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Stephen Dent

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## FREEDING THE CAPTIVE: THE CASE FOR EXPANDING THE CAPTIVE AUDIENCE DOCTRINE

*by Stephen Dent\**

**A**s a fundamental principle of American democracy, freedom of speech encourages a “market place of ideas”<sup>1</sup> where citizens can outwardly express themselves without fear of retribution from the government. Judges repeatedly protect offensive speech even when it is found to be “reprehensible.”<sup>2</sup> The same laws that allow us to speak can sometimes force us to listen to unwanted speech. One Justice noted this dilemma by stating, “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”<sup>3</sup> Offensive speech forces the government to decide who it should protect: the speaker or the listener. It is a balancing act of sorts; the legal system offers governmental protection to two groups whose fundamental rights and interests conflict.

Conflicting free speech rights were recently considered by the Supreme Court in *Snyder v. Phelps*. In *Snyder*, Albert Snyder sought

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\* Stephen Dent is a senior from Salt Lake City, Utah majoring in political science. He will graduate in April 2011 and will attend law school in the fall.

1 Keyshian v. Board of Regents, 385 U.S. 589, 603 (1967).

2 See *R.A.V. v. St. Paul*, 505 U.S. 377, 396 (1992) (“Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”).

3 *U.S. v. Rabinowitz*, 339 U.S. 56, 69 (1950).

damages against the Westboro Baptist Church (the “Church”) for holding a protest near his son’s funeral. His son, Matthew, was killed while serving as a Marine in Iraq and the Church was attempting to spread its message that God hates America for its tolerance of homosexuality and punishes the nation by killing American soldiers. Members of the Church, led by Fred Phelps, traveled from their headquarters in Topeka, Kansas to Westminster, Maryland to picket at the funeral. During their protest, they held up signs that read, “Thank God for Dead Soldiers,” “God Hates the USA,” and “God Hates Fags,” among others.

This paper considers the question of when the government should protect listeners from unwanted speech. More specifically, it will examine the captive audience doctrine (the “Doctrine”), which provides governmental protection for a group or individual that cannot or should not have to leave its space or venue to avoid hearing unwanted speech.<sup>4</sup> Among the Supreme Court’s questions in *Snyder* was whether funeral goers constitute a captive audience and are therefore entitled to protection from unwanted communication.<sup>5</sup>

Despite delineating a few specific events and locations that warrant protection from unwanted communication, the Court has “applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.”<sup>6</sup> Although the Court has yet to provide a wide-ranging definition of a captive audience, it “declined to expand the captive audience doctrine” in *Snyder*.<sup>7</sup> Instead, it briefly discussed the issue and ruled that the funeral goers were not captive. This ruling was indeed accurate because the funeral party barely saw and did not hear the protest; thus, they were not held captive to the Church’s speech. Despite the correct decision, the

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4 See *Frisby v. Schultz*, 487 U.S. 474 (1988).

5 *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009).

6 See *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (upholding an ordinance that allows a homeowner to restrict the delivery of offensive mail to his home); see also *Frisby v. Schultz*, 487 U.S. 474, 476 (1988) (upholding an ordinance that prohibits picketing “before or about” an individual’s home); *Snyder v. Phelps*, 562 U.S. LEXIS 1903, at \*29 (2011).

7 *Snyder*, 562 U.S., at \*29 (2011).

Court missed an opportunity to expand on the Doctrine and establish a clearer definition. Perhaps its muteness was due to the funeral party's failure to qualify as a captive audience; perhaps the other key issues the Court addressed in the case trumped the importance of the Doctrine.<sup>8</sup>

This paper argues that the Court should expand the Doctrine in order to define what group or individuals are considered captive and therefore should be protected from unwanted communication. In order to expand the Doctrine, this paper proposes two criteria that should define an audience as captive:

1. The audience must not be able to or should not have to leave its space to avoid the communication. Specifically, the audience must be participating in a significant life event in order to gain protection against unwanted speech.
2. The communication must be audible and must disrupt the event in an intolerable manner.<sup>9</sup>

These criteria of the captive audience doctrine would establish a clear definition for an issue that has yet to be clearly defined. This paper will discuss each of the criteria in depth and explain the necessity of expanding the Doctrine.

## I. BALANCING RIGHTS OF THE SPEAKERS AND LISTENERS

A captive audience is a group or individual that cannot avoid a message or should not have to leave their space to avoid the message.<sup>10</sup> To balance the rights of speakers and listeners, it is necessary to determine when individuals ought to have government protection from unwanted communication. Determining when this protection should be afforded hinges on the expansion of the Doctrine.

For example, individuals using public transportation or participating in work meetings have been considered captive because they

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8 *Id.* (The Court was also presented with the question of whether tort liability can be found in a case involving private individuals and concerning a private matter).

9 *Cohen v. California*, 403 U.S. 15, 21 (1971).

10 *Frisby*, 487 U.S. 474.

cannot escape unwanted speech.<sup>11</sup> To argue this point, Justice Douglas reasoned that public transportation is essential to many people today; therefore, individuals should not have to find another form of transportation in order to avoid unwanted speech.<sup>12</sup> Some other examples of potential captive audiences are individuals at medical facilities, places of worship, and welfare offices.<sup>13</sup> Without exception, individuals in their own homes compose a captive audience, for they should not have to leave the sanctuary of the home to avoid unwanted speech.<sup>14</sup>

States have already established legislation that protects captive audiences. After states establish legislation, the burden often rests on the courts to resolve whether the various bills are constitutional. For example, the Court ruled in *Hill v. Colorado* that individuals who are subject to persistent, unwanted communication are captive and warrant government protection.<sup>15</sup> In *Hill*, the Court upheld a Colorado ordinance that prohibited protestors within a hundred foot radius of an abortion clinic. Despite recognizing an individual's right to attempt to persuade, the Court also recognized the listener's right to be free from unwanted speech.<sup>16</sup> Justice Stevens justified the decision by stating that the ordinance did not regulate speech, but rather regulated the time and place that some speech may occur. Also, speech was not prohibited based on content or disagreement with its message. Instead, it was regulated in an attempt to protect citizens from unwanted communication.<sup>17</sup>

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11     Lehman v. Shaker Heights, 418 U.S. 298 (1974).

12     Public Utilities Comm'n v. Pollock, 343 U.S. 451 (1952).

13     Caroline M. Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 941-48 (2009).

14     See FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring) ("Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . a different order of values obtains in the home.").

15     Hill v. Colorado, 530 U.S. 703 (2000).

16     *Id.* at 707.

17     *Id.*

In response to the Church's funeral protests, forty-two states have passed legislation that restrict the time and place of protests surrounding a funeral.<sup>18</sup> Many of them mirror Senator Evan Bayh's proposed legislation in 2006 that aimed to prohibit protests within 300 feet from the funeral and within an hour of the beginning or end of the funeral.<sup>19</sup> Funeral protest bills have spurred mixed reactions among the American public and the legal community. Federal judges have both affirmed and invalidated legislation on

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18 See ALA. CODE § 13A-11-17 (LexisNexis Supp. 2007); ARIZ. REV. STAT. ANN. § 13-2930 (2011); ARK. CODE ANN. § 5-71-230 (2007); COLO. REV. STAT. § 13-21-126 (2007); DEL. CODE ANN. tit. 11 § 1303 (2007); FLA. STAT. § 871.01 (2007); GA. CODE ANN. § 16-11-34.2 (2007); IDAHO CODE ANN. § 18-6409 (Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2008); IND. CODE ANN. § 35-45-1-3 (LexisNexis Supp. 2008); IOWA CODE ANN. § 723.5 (West Supp. 2008); KAN. STAT. ANN. § 21-4015 (2007); KY. REV. STAT. ANN. §§ 525.055, .145, .155 (LexisNexis Supp. 2007); LA. REV. STAT. ANN. § 14:103 (Supp. 2008); ME. REV. STAT. ANN. tit. 17A, § 501-A (Supp. 2007); MD. CODE ANN. CRIM LAW § 10-205 (LexisNexis Supp. 2007); MASS. ANN. LAWS ch. 272, § 42A (2007); MICH. COMP. LAWS ANN. §§ 123.1112-13 (West 2007); MINN. STAT. ANN. § 609.501 (West Supp. 2008); MISS. CODE ANN. § 97-35-18 (West Supp. 2007); MO. ANN. STAT. § 578.501 (West Supp. 2008); MONT. CODE ANN. § 45-8-116 (2007); NEB. REV. STAT. §§ 28-1320-01 to 1320.03 (2007); N.H. REV. STAT. ANN. § 644:2-b (LexisNexis Supp. 2007); N.J. STAT ANN. § 2C:33-8.1 (West Supp. 2008); N.M. STAT ANN. § 30-20B-1-5 (West Supp. 2007); N.Y. PENAL LAW § 240.21 (McKinney 2000); N.C. GEN. STAT. § 14-288.4 (2007); N.D. CENT. CODE § 12.1-31-01.1 (Supp. 2007); OHIO REV. CODE ANN. § 3767.30 (LexisNexis 2005 & Supp. 2008); OKLA STAT. tit. 21, § 1380 (2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2008); S.C. CODE ANN. § 16-17-525 (Supp. 2007); S.D. CODIFIED LAWS §§ 22-13-17 to 22-13-20 (2007); TENN. CODE ANN. § 39-17-317 (2007); TEX. PENAL CODE ANN. §§ 42.055, 42.04 (Vernon Supp. 2008); UTAH CODE ANN. § 76-9-108 (Supp. 2007); VT. STAT. ANN. tit. 13 § 3771 (Supp. 2007); VA. CODE ANN. § 18.2-415 (Supp. 2008); WASH. REV. CODE ANN. § 9A.84.030 (West Supp. 2008); WIS. STAT. ANN. §§ 947.01, 947.011 (West 2005 & Supp. 2007); WYO. STAT. ANN. § 6-6-105 (2007).

19 See Dignity for Military *Funerals* Act of 2006, S. 2453, 109th Cong. § 2 (2006).

constitutional grounds.<sup>20</sup> In January 2011, Arizona state representatives unanimously passed legislation that regulates time and place of funeral protests. The legislature passed the bill after the Westboro Baptist Church announced their plans to picket at the funeral of Christina Green, a nine-year old girl who was fatally shot in the recent Arizona shooting in which Representative Gabrielle Gifford was critically wounded.<sup>21</sup>

The proposed expansion of the Doctrine does not limit the content of speech, but instead imposes reasonable time and place restrictions on unwanted communication. Furthermore, the Doctrine gives states the right to protect their citizens from unwanted speech through forming legislation that complies with the criteria. Not only would funeral goers gain government protection, but any individual participating in a significant life event and qualifying as a captive audience would be protected from unwanted speech.

#### *Criterion #1*

The Court has already provided governmental protection for some groups it considers as captive audiences. *Hill v. Colorado* protected listeners from unwanted, confrontational face-to-face communication with other individuals.<sup>22</sup> Other groups that have been defined as captive audiences are those at graduation ceremonies, medical facilities, and places of employment, especially work meetings.<sup>23</sup> This is because individuals cannot or should not have to leave these events in order to avoid unwanted speech. Some universi-

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20 See *Phelps v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (upholding an Ohio ordinance that restricts the time and place of funeral protests); *Phelps v. Nixon*, 545 F.3d 685 (8th Cir. 2008) (reversing district court decision to dismiss the Church's motion for temporary injunction of a Missouriian ordinance that restricts the time and place of funeral protests).

21 ARIZ. REV. STAT. ANN. § 13-2930 (2011).

22 *Hill v. Colorado*, 530 U.S. 703 (2000).

23 See Caroline M. Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939, 941-48 (2009); Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 65 (2010).

ties have also been allowed to restrict offensive speech at sporting events, reasoning that spectators would be held captive to offensive, unwanted speech.<sup>24</sup> These measures were taken when parents started complaining that their children were subject to offensive, vulgar chants from the student section.<sup>25</sup>

Although different courts have issued various decisions and definitions regarding captive audiences, this criterion seeks to clarify the definition. First, it maintains that the audience is captive if it cannot or should not quit its space to avoid unwanted speech. Also, it defines what types of events reasonable individuals should not be forced to leave. In this paper, these events have been termed significant life events. In order to protect participants of significant life events from unwanted speech, it is necessary to determine what actually qualifies as a significant life event. This can be done by using the given definitions of significant and event and by also using the reasonable person test. Typical events that would be considered significant life events include weddings, religious ceremonies, funerals, and abortions. The court has already upheld that certain events are in fact protected. In *Hill v. Colorado*, the U.S. Supreme Court ruled that an individual has captive audience protection while undergoing an abortion.<sup>26</sup>

What qualifies as a significant life event? The basic definitions of these terms combined with the reasonable person standard, give us certain criteria that an event must meet to be considered protected by the Doctrine. According to the *Merriam-Webster Dictionary*, significant is defined as “having meaning.” By the same source, “event” is defined as “a noteworthy happening” and “a social occasion or activity.”<sup>27</sup> Because these definitions can be at times considered overly vague and all-encompassing when trying to apply to a given situation, a reasonable person standard must also be met. Would a

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24 See Gregory Matthew Jacobs, Comment, *Curbing Their Enthusiasm: A Proposal to Regulate Offensive Speech at Public University Basketball Games*, 55 CATH. U. L. REV. 547, 548 (2006).

25 *Id.*

26 *Hill*, 530 U.S. 703.

27 MERRIAM-WEBSTER DICTIONARY 788, 2116 (11th ed. 2003).



reasonable person consider this event to have significant meaning to the one involved in the event? Would a reasonable person deem the event “noteworthy”?

Those attending a religious event, for example, are participating in a significant life event. Many people consider church meetings to be very important to their well-being and happiness. These ceremonies can include weekly religious observance or a singular, “once-in-a-lifetime” ceremony, like a baptism or a wedding. If speech disrupts these ceremonies and forces participants to either leave the event or endure unwanted speech, these participants would be considered a captive audience and would afford protection. The circumstances of a religious ceremony would restrict the participating audience’s ability to walk away or to talk back to those expressing objectionable speech. Such a limitation on one’s ability to avoid or confront objectionable content should limit the speaker’s freedom.<sup>28</sup>

There are many other life events which are not necessarily religious in nature, but still hold a valuable significance in one’s life. Weddings and funerals provide two obvious examples of significant occasions in a person’s life. However, many other events can fall under the definition of significant life event. This criterion delineates what events can be considered significant. In doing so, it holds the events to a standard of noteworthiness and rareness.

Consider, for example, two friends going on their morning jog. While on the run, protestors are holding an offensive rally in opposition to a charity that the runners supports. The protest includes chants, speeches, and picketing. The runners’ activity would not qualify as a significant life event. The friends frequently go jogging and although there may be a level of personal significance, it happens so frequently that the value of the significance is highly diminished. A daily routine cannot be considered noteworthy or memorable. The event is deemed insignificant not because of the activity, but because it does not qualify as significant nor as an event.

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28 See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)(court ruled in favor of New York City’s sound amplification guidelines because it protected citizens from unavoidable noise).

Now consider the same people attending an annual fundraiser that helps raise money for the charity they support. The event is significant in that it happens infrequently. The activity is an event in that it is a special occasion that is noteworthy and participants in the event will want to memorialize the activity. If the same offensive protest mentioned above disrupted the events in an intolerable manner, the fundraiser participants would be considered captive.<sup>29</sup> A protest at the event is forcing the participants to quit their space in order to avoid unwanted speech. The group, therefore, is captive and merits protection from the unwanted speech.

The freedom of speech is valuable and will remain paramount, but it is not absolute. In order to balance the rights of the speakers and hearers, the Court must protect citizens participating in significant life events. Governmental protection for the listeners will guarantee that citizens do not have to fear unwanted speech at important events in their lives. This includes funeral-goers, for they would now warrant governmental protection from unwanted speech while they mourn their loved ones.

#### *Criterion #2*

This criterion lays out the necessary form of protest that can reasonably be considered unwanted. First, the communication must be audible to the audience. Visual communication has been protected by the Court in *Cohen v. California*; the Court overturned a disturbing the peace conviction of a man protesting the Vietnam War.<sup>30</sup> The protestor, Paul Cohen, was arrested for wearing a jacket that said “F\*\*\* the Draft” inside a courthouse. The Court reasoned that onlookers of the jacket could avoid the message by “simply averting their eyes” and therefore would not be held captive.<sup>31</sup> Along those same lines, objectionable and unwanted content sent through the mail to someone’s place of residence does not hold residents captive because they have the ability to simply dispose of the mail. Conse-

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29     Cohen v. California, 403 U.S. 15, 21 (1971).

30     *Id.*

31     *Id.*

quently, for an audience to be held captive, the communication must be audible to the audience.

Audible speech must also be expressed in an intolerable manner that holds the audience captive to the message. The intolerable manner principle was also established in *Cohen* when Justice Harlan II wrote, “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>32</sup> The mere act of an audience hearing unwanted communication does not necessarily qualify the individuals as captive.<sup>33</sup> Instead, the communication must disrupt a significant life event and hold the audience captive to its message. An audience is not captive if it can neither see nor hear the protest, even if the protest’s message is directly targeted at the audience. Disruption of an intolerable manner is when the event is disrupted to the point that it can no longer be carried out in its usual manner. It is when the event goers are forced to leave the event in order to avoid the speech.

Captivity to a message requires the inability to escape the communication. Inability to escape can be a literal physical incapacity to quit a space. Courts have ruled that this incapacity exists in such events as medical procedures and transportation.<sup>34</sup> Inability to escape also exists when it is unreasonable to leave a certain space to avoid a message. Using the example in Criterion #1, the fundraiser attendees would not be considered a captive audience due to the mere presence of protestors. They will, however, be captive if the protestors’ communication is audible and loud enough to disrupt the event and make it impossible for individuals to avoid the message. Since the fundraiser would qualify as a significant life event, it is not reasonable for participants to leave the event in order to avoid the message. Conversely, individuals participating in weddings, funerals,

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32 *Id.*

33 *See* *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970).

34 *Hill v. Colorado*, 530 U.S. 703 (2000); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

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als, and other significant events should not have to leave the event to avoid speech that disrupts the activity in an intolerable manner.

## II. CONCLUSION

The First Amendment has provided American citizens with a marketplace of ideas wherein the government has protected freedom of speech. The Court has protected this freedom on various occasions. When the Westboro Baptist Church started protesting at the funerals of fallen soldiers, grieving families turned to the same government that has traditionally protected the freedom of speech to protect their freedom to not hear. We now face the question of which right is paramount: the speaker's or the listener's.

Our justice system's protection of speech must be accompanied by the protection of the captive audience against unwanted speech. The Captive Audience Doctrine balances these two rights by protecting citizens from unwanted communication by allowing states to establish reasonable time and place restrictions. The Doctrine requires that an audible form of communication disrupts a significant life event in such a way that the event cannot be carried out in its usual manner. Instead of prohibiting speech based on content, the Doctrine would act as a protection for captive audiences by offering them relief from uninvited speech. Furthermore, it would establish a clear definition of what audiences can reasonably be considered captive.

Government protection of the captive audience liberates listeners from unwanted communication and protects the significance of the event. The American legal system must balance the rights of the speaker and the listener. It must protect individuals participating in significant life events from unwanted speech. It must give us the right to bury our dead in peace. It must free the captive.