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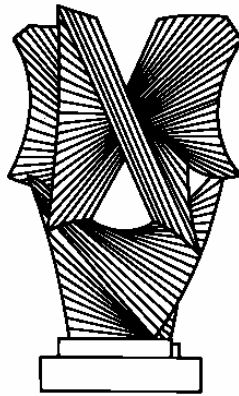
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CAPTIVE AUDIENCES AND THE FIRST AMENDMENT

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Captive Audiences and the First Amendment

by Douglas Gary Lichtman

The existence of cost-effective self-help remedies often argues against government regulation as a means to accomplish similar ends; and nowhere is that more apparent than in the vast jurisprudence that surrounds the First Amendment. On countless occasions, courts have struck down government restrictions on speech for the simple reason that self-help provides a seemingly adequate alternative. Thus, when the city of Los Angeles arrested a war protestor whose jacket bore the now-infamous “Fuck the Draft” inscription, the Supreme Court held the relevant ordinance unconstitutional. Offended viewers, the court explained, have a sufficient self-help remedy in the form of simply averting their eyes. Similarly, in a long line of cases involving speakers caught advocating crime, sabotage, and other forms of violence as a means of achieving political or economic reform, the Court (albeit after a false start or two) again struck down government restrictions, emphasizing that, where there is “time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

This is of course not to imply that every self-help mechanism is favored. Violence, for example, can very effectively discourage speech, but violence is a form of self-help to which the government has no obligation to defer. Similarly, hecklers from time to time chill speech by hurling insults (and sometimes glass bottles) but, again, the government is not required in these instances to sit idly by, and in extreme cases might even have an obligation to intervene

on the speaker’s behalf. That said, it is nevertheless striking how often courts invalidate government regulations simply because plausible self-help alternatives are available. The New York Public Service Commission was for this reason rebuked when it attempted to prohibit power companies under its jurisdiction from including with customer bills pamphlets discussing politically sensitive subjects like the use of nuclear energy. The restriction was unconstitutional, said the Court, because offended customers have an adequate self-help response: they can throw any troubling pamphlets away. More recently, the federal government has repeatedly failed in its attempts to regulate indecency online, again because self-help—here in the form of software filters that empower Internet users to block speech at the receiving end rather than interfering with speech at its source—calls into question the government’s assertions that the proposed regulations serve a compelling state interest, let alone are sufficiently tailored to pass constitutional muster.

Two intuitions seem to animate these various decisions. First, self-help in these examples makes possible diverse, individuated judgments. It increases the flow of information by allowing willing speakers to reach willing listeners, and it at the same time empowers unwilling listeners to opt out of the communication at low cost. This is attractive because society has a strong interest in allowing each individual to decide for himself what speech to hear. There are of course caveats to this argument; as I will argue below, sometimes individual judgments should be trumped and listeners should be forced to consider information and confront viewpoints that they would rather avoid. However, in most instances, deferring to the individual is attractive, and thus self-help is favored because it offers listeners significant flexibility to choose what they will hear and also what they will ignore.

Second and perhaps more important, self-help in these examples reduces the government’s overall role in regulating speech. The First Amendment is suspicious of government regulation not only because regulation inevitably brings with it the possibility that some manipulative government official will use a seemingly innocuous regulation

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to in fact advance a particular viewpoint—a classic First Amendment concern—but also because even well-intentioned regulations can, given the enormous influence of the state, inadvertently skew public discourse. The V-Chip offers a sharp example for this latter concern. The V-Chip is a government-facilitated technology that helps parents filter television content. Television manufacturers are required to build the filter into every new model thirteen inches or larger; and the filter works by reading ratings that are encoded onto broadcast television signals. Those

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ratings evaluate each program based on a scale that focuses primarily sexual content, language, and violence, and the scale thus makes it easy for parents to filter based on these characteristics. But (and here is the problem) the scale does nothing to help parents filter based on other characteristics, such as religious overtones or political content. The result is that parents who might have previously taken the time to help their children make educated choices based on a combination of all five factors might now opt for the easier approach of just focusing on the government-facilitated three. If that happens—an

open question given how few families currently use the V-Chip—the government’s intervention will have skewed content decisions: the importance of the favored characteristics will be amplified at the expense of characteristics not included in the official rating scheme.

The V-Chip example is all the more troubling because the content skew I describe here was not inevitable. Suppose, for example, that the V-Chip were designed not to filter based on specific predetermined characteristics, but instead to filter using collaborative filtering techniques. My family would identify fifteen programs that we deem appropriate. The collaborative filter would use those choices to identify other families with similar tastes. Then the filter would use the choices made by those other families to make recommendations to my family, and it would use future choices made by my family to make recommendations to those other families. Never would any of us need to be explicit about what characteristics drive us to disapprove of one program while favoring another. And, rather than being limited to choose based on the government’s three characteristics, our pattern of choices might naturally result from a complicated balance of hundreds of different characteristics, namely ones on which we and like-minded families implicitly agree. The government-imposed skew inherent in the current system would be removed; and the very same First Amendment interests championed by self-help in my original examples—individuation, and a reduction in the chance that government regulation will intentionally or inadvertently favor one perspective or subject over another—would at the same time be vindicated.

These two touchstones—individuation, and a reduction in government involvement—do more than help to identify cases where self-help might offer an attractive alternative to government regulation; they also help to identify types of self-help that ought to be disfavored. Heckling, for example, drowns out and discourages speech that otherwise might have been warmly received by a willing audience. It is therefore unattractive on grounds of individuation. Violence similarly is an obstacle to individuation in that it allows a subset of the audience to impose its will on the

remainder. With respect to government involvement, meanwhile, violence and extreme forms of heckling both actually increase the need for government intervention. They do so by creating situations where the government must step in to protect public safety.

Courts sometimes insert a third consideration into the mix: the notion that self-help should be preferred only in instances where it will be “equally effective” in terms of achieving the objective that the government regulation itself would target. I do not embrace this third consideration because, in my view, the First Amendment at the very least must represent a commitment to sacrifice some modicum of efficacy in order to reduce government

speech *ex ante*, among other reasons because speech in rebuttal rarely garners as much attention as the more sensational speech to which it is designed to respond. As Eugene Volokh has previously noted, to claim otherwise in any of these cases is to unfairly impugn the motives and competency of the relevant lawmakers, in essence accusing them of indefensibly opting for law when self-help would have done just as well. Worse, these assertions hide an important step in First Amendment analysis: comparing the loss in efficacy to the gains associated with removing a formal government regulation on speech.

My examples thus far all explore this intuition that, in the context of the First Amendment, the



involvement in speech regulation. Besides, assertions along these lines are squarely inconsistent with the facts of the foundational cases. The option of averting one’s eyes to avoid exposure to an offensive message, for example, is not as protective as a government intervention that would forbid the dissemination of such messages in the first place. The unwilling audience member will typically have to confront at least a glimpse of the offensive message before knowing to turn away, and the process of watching for offensive messages itself necessarily reminds unwilling audience members of exactly the communications they were hoping in the first place to avoid. Similarly, fighting speech with speech is certainly not as effective as prohibiting the troubling

existence of a plausible self-help remedy poses a challenge to the government’s claim that direct intervention is required. But in First Amendment jurisprudence the opposite argument also plays a prominent role: where a “captive audience” has no effective self-help mechanism by which to avoid exposure to a given communication, that absence of a plausible self-help mechanism is taken to be an argument in favor of direct government regulation. The point was perhaps most famously made in *Cohen v. California*, the case I mentioned earlier involving the offensive anti-war jacket. The city of Los Angeles defended the arrest in that case on the ground that, because citizens cannot avoid occasionally coming to the local courthouse for official

business, and once in the courthouse they cannot avoid being exposed to communications originating around them, the city ought to be allowed to prohibit malicious speech within courthouse walls. Captive citizens have no self-help options, argued Los Angeles city officials, and that lack of any plausible self-help alternative justifies a speech restriction that might otherwise not be permissible.

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The captive audience argument was rejected in *Cohen*, but the theory has been invoked in many other instances, and with varying degrees of success.

other instances, and with varying degrees of success. For example, when the city of Shaker Heights, Ohio, decided to allow advertisements to be displayed inside its public transit system, four Justices emphasized audience captivity as an important factor in justifying a government restriction on the types of advertisements allowed, and a fifth would have gone farther and on this argument banned advertisements entirely. By contrast, when the city of Jacksonville, Florida, enacted an ordinance designed to stop drive-in movie theaters from displaying potentially offensive visuals in instances where the images would be visible from the public streets, six Justices endorsed the view that the government can selectively “shield the public” in cases where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,” but the six then announced that in this particular situation the necessary degree of captivity was not realized because drivers could simply look away. Personal residences are a setting where

concerns about captivity have had particular bite, presumably on the rationale that citizens in their homes should have maximal protection from communications they might find offensive. Thus, in the leading case, the Federal Communications Commission was found to have acted within constitutional boundaries when it prohibited the use of certain vulgar words on the radio, both because “material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home,” and because home audiences are captive, with the only plausible self-help solutions being relatively unattractive options like changing the channel at the first sign of offense or refusing to listen to the radio at all.

Important distinctions can be drawn between these several examples, in that they vary with respect to the nature of the speech at stake, the severity of the speech restriction being challenged, and the degree of audience captivity involved. Those details aside, however, the central insight here is that, where relevant at all, the existence of a captive audience is seen to argue exclusively in favor of government restrictions on speech. That is in my view a fundamental mistake. The absence of plausible self-help remedies is not merely a deficiency that the government ought to be allowed to address, but also an opportunity that the government ought not be allowed to without justification squander.

Think of it this way: we as a society have a strong interest in finding ways to ensure that each of us is exposed to a wide variety of conflicting perspectives. Society in fact expends significant social resources in pursuit of this goal, tolerating repulsive speech like that which originates with hate groups like the Ku Klux Klan; accommodating protesters even at abortion clinics where their message will inevitably upset already fragile emotions; requiring broadcasters to air programming devoted to education and news even though viewers would strongly prefer other television fare; limiting plausibly efficient industry consolidation in and across the radio, television, and newspaper industries for fear that consolidation might lead to conformity in thought or perspective; and, among many other examples, spending real tax dollars each election cycle to finance political

campaigns, with much of that money ironically spent to attract the sort of voter attention that the captive audience would naturally provide.

Against this backdrop, audience captivity has genuine and unappreciated appeal. Consider again the courthouse at issue in *Cohen*. Why not allow unfettered speech in the courthouse? Surely it is implausible to think that citizens will stop showing up for city business, or will wear blinders and earplugs as they walk through the public halls. Just the same, it is implausible to think that the government will in response build fewer courthouses in an attempt to indirectly accomplish its original speech-restricting purpose. Thus, harnessing the captive audience in this

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instance would not lead to any significant behavioral responses. Society would end up with a new mechanism by which to promote exposure to diverse views, and that mechanism would come at relatively low cost given that neither unhappy citizens nor an unhappy government would do much to resist the effort. In short, captive audiences offer an inexpensive way to accomplish goals that society today accomplishes through the more costly mechanisms I outline above. That is not to suggest that every captive audience should be harnessed in this manner, or that using captive audiences in this way would fully obviate the need for those other approaches. My point is only that the existence of a captive audience should not be understood solely as a reason to regulate speech. Captive audiences can be put to beneficial use; and that fact is ignored today in First Amendment jurisprudence.

Let me be more concrete. I propose here that the existence of a captive audience is properly understood as a reason to allow unfettered speech, and thus the burden on the government to justify a restriction on speech should be higher in instances where a captive audience is in play than it would be were there no captive audience present. With respect to public

transportation systems, then, audience captivity should make us skeptical of a rule that bans advertisements. Why, we should ask, is the government wasting such a golden opportunity to promote diverse communication? In the courthouse, I would similarly be suspicious of any speech-restrictive rule. There might be good reasons for some such rules—perhaps a restriction is necessary to protect children from inappropriate images, or to ensure that court business can be conducted without too much distraction—but, whatever the reasons, I would judge them by a higher standard than that normally applied, precisely because a captive audience is too valuable an asset to without justification waste. Again, this is in contrast to current thinking, where the absence of audience self-help mechanisms is considered to be a reason to allow government regulation, not an argument against it.

This might sound crazy to some readers; but note that society in other settings already makes strategic use of captive audiences. For example, every four years the major television networks all simultaneously air the presidential debates. This is wasteful, in that the broadcasts are largely redundant; but there is little public opposition because everyone understands that this is an attempt to create artificial captivity. If NBC were to offer the option of watching baseball instead of the presidential candidates, a good many citizens would accept the invitation. Thus the Federal Communications Commission pressures NBC not to let viewers off the hook so easily, and the networks thereby together create a captive audience and use that audience to pass along hopefully revealing information relevant to the election.

My argument here is made in similar spirit. A captive audience is attractive because it offers an opportunity to pressure individuals to do that which they privately disfavor, and to exert that pressure at low cost in terms of unwanted self-help responses. The strategy should not be used to excess. But, where a captive audience naturally exists, the First Amendment should at least ask questions before allowing the government to squander the resource.