

Listeners' Choices and the First Amendment

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**THANK
GOD
FOR
DEAD
SOLDIER**

**GO
WHAT
YOU
LEAR**

Snyder v. Phelps

“The Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”

The standard view

- Freedom of speech protects speakers
- Listeners are victims or would-be censors
- First Amendment doctrine is mostly about distinctions between different kinds of speech ... but most such distinctions are suspect

Everything you know is wrong

- I'm going to argue that listeners' choices about which speakers to listen to:
 - *Must be* recognized by any coherent theory of free speech—even a speaker-focused one
 - *Should be* recognized as normatively worthy
 - *Are in fact* widely recognized in First Amendment caselaw

I. Choices about speech

Free speech as a matching process

- A billion speakers and a billion listeners = $10^9,000,000,000$ possible matchings
- Who decides who speaks to whom?
 - Speakers
 - Listeners
 - History
 - Government

Two clear cases

Duct Tape: S gives a speech criticizing the mayor. L is in the audience. The police place duct tape over S's mouth.

Air Horn: S gives a speech criticizing the mayor. L is in the audience. The police stand next to L blowing air horns.

Two ambiguous cases

Lonely Speaker: S gives a speech criticizing the mayor in a forest with no one else around. The police arrest S.

Lonely Listener: L stands in a forest listening with no one else around. The police arrest L.

A harder case

Bored Audience: S gives a speech criticizing the mayor. L, who is within hearing range, would like to get up and leave.

Three kinds of unwilling-listener cases

- One-to-one
- One-to-many
- Many-to-one

One-to-many

Controversial Protest: S gives a speech criticizing the mayor and would like to reach as many listeners as possible. X and Y are within hearing range. X is interested in listening to S; Y is not.

Many-to-one

Dueling Speeches: A is giving a speech criticizing the mayor. In the room next door, B is giving a speech praising the mayor. L would like to attend A's speech.

One-to-one

Bored Audience (redux): S gives a speech criticizing the mayor. L, who is within hearing range, would like to get up and leave.

Are you sure that S is the only relevant speaker and L is the only relevant listener?

From a one-to-many case to many one-to-one cases

Controversial Protest (redux): S gives a speech criticizing the mayor and would like to reach as many listeners as possible. X and Y are within hearing range. X is interested in listening to S; Y is not.

What if S could speak only to X?

II. Why free speech?

Two distinct questions

Does a normative theory of free speech focus on *speakers*, *listeners*, or *both*?

Does the theory care about speakers and listeners *for their own sake* or *for society's sake*?

Individualistic theories: liberty and autonomy

- *Speakers' and listeners' liberty*: requires a tie-breaker in cases of conflict
- *Speakers' self-expression*: why do you need an audience?
- *Listeners' self-development*: why are choices about speech different than choices based on speech?
- *Thinkers' self-development*: strong emphasis on mutual consent

Societal theories: truth and democracy

- *Truth-seeking*: no reason to think that speakers are systematically closer to truth than listeners
- *Marketplace of ideas*: in a normal marketplace, transactions take place by mutual consent
- *Self-government*: justifies disregarding both listener and speaker choice in appropriate cases

III. Listener choice in First Amendment cases

Willing speakers and willing listeners

- Listeners stand in for absent speakers: prisoners, foreign political propaganda
- Listeners stand in for inhuman “speakers”: corporate, commercial, and computer speech
- Third-party harms are the same whether we look at speakers or listeners: child pornography, copyright infringement

Unwilling listeners: some principles

- Unwilling listeners who can easily avert their eyes are expected to: FUCK THE DRAFT jackets
- Speakers who are able to choose which listeners to target can be required to: door-to-door solicitors
- Speakers can be required to facilitate listeners' filtering choices: CAN-SPAM
- As listeners' filters get better, proactive restrictions becomes more and more suspect: dial-a-porn

Willing but unwitting listeners

- Listeners protected against some false speech: fraud, commercial speech, defamation
- Some speech that allegedly activates the non-rational brain can be restricted: fighting words, incitement, and obscenity

Protesters and hecklers

- Protesters often get at least one bite at the apple: some people might be willing to listen
- But they can't use overwhelming force like sound trucks or trapping listeners at home
- Some commentators think that hecklers and invited speakers stand on the same footing
- This is obviously wrong: the audience is there to see the invited speaker, not the hecklers

Cheap listening and what it will do

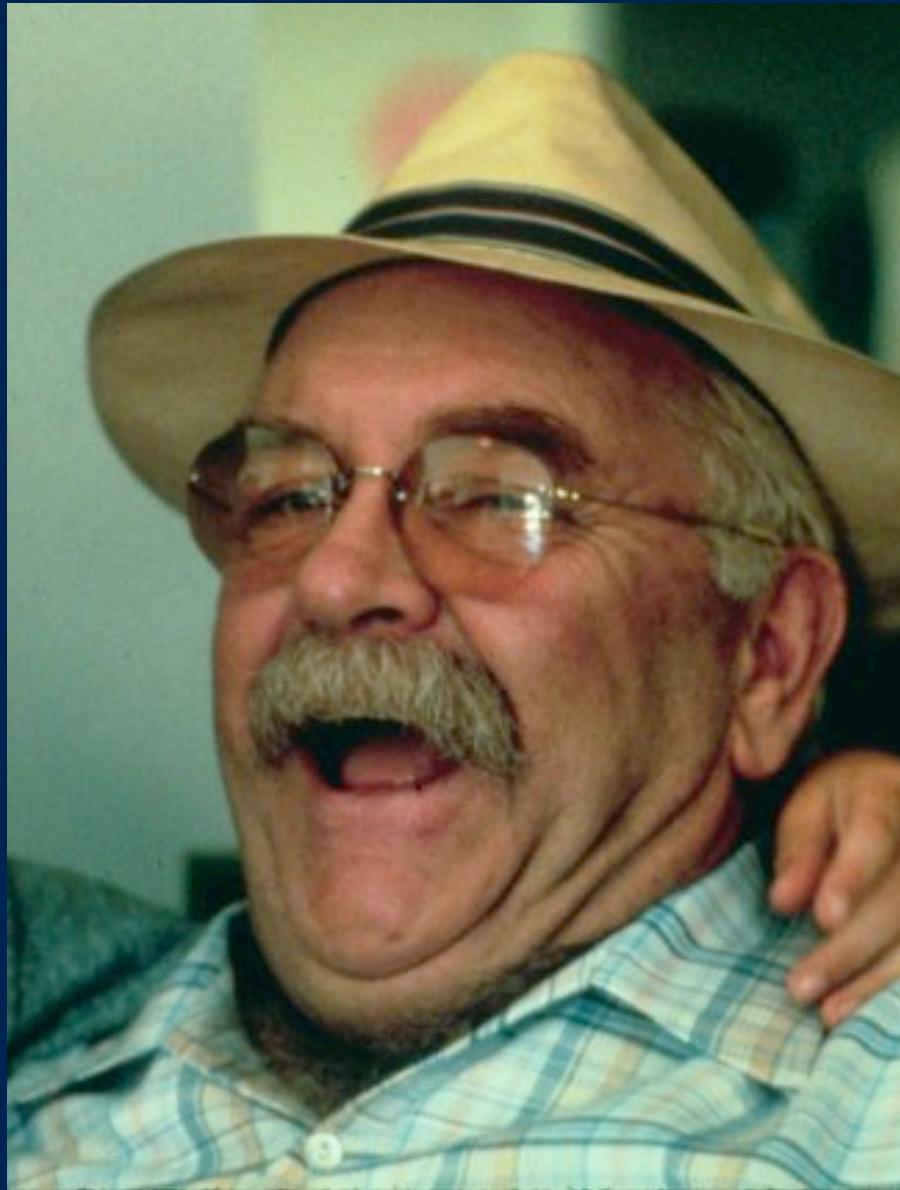
- 20th century mass media created *transmission* bottlenecks: intermediaries (or regulators) made choices about available speech
- 21st century digital media make *selection* the bottleneck: the limited resource is listeners' attention rather than bandwidth
 - This is why I am obsessed with search engines
 - Zeyenp Tufekci: censorship is *denial of attention*

How to think clearly

- Look at the structure of who speaks to whom
- Respect listeners' agency
- Zoom out
- If the ideal of informed listener choices about speech fails, articulate how and why it fails

Coda

Cocoons and bubbles



Do social media suffer from
too much listener choice or
not enough listener choice?

I don't know.

Questions?