

## Orwell's Metaphors

A Response to Derek E. Bambauer, *Orwell's Armchair*, 79  
U Chi L Rev 863 (2012)

David G. Post†

Here, as I understand it, is “The Internet According to Bambauer.” Governments will engage in censorship of Internet content. This is normatively troubling but descriptively undeniable. The autocrats and dictators, of course, will take the lead, hard at work at their censorship machines.<sup>1</sup> But it’s not just the autocrats and dictators; even countries with well-developed democratic governance processes (like our own), and well-developed protections for dissident or otherwise controversial speech (like our own) will do so.<sup>2</sup> Indeed, most (like our own) have already begun to do so,<sup>3</sup> and they are unlikely to stop anytime soon.<sup>4</sup> Not all of this Internet censorship is in pursuit of (normatively) illegitimate goals (for example, suppressing political dissent). If we strip the term of its “pejorative connotation[s]”<sup>5</sup> and define it simply as occurring whenever “a government prevents communication between a willing speaker and a willing listener through interdiction rather than through post-communication sanctions,”<sup>6</sup> some “censorship” pursues perfectly legitimate goals (for example, protecting the rights of copyright holders).<sup>7</sup> Governments have many diverse tools at their disposal for what Professor Bambauer calls “hard censorship” (techniques involving “direct control” or “deputizing intermediaries” where “the state imposes its content preferences directly, either by implementation through computer code or by force of law”<sup>8</sup>) and for “indirect,” or “soft,” censorship (“pretext, payment, and persuasion,” where “the

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† Professor of Law, Beasley School of Law, Temple University.

<sup>1</sup> Consider Derek E. Bambauer, *Orwell's Armchair*, 79 U Chi L Rev 863, 871 (2012).

<sup>2</sup> See id at 871–72.

<sup>3</sup> See id at 866–67. See also Derek E. Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship*, 31 U Pa J Intl L 493, 494 (2009).

<sup>4</sup> See Bambauer, 79 U Chi L Rev at 944 (cited in note 1).

<sup>5</sup> Id at 871.

<sup>6</sup> Id.

<sup>7</sup> See id at 928 (“This framework implicitly concedes that some censorship may be permissible.”); id at 873 (“[T]his Article does not consider the efforts to restrict content that it describes as automatically suspect.”).

<sup>8</sup> Bambauer, 79 U Chi L Rev at 870 (cited in note 1).

state's intervention is far less visible and direct<sup>9</sup>). They are very creative in deploying these tools.<sup>10</sup>

Professor Bambauer argues that we should prefer hard censorship to soft. Not that we should encourage governments to engage in hard censorship, but that we should encourage them (or even demand of them) that when they do censor (and they will – see above), they do so using the tools of hard censorship, because those are more likely to be “open, transparent, narrowly targeted, and protective of key normative commitments such as open communication, equal treatment under the law, and due process.”<sup>11</sup>

Whether America should prevent its citizens from accessing certain content online is a difficult normative question. I am skeptical. Should the government censor the Net, however, it should do so directly—using legislation that is tailored to the problem, that incorporates safeguards informed by the history of prior restraint, and that creates a system that is open, transparent, narrow, and accountable. Hard censorship is superior to soft censorship in achieving legitimacy.<sup>12</sup>

One conclusion Professor Bambauer draws from all this is that legislation like the recently deceased Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act<sup>13</sup> (PROTECT-IP Act or PIPA) and the Stop Online Piracy Act<sup>14</sup> (SOPA), introduction of which ignited a firestorm of criticism in early 2011<sup>15</sup> leading, ultimately and with rather stunning rapidity, to their demise, are “step[s] in the right direction”—not without their “significant shortcomings,” to be sure, but “admirably open and transparent about the censorship they seek to impose.”<sup>16</sup>

Now *there's* a conversation starter. Within the legal academic community, and indeed pretty much anywhere outside of the entertainment industry, support for these legislative efforts was sparse, to put it mildly. Professor Bambauer's apparently contrarian position here will be a tempting

<sup>9</sup> Id.

<sup>10</sup> Id at 885.

<sup>11</sup> Id at 868–69.

<sup>12</sup> Bambauer, 79 U Chi L Rev at 930 (cited in note 1).

<sup>13</sup> S 968, 112th Cong, 1st Sess, in 157 Cong Rec S 2936 (May 12, 2011).

<sup>14</sup> HR 3261, 112th Cong, 1st Sess, in 157 Cong Rec H 7133 (Oct 26, 2011), online at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3261ih/pdf/BILLS-112hr3261ih.pdf> (visited Jan 7, 2013).

<sup>15</sup> See, for example, Larry Downes, Who Really Stopped SOPA, and Why? (Forbes Jan 25, 2012), online at <http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why> (visited Jan 7, 2013) (describing opposition to the proposed acts from Internet users, digital interest groups, and online publishers like Wikipedia and Reddit); John R. Allison, et al, *Professors' Letter in Opposition to "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011"* (PROTECT-IP Act of 2011, S.968) (July 5, 2011), online at <http://blogs.law.stanford.edu/newsfeed/files/2011/07/PROTECT-IP-letter-final.pdf> (visited Dec 21, 2012).

<sup>16</sup> Bambauer, 79 U Chi L Rev at 927 (cited in note 1).

target for mischaracterization. “Bucking Trend, Internet Law Scholar Declares SOPA ‘Step in Right Direction’ and ‘Admirably Open.’”<sup>17</sup> It’s only an “apparently” contrarian position because, as Professor Bambauer is at some pains to point out at numerous junctures,<sup>18</sup> he’s not really a supporter of SOPA or PIPA or anything like them;<sup>19</sup> it’s the process that he applauds, not the substance.

It’s a fine line that he’s navigating: “I don’t like what you’re doing, but here are the ways you can do it better” can start to look an awful lot like encouragement, if one is not careful. Substitute “torture” or “murder” for “censorship,” and you can see the problem.

But in fairness to Professor Bambauer, the ultimate demise of SOPA and PIPA helps to prove his point, well illustrating the virtues of the “hard censorship” approach. Precisely because they were open and transparent attempts to filter Internet content, the people (of the United States, at least) had the chance to look them over and to think about it. And when they did so, they didn’t like what they saw, and they let their elected representatives know how they felt. All to the good.

But it’s not just less censorship Professor Bambauer is after; he wants better censorship. The devil, as usual, is in the details; because the “legitimacy of Internet censorship depends importantly on the design and implementation of decisions about what content to block,”<sup>20</sup> Professor Bambauer sketches out a proposed filtering statute that meets his normative criteria of being “open, transparent, narrowly targeted, and protective of key normative commitments such as open communication, equal treatment under the law, and due process.”<sup>21</sup>

There is much that can (and undoubtedly will) be said about Professor Bambauer’s proposal. My one contribution to the discussion is this: I get “open and transparent”<sup>22</sup> and a preference for content controls that is openly enacted after public discussion and debate over their less visible,

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<sup>17</sup> This, incidentally, will almost certainly help to inflate citation counts for *Orwell's Armchair*. I predict the appearance of a substantial number of sentences in law reviews of the following general form: “SOPA and PIPA generated near-unanimous criticism among academic commentators. See, for example, [insert very long string cite]. But see Bambauer, *Orwell's Armchair* (arguing that SOPA was a “step in the right direction” and “admirably open and transparent”).”

<sup>18</sup> See, for example, Bambauer, 79 U Chi L Rev at 930 (cited in note 1) (describing himself as “skeptical” on the “difficult normative question” of “[w]hether America should prevent its citizens from accessing certain content online”) (emphasis added); id at 927 (not “conced[ing]” the point that “interdicting online content is normatively desirable”); id at 936 (noting that he is not arguing “that censorship is desirable,” but only that it is “inevitable”).

<sup>19</sup> Indeed, it would be odd for Professor Bambauer to take such a position, given that he was a signatory to the *Professors' Letter in Opposition to "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011"* (PROTECT-IP Act of 2011, S. 968). Allison, et al, Letter in Opposition at 7 (cited in note 15).

<sup>20</sup> Bambauer, 79 U Chi L Rev at 929–30 (cited in note 1).

<sup>21</sup> Id at 869.

<sup>22</sup> Id at 927.

and therefore more pernicious, cousins. What I don't get is how hard censorship regimes will be protective of those normative commitments Professor Bambauer refers to—in particular, the commitment to due process of law.

Professor Bambauer identifies the “difficult problem” of the “border-enforcement aspect of filtering.”<sup>23</sup> Filtering, he notes, “targets content hosted on sites beyond American territory,” but the authors or owners of that content

might lack the resources or incentive to defend their rights in the United States. Travel and legal representation are costly, and the site might not consider its American audience worth the bother. This might mean that audience interests are inadequately represented in any proceeding to determine whether filtering is lawful, or desirable. Foreign content providers might create a positive externality for American users: they generate more benefit than they capture through fees or advertising. Unless there is a mechanism that creates standing for American Internet users during censorship proceedings, the societal harm of filtering a site might be greater than the loss to the site's owner. Designing a system to prevent such a discrepancy is difficult. Yet, this Article proposes to try.<sup>24</sup>

But the border-enforcement problem is much more serious than that. It's not merely a matter of determining who has standing to challenge filtering laws; it's a question of how to provide due process of law—a meaningful opportunity to be heard, before a neutral magistrate, in an adversarial proceeding in which one gets to present one's own side of the story, in a forum that can lawfully assert jurisdiction over one or one's property—at this scale to all of those deprived, via the prior restraint of filtering, of their right to speak.

The numbers are going to be astonishingly large—they always are on the Net. Professor James Grimmelman put it well:

The Internet is sublimely large; in comparison with it, all other human activity is small. It has more than a billion users, who've created over two hundred million websites with more than a trillion different URLs, and send over a hundred billion emails a day. American Internet users consumed about ten exabytes of video and text in 2008—that's 10,000,000,000,000,000 bytes [that's 10-with-18-zeroes-after-it bytes]. . . . Watching all the videos uploaded to YouTube

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<sup>23</sup> Id at 929.

<sup>24</sup> Bambauer, 79 U Chi L Rev at 930 (cited in note 1).

alone in a single day would be a full-time job—for fifteen years. The numbers are incomprehensibly big, and so is the Internet.<sup>25</sup>

Professor Bambauer's proposed statute looks like this:

The statute should incorporate strong procedural protections for content owners. Most critically, it should provide defendants with notice and opportunity to respond and prohibit injunctions or orders affecting the material before adjudication occurs. Since most content owners would reside outside the United States, it would be harder to provide adequate notice and for the defendants to obtain local counsel. The Attorney General should be required to notify content owners via e-mail to addresses listed as points of contact on the allegedly unlawful Web page(s) and for the domain name under which they are hosted, via physical mail to all such addresses, and via the method of service of process for the jurisdiction in which the content owner resides, if it can be determined. Next, the statute should toll further action for at least ninety days, to provide time for the defendant to retain counsel and formulate a response. . . .

Filtering decisions should also be reviewed regularly. Orders generated under a filtering statute should expire after one year at most. The law should also provide a means for the content owner to challenge the order, either because the classification of the material as unlawful is in error or because the content has changed or been removed.<sup>26</sup>

It sounds good—surely better than SOPA, which, “open and transparent” though it might have been, solved the due process problem simply by pretending that it wasn't there, “running roughshod” over the principle.<sup>27</sup>

But it's a bit of a phantom; what if the subjects of these filtering orders actually take us up on our offer of due process? What if, presented with a

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<sup>25</sup> James Grimmelmann, *The Internet Is a Semicommons*, 78 *Fordham L Rev* 2799, 2803 (2010).

<sup>26</sup> Bambauer, 79 *U Chi L Rev* at 931–32 (cited in note 1).

<sup>27</sup> David G. Post, *SOPA and the Future of the Internet*, in Jerry Brito, ed., *Copyright Unbalanced: From Incentive to Excess* 37, 47 (Mercatus 2012). As I noted there,

I'm not aware of any SOPA supporter who argues that SOPA actually does provide foreign website operators with a meaningful opportunity to be heard, before a neutral magistrate, in an adversarial proceeding and in a forum that can lawfully assert jurisdiction over them or their property, before depriving them of their ability to communicate with millions of Internet users in the United States.

*Id.* at 47 n 14. And in response to the argument that we needn't worry about this because foreign nationals standing outside US borders don't have due process rights, I wrote:

The Constitution of the United States, remember, doesn't bestow the right to due process upon us; it declares that the government *won't deprive us of the due process rights we all already have* by virtue of the fact that we are human beings. That is the principle on which we should begin building a just, legal regime for our new global place.

*Id.* at 47.

meaningful opportunity to respond, they—or even a small fraction of them—actually did respond, demanding an adjudication on the merits? Due process is very costly, in terms of time and resources and attention. This would be an avalanche, and I’m not sure we’re prepared for an avalanche.

I don’t think that Professor Bambauer—or anyone else, for that matter—has solved this problem (or has persuaded me that hard censorship schemes are any more likely to solve it than any others). How do you scale up due process rights for a global platform with billions of participants?<sup>28</sup>

And finally, a small and probably insignificant quibble. I heard Professor Bambauer give an early version of this paper at a workshop several years ago. I didn’t like the metaphor he chose—Orwell’s Armchair—then, and I’m still not crazy about it. Metaphors matter a great deal in this area,<sup>29</sup> and there’s something that troubles me about this one. It’s not the “armchair” part that bothers me; it’s the manner in which Professor Bambauer has attributed it to Orwell. Professor Bambauer certainly has given us much to worry about regarding the armchair, for example, the condition “where the state eases people into a censored environment through softer, more indirect means.”<sup>30</sup> But it seems a bit unfair to Orwell to make it his armchair; unlike, say, “Orwell’s Oceania” or “Orwell’s Animal Farm,” he didn’t construct it or use it, and associating his name with it in the possessive seems misguided. It’s an Orwellian armchair—but it’s not Orwell’s.

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<sup>28</sup> For a discussion of scale and Internet law, see David G. Post, *In Search of Jefferson’s Moose: Notes on the State of Cyberspace* 60–89, 126–41 (Oxford 2009); David G. Post, The Challenge(s) of Cyberlaw, in Sean A. Pager and Adam Candeub, eds, *Transnational Culture in the Internet Age* 18 (Elgar 2012); Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 *Vand J Enter & Tech L* 695, 698–711 (2011) (tracing the evolution of peer-to-peer file sharing networks and examining the copyright enforcement problems created by the scalability of such networks).

<sup>29</sup> See, for example, Julie E. Cohen, *Cyberspace as/and Space*, 107 *Colum L Rev* 210 (2007).

<sup>30</sup> Bambauer, 79 *U Chi L Rev* at 870 (cited in note 1).