SNYDER V. PHELPS: THE FREEDOM OF SPEECH VERSUS FUNERAL SANCTITY SHOWDOWN IN THE SUPREME COURT

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INTRODUCTION[1]

A case is pending in the U.S. Supreme Court that will put to the test whether the First Amendment to the Constitution protects offensive speech just as rigorously as it protects the speech we value. On March 3, 2006, Lance Corporal Matthew Snyder was killed in the line of duty in Iraq. At his funeral, the Westboro Baptist Church, a Kansas-based church known for its "fire and brimstone" fundamentalist religious faith, protested with signs bearing phrases such as "God Hates the USA," "God hates you," "Semper fi fags," and "Thank God for dead soldiers."[2] Albert Snyder, the deceased soldier's father, filed suit against the Westboro Baptist Church and Fred Phelps, founder of the church, alleging five state tort claims—defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy.[3] A jury returned a verdict in favor of Snyder, awarding him $2.9 million in compensatory damages and a total of $8 million in punitive damages.[4]

On appeal, the Fourth Circuit reversed, holding that the Phelps's expression was protected speech under the First Amendment and was therefore not subject to tort liability.[5] The Fourth Circuit's decision, and the upcoming decision by the U.S. Supreme Court, has commanded the attention of the nation, which has widely condemned the actions of the Westboro Baptist Church. The dilemma is that the First Amendment protects speech regardless of its offensive nature and the effect it may have on its audience, because to punish offensive speech may lead to the censorship of unpopular ideas. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional

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[1] On March 2, 2011, the Supreme Court held that the First Amendment protected the Westboro Baptist Church's practice of protesting military funerals. *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011). This article was published on the day of that decision.

[2] Snyder v. Phelps, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008), *rev'd* 580 F.3d 206 (4th Cir. 2009). The Phelps protest and picket at military funerals to espouse their religious belief that "God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military." *Id.*

[3] *Id.* at 571.

[4] Snyder v. Phelps, 580 F.3d 206, 215 (4th Cir. 2009).

[5] *Id.*

protection."[6]

The Supreme Court, which heard oral arguments on the case on October 6, 2010, will attempt to set aside its emotional reactions and decide the legal issue of whether Snyder may recover under a speech-based tort claim for the injury he suffered as a result of the Phelps's behavior or whether the Phelps's egregious conduct is constitutionally protected. If the Justices cannot set their emotional responses aside, we may see a decision which crafts a "funeral exception" to the First Amendment's right to freedom of speech, thus beginning a long journey down a slippery slope that slowly erodes the fundamental principle that the First Amendment protects individuals' opinions—no matter how offensive or disagreeable they may be.

I. *SNYDER V. PHELPS*: HISTORY OF THE CASE

Phelps began protesting at funerals of slain Iraqi and Afghan war veterans in 2005 to spread the belief that those wars were the ultimate result of America's willingness to embrace homosexuality.[7] At the military funeral of Matthew Snyder in March 2006, Phelps picketed, holding signs bearing phrases such as "God Hates the USA," "God hates you," "Semper fi fags," and "Thank God for dead soldiers."[8] During the funeral, Phelps and his followers were not noisy, did not block access to the funeral, and complied with local ordinances and police direction to remain at least several hundred feet away from the funeral.[9] Albert Snyder did not even see the protesters' signs until they were broadcast on television later that day.[10] Phelps also published an "epic" on their website mentioning Snyder and his son, asserting that the Snyder's "raised [their son] for the devil" and making other such assertions.[11] Snyder originally brought five claims against the defendants: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy.[12] The district court granted the defendants' motions for summary judgment as to the defamation and publicity given to private life claims, and a jury returned a

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[6] FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).
[7] *Snyder*, 533 F. Supp. 2d at 571–72.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Snyder v. Phelps, 580 F.3d 206, 225 (4th Cir. 2009); Brief for Petitioner at 7–8, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751).
[12] *Snyder*, 580 F.3d at 211.

verdict in favor of the plaintiff on the remaining three claims, awarding Snyder $2.9 million in compensatory damages and $8 million in punitive damages.[13]

The Court of Appeals for the Fourth Circuit reversed, holding that the protesters' speech at the funeral and the online "epic" were protected by the First Amendment and therefore not subject to tort liability.[14] The Fourth Circuit noted that while the First Amendment does not categorically protect statements of "opinion," it will protect fully "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[15] The court went on to note that there are two subcategories of speech that cannot be reasonably interpreted as stating actual facts about an individual and thus constitute constitutionally protected speech. First, the First Amendment protects statements on matters of public concern which fail to contain a "provably false factual connotation."[16] Second, rhetorical statements containing "loose, figurative, or hyperbolic language" are also entitled to First Amendment protection.[17] The Fourth Circuit interpreted these subcategories as dispositive of the issue without regard for the public or private status of the plaintiff.[18]

The Fourth Circuit found that the Phelps's statements at the funeral involved matters of public concern, such as the issue of homosexuality in the military and the sex-abuse scandal in the Catholic Church, which are issues of social, political, or other interest to the community.[19] Regardless of whether the speech involved matters of public concern, the court concluded that the picketers' signs and the online "epic" both contained hyperbolic rhetoric and did not assert provable facts about an individual, thus they could not reasonably be interpreted as asserting actual and objectively verifiable facts.[20] Consequently, the Fourth Circuit held that the Phelps's statements at the funeral and the

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[13] *Id.* The district judge in his post-trial opinion reduced the amount of punitive damages to reach an aggregate total of $5 million. *Id.* at 215–16.

[14] *Id.* at 226.

[15] *Id.* at 218.

[16] *Id.* at 219.

[17] *Id.* at 220.

[18] In fact, the Fourth Circuit criticized the District Court for focusing solely on the issue of the public/private status of the plaintiff, stating that in so doing, the lower court ignored the legal issue concerning the nature of the speech and thus failed to assess whether the statements could reasonably be interpreted as asserting "actual facts" about an individual or whether they contained merely rhetorical hyperbole. *Id.* at 222.

[19] *Id.* at 223.

[20] *Id.*

online "epic" were constitutionally protected and thus immune from tort liability.[21]

Albert Snyder, challenging the Fourth Circuit's decision, filed a petition for a writ of certiorari, which was granted on March 8, 2010. [22] The Supreme Court will consider three questions: First, does the Supreme Court's decision in *Hustler Magazine v. Falwell*[23] also apply to suits not involving public figures? Second, do free speech rights "trump" freedom of religion and assembly? And third, is someone attending a funeral a "captive audience" entitled to special protection from "unwanted communications?"[24]

II. *HUSTLER MAGAZINE V. FALWELL*

The Supreme Court's First Amendment jurisprudence has developed various standards for determining when the First Amendment acts as a complete or partial bar to tort liability. In *New York Times v. Sullivan*,[25] the Supreme Court first declared that the First Amendment may limit state tort liability arising from speech, recognizing that state compensatory interests must sometimes be subordinated in order to protect important First Amendment interests in the free flow of ideas and opinions on matters of public concern.[26] The Supreme Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "actual malice," a term defined as "with knowledge that it was false or with reckless disregard" for its truth.[27] This constitutional protection of free speech has been expanded to apply to defamation actions against public *figures* as well as public *officials* in cases involving statements of public concern,[28] but not in the context of defamation suits against *private* persons involving statements of *public* concern.[29]

Hustler presented the Supreme Court with the question whether the *New York Times* standard applied to tort claims

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[21] *Id.* at 226.

[22] Snyder v. Phelps, 130 S. Ct. 1737 (2010); Petition for Writ of Certiorari at i–ii, *Snyder*, 130 S. Ct. 1207 (No. 09-751).

[23] 485 U.S. 46 (1988).

[24] Petition for Writ of Certiorari, *supra* note 19, at i–ii.

[25] 376 U.S. 254 (1964).

[26] *Id.* at 283–84.

[27] *Id.* at 280.

[28] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163−65 (1967).

[29] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974). *Gertz* would only require a showing of actual malice before preferred or punitive damages are applied. *Id.* at 350.

other than defamation, specifically, intentional infliction of emotional distress.[30] The Court employed a balancing test, weighing the First Amendment interests against the state's interest in protecting its citizens from intentionally inflicted harm.[31] It concluded that these competing interests could be properly balanced only by applying the *New York Times* standard, and held that public figures can only recover for the tort of intentional infliction of emotional distress where the speech involved matters of public concern by additionally showing that the statement contains a false statement of fact which was made with actual malice.[32] The *Hustler* Court grounded its ruling in the special status of public officials, who, unlike private citizens, voluntarily assumed the risk of closer public scrutiny and moreover have greater access to channels of communication which gives them a better opportunity to counteract false statements than private individuals have.[33]

The Supreme Court's emphasis on the public status of plaintiffs and its willingness to adopt higher barriers for constitutional protection in such cases, in addition to the Court's unwillingness to apply such heightened burdens on private individuals in *Gertz*, suggest that it will be reluctant to extend *Hustler* to emotional distress claims asserted by private plaintiffs. Furthermore, the Court will likely hold that the parties involved here are private because although the case has generated a lot of publicity, the Court normally requires that the plaintiffs have "thrust themselves to the forefront" of a public controversy instead of being dragged into it by the other party.[34]

III. FREEDOM OF SPEECH VS. FREEDOM OF RELIGION AND PEACEFUL ASSEMBLY

In his petition to the Supreme Court, Snyder claims that the Fourth Circuit's decision subordinated his First Amendment rights of free exercise and peaceful assembly to the Phelps's free speech rights.[35] But as Phelps argues, and the Court is likely to agree, the Snyder family's right to engage in a religious ceremony free from interference was not infringed because the Phelps'

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[30] Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).
[31] *Id.* at 50–51.
[32] *Id.* at 56.
[33] *Id.* at 51–52.
[34] *Gertz*, 418 U.S. at 345.
[35] Brief for Petitioner, *supra* note 9, at 55.

conduct caused no such interference—rather, the Snyder's were unaware of their presence until after the funeral.[36] The protest did not audibly or physically interrupt the ceremony or interfere with it in any cognizable way. At most, the protest may have lessened the psychological worth and satisfaction of the funeral and emotionally disturbed the Snyder's.[37] However, it caused no legally cognizable interference with the ceremony and thus the Court will likely dismiss this claim in short order.

IV. THE CAPTIVE AUDIENCE DOCTRINE

The captive audience doctrine of the Supreme Court's free speech jurisprudence recognizes that a speaker's right to communicate is not absolute and in certain circumstances may be outweighed by the privacy rights of an individual.[38] The government may act to restrict speech that unreasonably invades the privacy interests of an unwilling listener who is "captive" in the sense that he cannot avoid objectionable speech.[39] This doctrine is most clearly associated with the home, where privacy rights are heightened, but has also been given application to various non-residential locations where the captive listeners' "substantial privacy interests are being invaded in an essentially intolerable manner."[40] The Court has recognized heightened privacy interests in a narrow category of non-residential locations, including hospitals and medical facilities, largely due to their nature as a refuge and the vulnerable condition of patients that reside therein.[41] The substantial interest in protecting an individual's physical and psychological well-being in these situations justifies regulations of offensive intrusions that are narrowly tailored to protect these interests while not unduly restricting the protesters' free speech.

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[36] *Id.* at 58.

[37] Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 310 (2010).

[38] Heffron v. Int'l Soc'y for Krishna Conscientiousness, Inc., 452 U.S. 640, 647 (1981).

[39] Kovacs v. Cooper, 336 U.S. 77, 86 (1949); Jessica C. Collins, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1259 (2010).

[40] Cohen v. California, 403 U.S. 15, 21 (1971). In public places, the Court has found a minimal privacy interest and has thus placed the burden on the viewer or listener of offensive and unwanted communications to avoid "further bombardment of his sensibilities." Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975).

[41] NLRB v. Baptist Hosp. Inc., 442 U.S. 773, 783−84 (1979).

The Supreme Court has observed in a different context that "family members have a personal stake in honoring and mourning their dead and objecting to unwanted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person."[42] Further, the sanctity of cemeteries and burial rites has long been recognized and respected,[43] and American courts have repeatedly described a "right" to a peaceful funeral.[44] This right is especially deserving of protection because at funerals, the family is at its most vulnerable. Another reflection of this strong public interest is that the federal government and forty-six states have enacted statutes regulating protests at funerals within the last two years.[45] Accordingly, there is arguably a substantial privacy interest at stake in the context of funerals and memorial services.

The second prong, whether the individual's substantial privacy interest has been invaded in an essentially intolerable manner, is more difficult. The Supreme Court has traditionally required that the challenged speech cause some sort of physical or aural invasion of a zone of privacy, and in public "the burden normally falls upon viewers to avoid further bombardment of [their] sensibilities simply by averting [their] eyes."[46] But the Court has been more willing to recognize "the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'"[47] Thus, the Court will be more likely to protect the interests of funeral goers when they are unable to avoid the offensive communications which intrude upon their reasonable expectation of privacy in a non-residential location. In this case, Snyder was unaware of the presence of the protesters until after the funeral, which makes it unlikely that the Court will find that the protest created a "confrontational setting" which would

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[42] Nat'l Archive & Rec. Admin. v. Favish, 541 U.S. 157, 168 (2004).

[43] *Id.* at 167.

[44] 11A AM. JUR. 2D *Dead Bodies* § 13 (2010). The right to a decent burial is manifested in the law in different ways, one of which is the existence of a specific category within the common law tort of negligent infliction of emotional distress for interference with proper burials. RESTATEMENT (THIRD) OF TORTS § 46 (Tentative Draft No. 5, 2007).

[45] Christina Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 161–74 (2008).

[46] Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

[47] Hill v. Colorado, 530 U.S. 703, 718 (2000).

constitute an invasion of the Snyder's privacy interests.[48] Furthermore, it is likely that Snyder and his family would not have objected to the presence of peaceful protesters bearing supportive messages, which suggests that the presence of the protesters was not the objectionably intrusive action but rather the offensive nature of the protest was the "intrusion."' But offensive speech cannot be regulated simply because of its content, and therefore without some level of intrusion the Court is unlikely to find that the Snyder's substantial privacy interest in burying his son in peace was invaded in an essentially intolerable manner.

CONCLUSION

Of the three questions posed to the Supreme Court, the only one which will likely cause the most discussion is the first, regarding the public/private status of the parties and the statement under the *Hustler* standard. Here, the Court faces several serious policy concerns that may influence its decision in either way. If the Court decides that the parties are private and the dispute involves purely private speech so that the First Amendment does not apply and recovery under state tort law is allowed, it may effectively open the door for future regulation of speech based on its offensive content. This would erode the core tenets of the First Amendment—that speech may not be regulated due to its content and would lead to the suppression of minority and unpopular opinions by the majority. On the other hand, if the Court decides to affirm the Fourth Circuit's decision and rule in favor of Phelps, its decision will be highly criticized by the public who feel as though the Snyders's rights have been violated in the most fundamental way. Debate from each side continues to engulf the nation as it awaits the Supreme Court's decision in this case.

[48] *Id.*