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# CAPTIVE AUDIENCES, CHILDREN AND THE INTERNET

William D. Araiza\*

Recent judicial decisions striking down laws regulating Internet content in order to protect children have drawn praise from civil libertarians.<sup>1</sup> It is easy to understand why: the Internet possesses several characteristics that make it a particularly valuable communications medium, while lacking other characteristics that have, in the past, justified government regulation. For example, the lack of technical limitations on the number of speakers obviates the need for government regulation designed to ensure that a diversity of views get aired. Instead, the Internet is a forum for an extraordinarily diverse set of viewpoints. Indeed, the ease and relative low cost of logging on and posting content, for example, by creating a webpage or participating in a chat room, largely obviates even the economic scarcity the United States Supreme Court has acknowledged in the context of newspaper publishing.<sup>2</sup> On the listener's side, content on the Internet normally is not encountered by accident; at the very least, the risk of an unpleasant surprise is smaller than in the broadcasting context. All told, the Internet is a radically new medium which promises greatly expanded opportunities for widespread interactive communication between people, much more so than the one directional speech of broadcasting, cable, or print media. Given a medium like this, a rule against government interference seems appropriate, and welcome.

Ironically, though, the extraordinary usefulness of the Internet suggests a potential reason for its regulation. As the Internet reveals its communicative potential, it becomes possible to argue that it needs to be regulated in order to make its benefits more widely available. This is especially true when such

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<sup>1</sup> See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Reno v. ACLU*, 521 U.S. 844 (1997); *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *prob. juris. noted*, 123 S. Ct. 551 (2002); *Mainstream Loudoun v. Bd. of Trs.*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

<sup>2</sup> See generally *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

regulation is promoted on the grounds of protecting children, who might be thought to suffer more than adults from inappropriate speech, even when the child turns away from that speech after the initial unwelcome exposure. If such unwelcome exposures lead would-be users to abstain from Internet usage, there will be a significant loss of the benefits of free speech, exactly because the medium could otherwise be so useful.

The Internet, like broadcasting, can also be characterized as a medium that intrudes into the home. While this is hardly a foregone conclusion - Internet use, like radio listening, can occur outside the home as well - the Internet has the capacity to intrude into the home in a way that other types of speech, such as political rallies and even leafletting, do not. As such, the Internet shares at least some similarities to broadcasting, in terms of its intrusiveness.<sup>3</sup>

Intersecting with these ideas of intrusiveness, the home, and children's protection is the right of parents to control what their children may see. When impaired by the government, the Court has found a constitutional dimension to that right, dating back to *Meyer v. Nebraska*<sup>4</sup> and *Pierce v. Society of Sisters*.<sup>5</sup> Conversely, the Court has demonstrated its respect for the concept of parental authority by acknowledging that it can justify speech restrictions designed to augment parents' ultimate ability to control their children's access to potentially harmful speech.<sup>6</sup> By such laws the government, in effect, offers to babysit, allowing the parent to know that the child is getting the benefit of access to information while not running the risk of encountering inappropriate information. As the Court stated in *Ginsberg v. New York*, "The legislature could properly conclude that parents . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."<sup>7</sup> If that interest was enough to justify, in *Ginsberg*, a restriction on the sale of pornography to children, presumably it is powerful enough to warrant at least some judicial deference when government

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<sup>3</sup> Cf. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>4</sup> 262 U.S. 390 (1923).

<sup>5</sup> 268 U.S. 510 (1925).

<sup>6</sup> See, e.g., *Ginsberg v. N.Y.*, 390 U.S. 629, 639 (1968). Slightly further afield, but not completely off the point, is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held that Amish parents could not be compelled to send their children to a certain level of state-provided schooling, due to the impact such a requirement would have on the parents' Free Exercise Clause rights and rights to raise their children in a particular religious tradition.

<sup>7</sup> 390 U.S. at 639 (1968).

attempts to restrict children's speech in aid of parental control in the home itself.<sup>8</sup>

There is, of course, an alternative to government assisting parental control in the home by limiting what a child might find online or on the radio. The government could simply warn the parent that she has the obligation to turn the computer off. After all, logging on to the Internet requires an affirmative step that a parent need not allow the child to take, as Justice Brennan argued in *FCC v. Pacifica Foundation* with regard to radio broadcasts.<sup>9</sup> Still, keeping a child from logging on to the Internet in order to protect him from unsuitable speech, just like keeping a child from turning on a radio, exacts real costs in terms of the child's loss of access to information.

This Article provides a very brief review of arguments for regulation of Internet content in pursuit of child welfare, in order to determine whether such regulation - normally, and, in the author's view rightly, presumed to be constitutionally problematic - can be defended. In order to do so, it posits the intersection of three distinct concepts all pointing in the direction of regulation: the pervasiveness of the medium, the presence of children, and the costs that are incurred when a parent prevents a child from accessing the Internet for fear of the child encountering offensive speech. It assumes Internet use in the home, where privacy interests may be at their peak,<sup>10</sup> and thus assumes away the sizable problem of Internet use in public libraries, where libraries' provision of Internet services arguably creates a public forum within which government may be especially limited in making content-based restrictions.<sup>11</sup>

In discussing the pervasiveness of the medium, the Article asks, in Part I, whether the Internet's character justifies application of a principle akin to the captive audience doctrine. It argues that a principle akin to the captive audience doctrine could theoretically be used to justify Internet regulation, although the breadth such a theory would need is enough to give one pause. Part II considers the special needs of children, and how those needs can be

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<sup>8</sup> Compare *id.* (noting that the restriction allowed parents to purchase pornographic magazines for their children), with *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (striking down the Communications Decency Act in part because "neither the parents' consent - nor even their participation - in the [offensive] communication would avoid the application of the statute").

<sup>9</sup> See 438 U.S. at 764-66 (Brennan, J., dissenting).

<sup>10</sup> See *id.* at 748 (plurality opinion) (noting the importance of the fact that radio intrudes into the home in determining the level of permissible government regulation).

<sup>11</sup> Compare *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 409 (E.D. Pa. 2002) (discussing libraries' provision of Internet services as creating a public forum); with *Mainstream Loudoun v. Bd. of Trs.*, 24 F. Supp. 2d 552, 562-63 (E.D. Va. 1998) (discussing the same).

accommodated in a regime of Internet regulation. It also considers the loss of benefits normally accruing from free speech when the lack of regulation leads individuals to keep their children away from the Internet. It concludes that while these losses may be real, and their minimization a legitimate government interest, a regime of content-based restrictions may be worse than the disease. Ultimately, private filtering, in this case by parents, may be the only constitutionally acceptable method of balancing the Internet's usefulness with whatever harm it could cause.

## I. THE INTERNET AND SPEECH

### A. *How Can the Audience Be Captive?*

At the outset it is fair to ask how captive audience doctrine can even possibly apply to a situation like Internet usage given the fact that the audience for Internet speech takes the affirmative step of logging on. By contrast, captive audience doctrine posits a situation in which the listener has no choice but to hear the undesired speech. This lack of choice has a strong spatial component to it; indeed, the classic example of a captive audience being the target of residential picketing.<sup>12</sup> Such cases have led commentators to characterize the captive audience doctrine as one essentially aimed at the home.<sup>13</sup>

However, even at the outset, it is important to note that this spatial component is not the sum total of the doctrine. Nobody would suggest that government has the right to censor a newspaper's content in order to protect the tranquility of the subscriber, even though the subscriber picks up her paper from the front lawn and reads it in her kitchen. Perhaps more realistically, nor can government censor the mail in order to protect an unsuspecting recipient of offensive matter. For example, in *Bolger v. Young's Drug Products Co.*,<sup>14</sup> the Court struck down an ordinance prohibiting the mail delivery of contraceptive advertisements to residential customers even in the absence of a recipient's

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<sup>12</sup> See, e.g., *Frisby v. Shultz*, 487 U.S. 474, 484-85 (1988); *Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939).

<sup>13</sup> See, e.g., Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 90 (1991); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 845 (1997).

<sup>14</sup> 463 U.S. 60 (1983).

request, despite the possibility that some recipients would find such advertisements offensive.<sup>15</sup>

Thus, concern for spatial privacy interests, while certainly important in understanding the Court's solicitude for captive audiences, fails to account for situations where a physical residence is not an absolutely protected enclave. This conclusion makes intuitive sense. Privacy is important not because it is an objective good to be protected regardless of the home dweller's wishes or actions, but because it preserves a sphere to which the individual can retreat *if she so wishes*. Thus, in the newspaper example above, the dweller's decision to subscribe, and to pick the newspaper up and read it in her kitchen, represents her decision to bring the world into her home. The dweller herself has decided to re-enter the world, even if only figuratively; she has no right to demand that the world be presented to her in a way she would find pleasant or non-offensive. The same could be said for mail delivery; by picking up and reading her mail the home dweller is again opening herself up to communication from the outside world.<sup>16</sup>

At the other extreme, the Court, or individual justices, has sometimes suggested that the privacy concerns implicit in captive audience doctrine extend beyond the home. Indeed, the first use of the term "captive audience" in a Supreme Court opinion was in a 1951 dissent by Justice Jackson, in a case dealing with offensive speech on a public street.<sup>17</sup> The following year, in *Public Utilities Commission v. Pollack*,<sup>18</sup> Justice Douglas used the term to describe passengers subjected to piped-in music, on a government-operated

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<sup>15</sup> *But see* *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding a ban on delivery of offensive mail when the recipient specifically requested such controls).

<sup>16</sup> This idea is consistent with the result in *Rowan, id.*, in which the Court upheld a statute allowing individuals to specify to the Postmaster General certain mailing they did not wish to receive. As one commentator noted, this statute still requires the recipient to re-enter the world, even if only to delegate to an agent (the mail service) the task of throwing out unwanted mail. *See* Strauss, *supra* note 13, at 91. Clearly, this is not a heavy burden on the mail recipient, as she need never actually see the mail she is rejecting. On the other hand, the minor burden of specifying the type of mail she wants rejected nevertheless involves the individual in culling the offensive from the acceptable, even if at a distance.

For roughly analogous examples of the Court finding privacy interests less compelling in situations where the unwilling listener has otherwise opened his property up to the public, *see, e.g.,* *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (organization with broad membership).

<sup>17</sup> *Kunz v. New York*, 340 U.S. 290, 295, 298 (1950) (Jackson, J., dissenting).

<sup>18</sup> 343 U.S. 451, 468 (1952).

streetcar.<sup>19</sup> For Justice Douglas, the operative fact was obviously not that the music intruded into people's homes, but that it was present in a context - public transportation - that he later described as "an association . . . compelled by the facts of life."<sup>20</sup> In *Lehman v. City of Shaker Heights*,<sup>21</sup> a plurality of the Court, joined by Justice Douglas to form a majority, similarly described the passengers of a streetcar as a "captive audience."<sup>22</sup>

Justice Douglas' concern is easy to understand: we are all, every day, "captive" in all sorts of contexts going well beyond the classic example of a home dweller subjected to a residential picket. Since I drive to my office every weekday morning I necessarily have to see what is going on around me. I am, in that sense, "captive" to graffiti on the street, offensive gestures people make and whatever else I see. To say that I could avert my eyes, take another route, move closer to my office or simply telecommute, seems by itself an insufficient answer to my claim of captivity. After all, an analogous answer could be given to the target of the residential picketing: the target could install sound proof windows, close her shades, move to another community, or take a sleeping pill so she would not be conscious during the protest.

The label "captive audience" thus reflects a value judgment that certain interests, which commentators often identify as privacy and autonomy,<sup>23</sup> are worth protecting in some contexts, even at the cost of suppressing speech. The importance society accords the home as a place for reflection and refuge for the world therefore justifies applying a doctrine to many, though not all, situations where unwanted speech intrudes into the home.<sup>24</sup> For Justice Douglas, the fact that commuters on a streetcar had no realistic transportation alternative made them captives as well. Analogously, some defenders of sexual harassment law argue that employees should not be forced to leave a job in order to avoid speech that, by creating a hostile working environment, constitutes employment discrimination.<sup>25</sup>

On the other side of the balance, if the scope of First Amendment protection accorded speech requires the Court to make value judgments about

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<sup>19</sup> See *id.* at 468.

<sup>20</sup> *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

<sup>21</sup> 418 U.S. 298 (1974) (plurality opinion).

<sup>22</sup> See *id.* at 302, 304; see also *id.* at 307 (Douglas, J., concurring).

<sup>23</sup> See, e.g., Strauss, *supra* note 13, at 108.

<sup>24</sup> See, e.g., *Frisby v. Shultz*, 487 U.S. 474, 484 (1988).

<sup>25</sup> See, e.g., Jack Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312 (1999).

“captivity,” it may also involve the Court making judgments about the nature of the unwanted speech. In *Pollak*, for example, Justice Douglas was especially concerned that the speech was government-sponsored (music piped in by the government-owned utility), and thus created the risk of government indoctrination. Indeed, he conceded that a passenger on a streetcar had no right to complain about other passengers’ speech; the unacceptable invasion, he thought, occurred when it was government doing the speaking.<sup>26</sup> Similarly, the *Lehman* plurality expressed concern that allowing political advertisements on the streetcar would give rise to public suspicions of favoritism.<sup>27</sup> At least one defender of sexual harassment law suggests that political speech by employees be exempted as a basis for hostile environment liability, given the importance of such speech and its marginal role in creating such environments.<sup>28</sup>

This analysis implies another important point: the captive audience determination not only extends potentially beyond the home, but, more fundamentally, is not place-specific. One might be deemed a captive to a residential picket but not to offensive mail sent to one’s home.<sup>29</sup> One might be deemed a captive to government speech in a streetcar, but not to private speech.<sup>30</sup> One might be deemed a captive to non-political speech in the workplace, but not political speech.<sup>31</sup> One might even be a captive audience to workplace harassment speech when one is not in the workplace itself.<sup>32</sup>

In sum, the term “captive audience” is not self defining. Rather, determining that someone is a captive in certain situations in a home, a streetcar, a workplace or a classroom<sup>33</sup> simply reflects a judgment that, in such a context, that person *should not* be compelled to listen to certain undesired

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<sup>26</sup> See *Pollak*, 343 U.S. at 468-69.

<sup>27</sup> See *Lehman*, 418 U.S. at 304. Additionally, in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684-85 (1986), the Court upheld a school’s punishment of a student for giving a sexually suggestive speech in front of an assembly the Court characterized as a captive audience, based largely on the inappropriate nature of the speech in such a setting, where pedagogical interests were so important. Compare *id.* at 689 (Brennan, J., concurring in the judgment) (“Respondent’s speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty.”).

<sup>28</sup> See Balkin, *supra* note 25, at 2315.

<sup>29</sup> Compare *Frisby*, 487 U.S. 474, with *Bolger v. Young’s Drug Prods. Co.*, 463 U.S. 60 (1983).

<sup>30</sup> See *Pub. Util. Comm’n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

<sup>31</sup> See Balkin, *supra* note 25, at 2315.

<sup>32</sup> See *id.* at 2313.

<sup>33</sup> See *supra* note 28.



speech. At the very least, in such a situation free speech rights should not stand as an absolute bar to government's discretion to decide to favor the unwilling listener over the unpleasant speaker.

The reasons to favor a listener require examination.

### B. *Balancing the Speech Interests*

Given this understanding of the captive audience doctrine, we are now better positioned to examine the ramifications of regulating content on the Internet, when such regulation is based both on the Internet's character and on a concern for children. One argument is that the Internet is so useful that its use should be encouraged by sanitizing it, even at the cost of suppressing speech. In *Reno v. American Civil Liberties Union*, the government attempted to defend the Communications Decency Act ("CDA") in part by arguing that the CDA was designed to *encourage* use of the Internet by ensuring that inappropriate speech was cordoned off from children.<sup>34</sup> Such an "encourage the listener" theory does not usually arise in captive audience doctrine, which normally presupposes speech occurring that the captive does not want to hear, in a context where the captive is forced to listen. But in the case of the Internet, it could be argued that the inability to filter out undesirable speech creates an unacceptable dilemma for a would-be user: use the Internet and subject yourself to the risk of encountering such speech, or abstain altogether from using the medium.

By analogy, defenders of sexual harassment law argue that employees' need to earn a living makes the workplace a context where an employee should not be forced to listen to undesired speech.<sup>35</sup> Justice Douglas suggested in *Pollack* that the commuter's need to ride the streetcar to work makes it a place where government should not have the right to pipe in government-selected speech.<sup>36</sup> The question then arises whether the Internet is sufficiently important as a medium that a user - particularly a child - should not be put to the risk of encountering inappropriate speech. The Internet differs from these other examples, though, in that the interest in favor of regulating the speech is itself a speech interest - *i.e.*, the heightened attractiveness of a "cleaner" Internet as an

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<sup>34</sup> 521 U.S. 844, 117 S. Ct. 2329 (1997).

<sup>35</sup> See, e.g., Balkin *supra* note 25, at 2312-13; Jessica Karner, *Political Speech, Sexual Harassment and a Captive Workforce*, 83 SO. CAL. L. REV. 637, 682-83 (1995); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 12-13 (1990).

<sup>36</sup> 343 U.S. at 468.

information source. In other words, there are First Amendment interests on both sides of the equation.

The Court in *Reno v. American Civil Liberties Union* roundly rejected this argument.<sup>37</sup> At the superficial level, the Court simply refused to believe that there was any mass tuning out of the Internet when usage statistics, at the time, indicated overall significant growth.<sup>38</sup> This reasoning is not particularly persuasive. An overall trend toward increased use of the Internet says very little about whether usage would have increased even more had there been regulation of indecent speech. A more precise estimate of the tune-out effect might, however, be exceedingly difficult to derive.

More profoundly, the *Reno v. American Civil Liberties Union* Court invoked what it considered to be a long-standing presumption against government regulation justified on this type of rationale. "As a matter of constitutional tradition," the Court stated, "in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."<sup>39</sup> Legislative restrictions on corporate political speech and the FCC's adoption of the fairness doctrine, versions of both of which the Court has upheld based on analogous theories,<sup>40</sup> stand as potential counter-examples. But no matter. The interesting thing about this statement is how cavalierly the Court makes it, without any discussion or citation at that part of the opinion to the particular characteristics of the medium. The Internet may well be a medium in which such restrictions do in fact accomplish more interference with, than encouragement of, the free exchange of ideas, but it is surely unpersuasive simply to announce this as a general rule and then walk away. On the other hand, there is perhaps good reason to begin with a presumption against regulation based on this rationale, given the suspicion, always lurking in government speech regulation, that such regulation is motivated by dislike of the content.

More generally, perhaps the proper response is that government simply has no business creating audiences for speech by sanitizing. The argument here is that if some media included speech that was so undesirable as to drive away listeners, that result would have to be accepted, or at least could not be altered

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<sup>37</sup> See 117 S. Ct. at 2351 (1997).

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

through government restriction of that undesired speech. Campaign speech might be an exception to this principle, given the constitutional status of the requirement that the political process be open to all on an equal basis.<sup>41</sup> The fairness doctrine might also stand as an exception, given the problem of spectrum scarcity and the fact that government plays a very different role with regard to allocation of the broadcast spectrum than with how speech is made with purely private means through a medium that does not suffer from technology-based scarcity.<sup>42</sup> Beyond such exceptions, the *Reno v. American Civil Liberties Union* Court's sweeping presumption may reflect a preference for private choices by both speakers and listeners over a governmental obligation to produce a particular quantity of speech.

A variant on this argument returns us to the concept of a captive audience. It might be argued that the Internet is simply so necessary to daily life as to justify regulation on the grounds that, just like Justice Douglas' streetcar, we cannot live without it. While this sounds like an empirical question - exactly how necessary *is* the Internet in our daily lives? - ultimately it is a value choice. Is it so important that everyone feel comfortable logging on, that we would be willing to suppress speech?

In attempting to explain the Court's citation of the "pervasiveness" of broadcast media as a justification for regulating it, Jack Balkin offers the suggestion that "there are significant cultural pressures to have a television set and keep it in one's home."<sup>43</sup> Obviously, there are important differences between television and the Internet; for example, warnings about upcoming offensive content are much less practicable on television or radio, as compared with websites.<sup>44</sup> But for our purposes, the important point is that the cultural pressure to allow a particular medium into a home could suffice to justify calling the audience captive, even if the listener, technically, still has power over the on/off switch.

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<sup>41</sup> See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-401 (2000) (Breyer, J., concurring); *Austin*, 494 U.S. 652.

<sup>42</sup> Compare *Red Lion*, 395 U.S. 367, with *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a right of reply requirement on newspapers).

<sup>43</sup> Jack Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1137 (1996) (suggesting this understanding of a medium's pervasiveness in the context of television).

<sup>44</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (noting the difficulty of warning potential listeners to a broadcast, given the fact that the audience is constantly tuning in and out).

Again recall the character of a home dweller “captive” to a residential picket. The dweller always has the option of installing soundproof walls and closing her curtains. We might call it unreasonable to impose such a requirement on the picketing target. Is it unreasonable to require a radio listener always to keep her radio off, to avoid hearing offensive speech?<sup>45</sup> Is it unreasonable to force an employee to leave her job, to avoid a hostile working environment based on gender? Is it unreasonable to force a would-be user not to use the Internet to avoid encountering offensive speech?

The above arguments are cast at an extraordinarily high level of generality. More needs to be said about the particular characteristics of the Internet and the particular problems posed by children’s use of it. The next Part considers these factors in more detail.

## II. DOES IT MATTER THAT WE ARE TALKING ABOUT CHILDREN?

The Court has found that children can be treated differently from adults across a broad range of topics, from denial of rights basic to adults (such as marriage), to access to information and subjection to value inculcation by the government. One justification for such differential treatment - a justification pregnant with potential meaning for the issue discussed in this article - was offered by Justice Stewart, concurring in *Ginsberg v. New York*’s holding that a child could be prohibited from buying sexually-oriented material that adults had a constitutional right to obtain.<sup>46</sup> In justifying the differential treatment for children and adults, Justice Stewart cited the “free trade in ideas” rationale for free speech. Such free trade, he said, requires that listeners have the ability to choose what to listen to. Choice, in turn, requires an ability to tune out offensive speech, a view that, according to Justice Stewart, explained the Court’s captive audience doctrine. All this mattered to Justice Stewart’s concurrence in *Ginsberg* because he compared a child to a captive audience, in that both were unable to choose to receive or reject certain speech, the captive listener because of her captivity and the child because of his immaturity.<sup>47</sup>

As suggested earlier, the intuition that Internet users are captive audiences also has something to do with choice.<sup>48</sup> Captive audience theory reflects a

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<sup>45</sup> *See id.*

<sup>46</sup> 390 U.S. 629, 648-50 (1968).

<sup>47</sup> *See id.*

<sup>48</sup> *See also, e.g.,* Strauss, *supra* note 13, at 108 (identifying individual choice, or autonomy, as a justification for captive audience doctrine).

concern that individuals subjected to certain speech, such as residential picketing, had no choice, or at least no reasonable choice, as to whether to listen to the speech. So too, users of the Internet may be put to a very difficult choice, - use an extraordinarily powerful information medium, present in the home and always beckoning,<sup>49</sup> or leave. Similar pressures to use a medium, despite the risk of encountering something unpleasant, underlay the *Pacifica* plurality's discussion of radio as pervasive.<sup>50</sup> Pervasiveness, and thus pressure to listen to the radio, might not be based on the invasion of radio broadcasting into the physical space of the home, but instead on its ubiquitousness and attractiveness, which arguably combine to render unreasonable a requirement that the would-be user abstain if she wants to avoid the undesired speech.<sup>51</sup>

Admittedly, these are different conceptions of choice. The choice Justice Stewart speaks of is the maturity to decide whether to receive certain speech. This situation posits the availability of the speech (*e.g.*, an adult magazine on a bookstore shelf), but also theoretically the complete discretion whether or not to access it. (The discretion is described as theoretical because the entire point of his analysis is that children may lack the maturity to consider the ramifications of the choice, and thus in some sense do not have full decisional capacity.). Sometimes this is also the choice in the Internet context, for example, when a child decides whether to search for pornographic sites. Often, however, choice in the Internet context is of a different sort. Many times, the choice is between going online at all and running the risk of *accidentally* encountering offensive speech, or abstaining from use entirely. It was this type of lack of choice that was at issue in *Pacifica*: once one decides to use the radio, one has no choice whether or not to receive offensive speech, since there is no effective way to warn audiences of what they could expect from that broadcast.

These conceptions of choice are distinct, but both of them are present in the context of children's use of the Internet. While the latter of these situations - the one analogous to the facts in *Pacifica* - is most obviously tied to concerns about a captive audience, the former is also relevant, assuming Justice Stewart's broader understanding of the concept of captivity as incapacity to make a fully informed decision. In short, we are dealing both with a medium whose power and soon-to-be ubiquitousness make complete abstinence difficult, or at least an unreasonable option, and with users who may not have the maturity to make the

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<sup>49</sup> See Balkin, *supra* note 43, at 1137.

<sup>50</sup> See *Pacifica*, 438 U.S. at 748.

<sup>51</sup> At the very least, this reading of *Pacifica* accounts for the trivial but still relevant fact that the listening in that case took place in a car, not a home.

difficult choice between abstinence and possible exposure to the offending material.<sup>52</sup>

The assumption that such use occurs in the home only strengthens the argument, even if captive audiences are not exclusively defined by reference to dwelling places. In this case, the location of the use is not as important for its physical attributes as for the fact that the home is the physical locus for parental authority. Parental authority over children enjoys constitutional stature,<sup>53</sup> and while the intrusion on that authority here does not emanate from government, the importance of parental control has justified government in assisting parents by, for example, restricting minors' independent access to everything from sexually-explicit materials to abortions to secondary education.<sup>54</sup> So understood, a restriction on children's access to offensive Internet speech could be viewed as government assistance to parental control when a child is otherwise "captive."<sup>55</sup>

Finally, we can add to the mix the special harm that offensive or inappropriate speech may have on children. It is reasonable to assume that adults are better able than children to brush off confrontations with unpleasant speech. Adults have a range of knowledge and experience that allows them better to contextualize and evaluate speech they receive. Thus, not only are children more "captive" than adults in the sense of not being as able to choose to receive or reject certain speech, but they may also be harmed more by unwanted speech that is in fact received.

Two objections to this analysis immediately come to mind. First, it is ironic that the success of a medium in becoming ubiquitous opens it up to government regulation. This argument returns us to the consequences of

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<sup>52</sup> It should be noted that this analysis assumes involuntary exposure to offensive speech on the Internet. If a child seeks this information out, the choice is not involuntary.

<sup>53</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>54</sup> See *Hogsdon v. Minnesota*, 497 U.S. 417 (1990) (upholding parental notification requirement before a minor could obtain an abortion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. N.Y.*, 390 U.S. 629, 639 (1968); compare *Reno v. ACLU*, 532 U.S. 844, 865 (1997) (striking down the Communications Decency Act in part because "neither the parents' consent – nor even their participation – in the [offensive] communication would avoid application of the statute").

<sup>55</sup> Obviously, for such a statute to perform this function it would have to allow for parents to override any access limitations imposed on their children if the parent determined the material to be suitable, at least when the parent had control over his or her children (and thus not, say, in a school environment). Compare *Reno v. ACLU*, 532 U.S. at 865.

entering the (virtual) public square, and the importance of the government interest in encouraging a larger audience in the square. Second, this analysis assumes that the choice is between, on the one hand, complete abstinence from Internet use and, on the other, use which necessarily exposes the user to the possibility of encountering offending material, either accidentally or on purpose. The choice may not be as stark. This latter objection requires that we consider the consequences of the Internet as a medium, in particular, the extent to which it accommodates filtering by the user. Moreover, the availability of privately-available filters raises the possibility that parental control – as noted above, one of the prime interests regulation seeks to promote – can be more precisely (and thus more effectively) promoted short of government control. This article takes up these points in sequence.

### A. *Entering the (Virtual) Public Square*

At first glance it seems perverse that a medium's very success at attracting an audience should thereby make it a special target for government regulation. But the captive audience idea - that a medium is fundamental to daily life, or so ubiquitous as to be necessarily an intrusive presence in the home - suggests at least the theoretical appropriateness of regulation, especially in the service of ensuring its availability to all. It must be realized that there are costs when a would-be Internet user abstains from logging on because of fear of encountering offensive speech. Those costs may not themselves be of constitutional stature; that is, a would-be listener probably does not have a constitutional claim simply because the presence of offensive speech in a particular forum prevents that person from entering.<sup>56</sup> Still, there is a social cost when an individual feels a need to abstain from acquiring information. Indeed, in the service of ensuring that information is provided to some, the Court has been willing to either uphold or apply less than strict scrutiny to government action intruding on the speech rights of others.<sup>57</sup> Thus, individuals may not have First Amendment rights to compel government to provide

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<sup>56</sup> However, if the offending speech emanates from the government, then there may be a constitutional claim that the individual has a constitutional right to be free of government indoctrination. See generally *Pub. Util. Comm'n v. Pollack*, 343 U.S. 450, 467-68 (1952) (Douglas, J., dissenting).

<sup>57</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (imposing intermediate scrutiny test for content-neutral restrictions on cable programming designed to protect financial viability of broadcast industry, which was the only source of television programming for a substantial minority of Americans); *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine).

information, but a government policy to do so certainly qualifies as a legitimate interest.

The only question, then, is whether that increase in speech can appropriately be “bought” at the cost of content-based regulation. It is by no means clear that it can. Most importantly, much of the value of speech, and thus the value of a larger audience, would be lost if government sanitized it to the point of banality. Network television should prove that. Critics of government-sponsored prayer argue that such prayers necessarily lose force when they have to pass through government censors who attempt to make the prayers unoffensive.<sup>58</sup> There is no reason to think the result should be any different for non-religious speech. Government might succeed in attracting more shoppers to the marketplace of ideas if it mandated that every merchant cater purely to mass tastes or beliefs, but the whole point of the marketplace is that there be competition among antagonistic, sharply focused ideas. This distinction, between on the one hand, simply more speech and, on the other, competition between different ideas, and the higher value placed on the latter, is reflected in the content-neutrality rule that is fundamental in First Amendment jurisprudence.<sup>59</sup>

In response, it might be suggested that content-based regulation of a forum in pursuit of attracting more listeners might still be worthwhile, as long as the rise in listenership in some way exceeded the reduction in the diversity of ideas. But this response is clearly inadequate. Beyond the difficulty in measuring listenership and diversity, the fact that these two concepts are not comparable<sup>60</sup>

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<sup>58</sup> See, e.g., Philip B. Kurland, *The Regents' Prayer Case: 'Full of Sound and Fury, Signifying . . .'* 1962 SUP. CT. REV. 1, 30-31 (1962) (discussing concerns that non-denominational school prayers could lead to establishment of bland, watered-down, civic religion).

<sup>59</sup> Compare, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (applying relatively deferential review to a speech restriction that is content-neutral), with *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) (applying strict scrutiny to a content-based restriction). Of course, even tests for content-neutral restrictions require that the restriction leave open alternative means of communication. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (time, place and manner regulations); *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986) (secondary effects regulations). However, the Court has not been particularly stringent in applying that requirement. See, e.g., *Playtime Theaters*, 475 U.S. 41, 53-54 (holding that the requirement was met in that case even though the ordinance confined adult theaters to a land area comprising less than five percent of the city, and even though the theaters argued that that area contained no real estate appropriate for that use).

<sup>60</sup> Compare *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 895, 897 (1988) (Scalia, J., concurring) (analogizing the balancing of local benefits and burdens on interstate commerce to the comparison of the length of a rope with the weight of a rock).



and the inevitable slippery slope concern it raises, it is doubtful that government should be trusted with fine-tuning the marketplace of ideas to create the optimum mix of participation and diversity. At least this is so when the speech to be reduced is actual speech and not, for example, arguably quasi-speech such as campaign contributions,<sup>61</sup> or when the government action is a pure reduction of speech, rather than, as in the fairness doctrine, a substitution of one type of speech for another. Even more fundamentally, it seems doubtful that increased access to information can ever be sufficient “compensation” for government-mandated contraction in information diversity. The major justifications for free speech (the search for truth, as an aid to self-government, and as an aid in self-actualization) all presuppose a diversity of viewpoints. Thus, at the extreme, nobody would argue that the First Amendment would be well-served by a massive government literacy program conditioned on a ban on political speech. If this extreme version of such a tradeoff is antithetical to the First Amendment, it is not clear why a milder version would not be.

Is there something special about children that changes the analysis? Children are presumed incapable of choice regarding certain basic issues such as the decision to view sexually-oriented material,<sup>62</sup> or at least incapable of a mature reaction to it, a maturity that we presuppose when we demand that speech not be forbidden adults.<sup>63</sup> This immaturity is presumed to extend only to certain types of content, thus suggesting the appropriateness, or the narrow tailoring, of content-based restrictions on sexually-oriented expression to children, but the unconstitutionality of broader-based restrictions on what information children may receive.<sup>64</sup> Thus, by contrast to a situation where government attempts to increase the size of an audience by restricting speech that everyone has a right to hear, but which some may simply choose not to hear, in our situation government would attempt to increase audience size by

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<sup>61</sup> See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (Stevens, J., concurring); *id.* at 390-91 (2000) (Breyer, J., concurring); *see*. See also *supra* text accompanying note 42.

<sup>62</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 648-50 (1968) (Stewart, J., concurring).

<sup>63</sup> Cf., e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding as unprotected speech that is calculated to provoke a response, rather than a reasoned reaction).

<sup>64</sup> The fact that a person is a child does not mean that he has no constitutional rights, including the right to receive information. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864-65 (plurality opinion); *id.* at 877 (Blackmun, J., concurring); *id.* at 885, 888 (Burger, C.J., dissenting) (agreeing that the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech but arguing that this right does not require the government to provide that information in a particular place or context).

restricting speech that may be proscribable for some would-be audience members.

This latter type of regulation is, at least in the abstract, less egregious, since the government is restricting speech that is not constitutionally guaranteed to everyone in order to protect those for whom the speech is considered so harmful as to be constitutionally unprotected. Thus, the question becomes, may government impose restrictions appropriate to an audience of children where the effect would be to deny speech to adults? For most students of the First Amendment, the answer is still probably "no," especially given the broad array of protected speech that might be considered inappropriate for a child, and which under this theory would be blocked for adults as well.<sup>65</sup>

The need to make this last choice is obviated if speech on the Internet can be segregated in a way so that children can be blocked from receiving speech that adults remain able to access. This article now turns to the possibility of filtering solutions to the problem.

### *B. The Availability of Filtering*

It is relatively easy for a parent to keep a child away from an inappropriate movie available only on videocassette. The parent can retain the video rental card, or can provide the child with a card that allows only the rental of certain types of movies. Video rentals, then, are easy for a parent to filter, assuming the existence of a ratings system that reliably tracks the material the parent wishes to deny his child. The existence of a reliable filtering mechanism is crucial: if such a system exists, either for video rentals or Internet usage, the choice between opening oneself up to information and keeping undesired speech away resolves itself; we can pick the material to which we wish to expose ourselves or our children. In such a case, there is no reason for government censorship, at least on a captive audience rationale; there is no longer captivity, as the listener gets to choose the speech to which she will be exposed. Moreover, to the extent such filters are privately available, the need for governmental assistance, via censorship, becomes far less compelling.

However, Internet filtering (in the sense of software that blocks a particular computer's access to certain websites), is a very inexact science. Internet filters

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<sup>65</sup> See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (sexual innuendo); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (profanity); *Ginsberg*, 390 U.S. 629 (sexually explicit magazines).

are thought to be either over or under-inclusive, and sometimes both.<sup>66</sup> To the extent that filters search only text, rather than images, a large hole is created in the reach of filters, although presumably most web pages containing offensive images also include text for which a filter might be expected to search. This inexactness means that the user remains confronted with the choice between abstinence and some amount of risk of exposure to undesired speech. On the other hand, such filters may screen out information that would be desired.<sup>67</sup> To complicate matters, individual users can often set filters at different levels of restrictiveness, with different blocking results.<sup>68</sup>

Even more fundamentally, filters, to the extent they are provided by third parties, such as an internet service provider ("ISP") or a software company, provide only a rough approximation of the precise choices a parent might wish to make for her child. One parent might actually prefer that a child be able to access scientific information about the human reproductive system, or about sexually-transmitted diseases; another parent might consider that content unacceptable. Indeed, the same parent might consider such content appropriate for her fourteen year-old, but not her seven-year-old. Nothing short of the parent standing over the child's shoulder, reviewing every web page her child accesses, provides precise filtering.<sup>69</sup>

This second level of imprecision inheres as well in government regulation. The Court made this point in *Reno v. American Civil Liberties Union*. The statute, the Court pointed out, would even have criminalized a parent's emailing of sexually explicit information to her own child, thus obviously going beyond the balance between a parent's preferences for the type of information to which she would like her child exposed.

Another possibility is to filter from the other end, that is, to require that websites engaging in regulated speech restrict access to children. The commonly suggested method of accomplishing this is through requiring that

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<sup>66</sup> See the discussion of the precision of the most common commercially available filters in *Am. Library Assoc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *prob. juris. noted*, 123 S. Ct. 551 (2002).

<sup>67</sup> See *id.* (identifying various non-offensive sites blocked by various filters); see also *infra* note 69.

<sup>68</sup> See, e.g., Kaiser Family Found., *See No Evil: How Internet Filters Affect the Search for Online Health Information* (visited December 16, 2002), at <http://www.kff.org/content/2002/20021210a/>.

<sup>69</sup> And, of course, to the extent that the parent exercises this review by actually standing over her child's shoulder, the child has already viewed the material and thus some harm has been done.

website operators obtain a credit card number or adult check password before providing access to the regulated content. The Court in *Reno v. American Civil Liberties Union* pointed out that such requirements could significantly impinge on such speech. Non-commercial speakers might find these requirements onerous and prohibitively expensive, while even commercial website owners might find their audiences diminished because of the delay and annoyance involved in procuring such a password and the fact that not all web users would have credit cards.<sup>70</sup>

Ultimately, wide demand for filtering raises the possibility that different versions of filtering software will be offered, corresponding to different parental tastes. Such private filtering could raise its own problems, particularly with regard to the power it would provide purveyors of the filtering software that ultimately come to dominate the market.<sup>71</sup> However, private filtering has the benefit of taking the government out of the business of regulating content and thus eliminating the most obvious constitutional concerns. Moreover, if private demand leads to a variety of filters being offered, each different in focus and features, the result will be an even greater scope for parental control over what children see on the Internet, as compared with a one-size-fits-all government regulation. Indeed, such government regulation, in addition to its other faults, would not only fail to promote parental rights effectively, but in fact impair those rights if the regulation failed to allow a parental override.<sup>72</sup>

Private filtering will never be perfect. Rating webpages that constantly change and are constantly being added to the Web, and whose content must ultimately be judged by either subjective standards or inherently inaccurate mechanical means, is a far different enterprise than rating videotapes or even television shows.<sup>73</sup> At the very least, it must be conceded that for the foreseeable future filtering will be a less-than-perfect alternative to complete abstinence from the Internet or complete exposure to whatever evils the Internet has to offer. Still, such private filters may be the best option in a world where even the strongest argument for government restriction of Internet speech in the pursuit of child protection ultimately fails.

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<sup>70</sup> See *Reno v. ACLU*, 521 U.S. 844, 856-57 n.23 (1997).

<sup>71</sup> See generally Balkin, *supra* note 43.

<sup>72</sup> Cf., cases cited *supra* note 8.

<sup>73</sup> For a discussion of the difficulties inherent in both human review and mechanical examination of webpages, see *Am. Library Ass'n. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

