of Americans say they trust news media less now than they did 10 years ago, and nearly 60 percent of Americans say it's harder to stay informed. Are we better informed?

A recent poll by the Woodrow Wilson National Fellowship Foundation found that only 36 percent of Americans are able to pass a basic citizenship test, featuring tough questions like what are the three branches of government? You can't make this up.

So this isn't only about news. It's about civics and related to that, the civility and civil discourse that Justice Kennedy spoke about a couple of days ago at this Meeting. And of course, it's about law.

Society puts things in order through law, but that's hard work under the best of circumstances, and it's really hard work when things keep changing. The volume and speed of change in media, fueled by artificial intelligence, fueled by technology, begs for a fresh look at issues across the board, including the law of defamation, product liability, antitrust, free speech, and privacy. And it may require a different way to think about regulation so that the reality of evolving technology doesn't almost immediately make regulation obsolete.

A good example of that, actually—and I didn't know that when I wrote this—is what the ALI is already doing in its examination of data-privacy legal principles. According to the document you adopted this morning, you're developing principles that “are primarily addressed to legislatures, administrative agencies, or private actors” that “can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.” And that seems to me to be exactly what's required in this time.

USC Professor John Seely Brown, who used to run Xerox, over at Xerox PARC, back in

very early internet days, calls the moment we're living in now the beginning of an era of imagination, and much of that reimagining involves the law. So my second purpose in speaking to you this afternoon is to encourage your active engagement.

I'll share some examples of the work I know is going on, like the notion of imposing information fiduciary responsibility on internet platforms, as suggested by Yale Law School's Jack Balkin and Harvard Law School's Jonathan Zittrain. Platform companies presently operate essentially with *carte blanche* over use of our information.

Compare that to a bank's use of our money, where we're compensated for that use with interest. Internet platforms capture the profit from using the data, but if something goes awry, we suffer the loss as individuals, in the case of a small data breach, or a society, in cases like Cambridge Analytica.

Professors Balkin and Zittrain argue that our personal data are a resource that belong to us, and we might reasonably demand a return for their use. Usage of a platform for social media is only free if we pretend our data have no value. Valuing data, therefore, is a first step toward productive change. Figuring out how to harness the data to negotiate with the tech companies is the second, although with artificial intelligence, it certainly is conceivable. And thoughtful regulation of the process might be the third.

Balkin and Zittrain go even further, suggesting that companies holding our data should, in effect, advise us of their use of our asset and must act loyally to our interests, compensation aside.

Now before I go on, I really should clarify that I am—and there are people in this room who know this—that I am instinctively against the regulation of news, information, media. Tony Scirica in particular is tired of hearing me rant and rail about his troglodyte decisions, trying to (*laughter*) put his thumb on the free press. But we, nevertheless, have managed to still have a 50-year friendship.

I have actually been an advocate for free speech and free press for my entire adult life. I remember taking that position with Judge Arlin Adams at Penn; Arlin Adams, who my classmates Gail Lione and Helen Pudlin, who are here today, will also remember. I've lived in other countries. I've seen how other people do it. I spent 25 years in the newspaper business. I know it's a dangerous, slippery slope to seek media regulation of content or to seek to influence the content by regulating their business.

But as former FCC Chair Tom Wheeler put it recently, when he was presenting a new book, *From Gutenberg to Google*, pioneers make the rules until they harm or affect the rights of others. I think we're there.

Tom argues, actually, that in a world of digital media, it's curious that we're still thinking in terms of 19th-century industrial models. Internet businesses are still largely governed by rules and regulations written for print and broadcast, but those are inadequate for a world where the asset, data, is infinite, and the model is distributed, not concentrated in a factory or an office. Our paradigms need to change.

The opportunities and obstacles presented by tech innovation are as significant as they are intricate. And sure, tech companies are businesses that exist to make money, and that is their purpose, and that is their right. But they act in society, and that means their actions can and should have consequences.

The main arguments platform companies make against regulation of their businesses are rooted in the challenges of controlling authenticity and truth. These are fair, practical points, and it's clear to any of us who work in print media or broadcast, we've never had to deal with the tidal wave of information that platforms face in an hour, much less a week.

But as a techno-optimist, I believe in the power of internet and social media and artificial intelligence to help solve these issues. I agree that we're certainly not there yet. In the short run, it's not hard to see how editing by a private company might solve one problem by creating another.

After all, Google or Facebook are not government. The First Amendment doesn't prevent them from censoring. But they are analogous to government in their reach and power to create what we know or think we know as fact.

So while we don't yet have the answers, I'm persuaded that our current tact of mild self-regulation leaves ample room for improvement. Consider § 230 of the Communications Decency Act, which established that internet service providers would not be treated as publishers and generally cannot be held responsible for content posted by third parties.

We first saw its impact in 1997 when a man sued AOL for anonymous and defamatory posts about him by AOL users. AOL was deemed not a publisher and, thus, was free of liability. So, of course, would be Google or Facebook, Snapchat, Instagram, or any of those other online content providers then or now.

By contrast, the station that broadcast the same statement as AOL, which its hosts had learned about on AOL, had to settle a companion libel suit. It's good for society that publishers spend significant sums to get the story right, and that is, after all, the mission of a news organization. But in addition, and only for traditional publishers, the potential cost of libel acts as a generally acceptable inhibitor of speech and promotes the use of verification journalism.

Might it be costly for internet platforms if they were liable for what they publish under some reasonable standard? Of course, it would be. Might they then determine it's in their interest to take reasonable steps toward verification and apply resources to it, human and technological? I'd say almost certainly.

And that, I would argue, is a desirable outcome. Many regard § 230 as essential to the growth of the internet, and I agree. But things change. Google's search engine now points to defamatory material along with everything else. And God only knows what lurks in the millions of daily Facebook posts and comments.

The modern realities of these services and their incredible reach and impact make their abdication of responsibility for content all the more unsettling. That may be why a recent Gallup poll found that four out of five Americans believe internet companies should be treated the same as broadcast and print in the eyes of the law.

As for Congress, if the Zuckerberg hearings showed anything, it's that federal lawmakers have awakened to the power of these companies and seem determined to act. I'm impressed, actually, compared to just a handful of years ago, by the number of senators and congresspeople who are actively considering legislation on a wide range of internet-related matters.

Will they legislate effectively, or will they legislate dangerously? And how might all of this interact with European laws of privacy or the powerful technological sophistication and competition posed by the more repressive governments like China or Russia? These are issues to

research and debate now, while still early in the digital age.

Last week, I was at the University of Chicago, home to Milton Friedman and Robert Bork, and I couldn't help but note the irony of a lecture hall full of business professors and legal scholars asking whether we should temper American antitrust law's narrow focus on market efficiency and return instead to a broader view that some companies are just too damn big or powerful for the good of society.

In Theodore Roosevelt's day, that would have been U.S. Steel or Standard Oil. Today, it might be Google, Facebook, Amazon, you tell me. The regulation of media business is especially tricky if you believe, as I do, in the First Amendment as core to American identity. It limits, and we want it to limit, the extent to which government can tell any of the platforms what they can and cannot publish. And we need to be mindful of the enormous benefits these platforms and apps bring to our daily lives.

But on the other side of that equation is the right of action of an individual harmed by the effects of careless process. Society, as a whole, is beset by limitless amounts of falsehood and covert propaganda and a questioning of the unlevel, uneven business playing field that the internet platforms enjoy.

Solutions may come in the form of filtering, labeling, or source disclosure. They may come with the end or modification of exemptions like § 230. They may come because of technological developments we've not even yet imagined. None of this will come easily, and all of this will be tested in courts.

In the meanwhile, back at the local level, Knight Foundation that I'm privileged to lead, announced a couple of months ago a \$300 million initiative to bolster local news. We hope—we think we see evidence that this is the beginning of a wave of philanthropic individual and institutional investment to regain trust at the level where the distance between the story and the reader is the shortest.

We intend to hire more reporters. We will train more reporters. We will stand up more local, online news organizations and provide more legal support for news outfits. We will fund and seek different, mainly not-for-profit business models in the belief that news is a public good that can be tax advantaged and publicly supported.

We'll also fund scholarly research on the impact of news in a democratic society, and we'll announce a range of grants in June. It is actually a stunning contradiction that an area where all of us feel expert has been subject to so little critical study.

And finally, this week, we expect to issue another request for proposals for scholarly research, this time focused strictly on legal issues. We want to promote the development of critical thought and solutions in the law, just as the ALI does.

Now really is the time to unleash the creativity of the legal profession on antitrust, privacy, libel, and free speech in this brave new world of digital and social media. Each of these areas of law was developed by legal scholars, and honed by courts and legislatures for the benefit of society.

And any of you who doubt the enterprise should just think and remember that theories of law that were once considered radical sometimes became norms that turned into law that benefited society until they didn't and then had to be replaced with new ones. Now is the time. Thank you.
(Applause)

President Levi: So we have about five minutes, and Mr. Ibarguen said he would take questions if we have questions.

Mr. Stephen Yee Chow (MA): I have one over here.

President Levi: Okay.

Mr. Chow: I have two comments. For those of us who study Communications Decency Act § 230 and the so-called “Good Samaritan rule,” there is some thought saying that interactive service providers are neither speakers nor publishers, which actually intended to say that they were distributors and subject to distributor rules, as opposed to giving them entire immunity for editorial functions and so forth. I mean, is this an area that you’ve pursued?

Mr. Ibarguen: I think it’s an area—well, I shouldn’t say that the foundation as such is not pursuing. Our typical way of acting, even in areas where we think we have some expertise like in local news, would always be to seek proposals from the field. So if that came back in response to the RFP that we’re about to issue, absolutely.

Mr. Chow: Yes.

Mr. Ibarguen: I think the absoluteness with which internet companies are asserting their immunity, I think, couldn’t possibly have been intended under any reading of that section. And so I think debating what the implications are, I think, is exactly what we ought to be doing.

I don’t think it’s something that we ought to leave just to Silicon Valley or Palo Alto. I think it’s not something to—I think it’s something for all of us to debate. And I think in that poll that I cited, where four out of five Americans think that these companies ought to be treated the same as other companies, well, there’s a great tradition of plain old common sense and fairness that runs through reactions in this country, and I think that has to be included and factored in.

Mr. Chow: Let me make one comment, which I’ve made both yesterday and today, that I think that the concept of personal information is probably too restricting at this point. The reality is that certain players, the ones who actually collect all the information on all our data packets from where it comes, when it comes, etc., etc., which can be observed, they will even say that’s a First Amendment right for them to observe this.

They, plus the algorithms involved, can perfectly target and without knowing, assign any name or number or anything to the particular person. And this is, in my view, the danger of creating bubbles where people only hear the news someone thinks they want to hear. And that’s been an issue.

Mr. Ibarguen: I would only just comment that when I said the phrase that these companies are determining what we know or think we know as fact, the treating of the algorithm as if it were, somehow, something that were handed down from God is crazy to me. And I remember and I mentioned to David when we were having lunch, there was—I don’t know if any of you know the investigative news site ProPublica. It did a study some years ago, which we were actually very proud to have helped start.

But they did a study, some years ago, on what happens in certain phrases and terms when you go to Google, and one of them was the word “thug.” And you push the word “thug” and then go to images, and what you got were pictures of very, very ugly black men only.

And then the story came out and said so the algorithm defines thug as an ugly black man,

and how does that happen with a neutral algorithm? So quickly, as if to prove that this is not somehow handed down from God, the algorithm was changed so that when you then pushed “thug” and images, you got also ugly Asian men and ugly Hispanic men in response. (*Laughter*)

Those of you who happen to be women are safe because thugs were not—could not be a woman until later when there was another category.

Now some of this is, for goodness sake, these are magical instruments that we’re beginning—we’re trying to figure out and trying to figure out. So let’s be of good faith and open-minded. But let’s also not pretend that somehow we worship at this alter of digital technology that is somehow perfect. It isn’t perfect.

Algorithms have parents, too, and those parents are 22-year-old guys who are sitting somewhere in Palo Alto, feeding it their own values. So let’s deal with that.

President Levi: Thank you very much. It’s time for all of us to return to our own little bubble, but we really appreciate the chance to look outside. Thank you very much. (*Applause*)