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• *Funerals, Fire, and Brimstone II: Reactions* •

AFTERTHOUGHTS ON *SNYDER V. PHELPS*

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From a scholarly and professional perspective, the United States Supreme Court's decision in Snyder v. Phelps[1] added little to the development of free speech doctrine. As a normative matter, the Court's role in the resolution of this case is hard to justify or explain.

Given the clear consensus of the Justices that an intentional infliction of emotional distress (IIED) claim and damage award, on the facts of this case, violated the free speech clause of the First Amendment, one can only wonder why the Court thought it appropriate to grant review in this matter in the first place. The Fourth Circuit had emphatically reversed the District Court's decision in plaintiff's favor.[2] Constitutional law scholars largely supported that holding.[3] There was no backlog of IIED cases involving funeral protests in the lower courts that required guidance on how to proceed in adjudicating these claims. Granting review may have raised false expectations of redress in the plaintiff, the father of an American soldier killed in the line of duty, a person who surely had suffered enough and did not need the High Court rubbing salt in his wounds. It also rewarded defendants, who crave attention for their invidious and hurtful views, with a victory before the Supreme Court and substantial national exposure for their hateful message. These are serious normative costs to incur for no useful purpose.

Moreover, it is not as if there aren't other, serious constitutional questions raised by state responses to the Phelps' funeral protests that the Court might have chosen to address rather than hearing this case. As the Court noted, over 40 states have enacted content neutral time, place, and manner restrictions limiting picketing or demonstrations within some

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[1] Snyder v. Phelps, 562 U.S. ___, 131 S. Ct. 1207 (2011).

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

[3] *See, e.g.*, Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300.

specified distance from funeral services, processions, or cemeteries.[4] There is a circuit split on the constitutionality of these laws.[5] Adjudicating the constitutionality of these regulations would have provided a valuable service to courts and state and local governments alike. Instead, the Court granted review in *Snyder v. Phelps*, a case which provided it no basis for evaluating the constitutionality of these common and repeatedly challenged restrictions on speech.

Turning to the merits of Justice Roberts' opinion, we think the Court may have spent more ink than was necessary on the question of whether the content of the Phelps' speech constituted a matter of public or private concern.[6] Other factors really did the lion's share of the analytic work in this case. The location of the protests was about 1000 feet from the funeral service.[7] The protestors' message was neither seen by, nor visible to, the mourners when they entered or left the church where the service was held.[8] The protestors complied with police directions as to where they could stand and hold their signs.[9] The protest was directed to the public at large.[10] This was public discourse, not speech exclusively, or at least primarily, directed at a target audience.

If all of these conditions are satisfied, it is not clear to us that classifying speech as a matter of public or private concern is terribly important. Assume a speaker strongly dislikes one of his colleagues at work. The speaker stands on a soapbox in a public park, and states that his colleague is a horrible person who should be despised by G-d and sent to hell when he dies. This is mean-spirited private speech, but as long as it isn't defamatory, we would think it is constitutionally protected – at least if it is addressed to a public audience and expressed in a location some distance away from the place where the maligned colleague lives and works.

Now assume that members of the Westboro church placed telephone calls to the home of parents of a soldier killed in the line of duty immediately before and after the funeral service for their son or daughter. Church members expressed the same messages that were on the signs in the *Snyder v. Phelps* case – messages that the Supreme Court has characterized as a matter of public concern. As we maintained in our article in the *Cardozo Law Review de•novo*

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4 *See Snyder*, 131 S. Ct. at 1218.

5 *Compare* Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008) (granting preliminary injunction against enforcement of Missouri anti-picketing statute for likelihood of success on the merits of First Amendment argument), *with* Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008) (upholding Ohio funeral speech law as a reasonable time, place, and manner regulation).

6 *See Snyder*, 131 S. Ct. at 1215-19.

7 *Id.* at 1213.

8 *Id.* at 1213-14.

9 *Id.* at 1213.

10 *Id.*

symposium on this case, there is a strong argument that such calls could be sanctioned as telephone harassment.[11] Similarly, the anti-abortion messages communicated by residential picketers in *Frisby v. Schultz* were also speech on a matter of public concern.[12] The picketers' expressive activity could be restricted, however, because it "inherently and offensively intrude[d] on residential privacy" and had a "devastating effect . . . on the quiet enjoyment of the home."[13] Thus, in particular cases, when, where, and how speech is communicated may be more important to determining whether the speech can be restricted or subject to penalty than is the determination that the speech is a matter of public or private concern.

That leads us to another question the Court does not answer in its opinion in *Snyder v. Phelps*. In supporting his conclusion that the defendants could not be held liable for IIED, Chief Justice Roberts made it clear that "the church members had the right to be where they were" when they engaged in their expressive activities.[14] He explained that "what Westboro said, in the whole context of how and where it chose to say it" is constitutionally protected, "and that protection cannot be overcome by a jury finding that the picketing was outrageous."[15]

But what if the church members were standing in a place where they did not have a right to be? If a state had a constitutionally valid content-neutral law prohibiting picketing within 100 feet of a funeral service and protestors violated the law and caused immediate and extreme distress to the mourners, would a cause of action for IIED by constitutionally valid on these facts? Juries would still have the discretion to punish some speech more severely than other speech because of its content and viewpoint under the outrageousness element of this tort. However, no protestors would be subject to civil liability as long as they maintained a lawful distance from the funeral service. Also, appellate courts could limit the risk of the tort being used abusively against particular defendants to some extent by reviewing jury findings de novo (as is appropriate in a free speech case) and developing rules regarding damages – as they have done in defamation cases.

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[11] *See* Alan Brownstein & Vikram David Amar, *Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?*, 2010 CARDOZO L. REV. DE NOVO 368, 380.

[12] Frisby v. Schultz, 487 U.S. 474 (1988).

[13] *Id.* at 486.

[14] *Snyder*, 131 S. Ct. at 1218.

[15] *Id.* at 1219.