7-1-2011

Snyder v. Phelps: The Destruction of the Equilibrium between the Right to Free Speech and the Right to Protection from It

Stewart Berkeley

Snyder v. Phelps: The Destruction of the Equilibrium between the Right to Free Speech and the Right to Protection from it

Stewart F. Berkeley*

I. INTRODUCTION

Since the landmark decision of *New York Times Co. v. Sullivan,*[1] courts have struggled with the crucial goal of balancing First Amendment freedom of speech rights with the "right to avoid unwelcome speech."[2] However, this fragile balance has been heavily disrupted by the 2009 decision of *Snyder v. Phelps.*[3] In *Snyder,* the Fourth Circuit eliminated all potential avenues of recovery to victims who are assaulted with any hateful speech that contains "hyperbolic rhetoric" or can't be proven false.[4] Thus, a grieving family (who had just suffered the horrific loss of a child and only wants to mourn in peace) can't recover for emotional distress when their funeral services are disrupted by bigoted protestors.

Instead of granting a means of protection to private citizens who were wronged at a time of extreme vulnerability, *Snyder v. Phelps* instead creates an incentive for religious speakers to be abusive, by expanding freedom of speech protections to unprecedented levels.[5] In *Snyder,* the Fourth Circuit wrongfully extends *Hustler Magazine v. Falwell*[6] by creating "something close to a categorical privilege for statements on matters of public concern unless they are provably false."[7] This new rule ignores any previous Supreme Court goals of offering greater protection to "private" citizens, who unlike "public" figures, are incapable of protecting themselves.[8]

---

* J.D. Candidate, May 2012, University of Miami School of Law; B.B.A., Finance, Marketing and Business Management and Organization, 2009, University of Miami.

[1] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[2] *See* Hill v. Colorado, 530 U.S. 703, 717 (2000).

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

[4] *Id*. at 220.

[5] *See* Krista Gesaman, *Free (Hate) Speech*, NEWSWEEK, Mar. 17, 2010, *available at* http://www.newsweek.com/2010/03/16/free-hate-speech.html.

[6] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[7] Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, *CARDOZO L. REV. (DE NOVO) 1,* 13 (2010).

[8] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974)(Ruling private

This casenote argues that *Snyder* strays from precedent by abandoning all previous Supreme Court intentions of allowing private citizens some form of protection from outrageous speech.[9] Part II will trace the evolution of First Amendment law beginning with *New York Times v. Sullivan*.[10] This section will focus on how the Supreme Court intended to protect freedom of speech while also protecting private citizens from undeserved abuse. Part III will offer a background showing the events that led up to *Snyder v. Phelps* and offer a brief factual background of the case. Part IV will analyze the Fourth Circuit court's decision in *Snyder v. Phelps* and demonstrate how it inappropriately granted Phelps First Amendment protection against Snyder's Intentional Infliction of Emotional Distress (IIED) and Intrusion upon Seclusion claims by expanding defamation doctrine to these unrelated torts. Furthermore, this section argues that allowing recovery for IIED should not be barred to private citizens because it poses little risk to 1st amendment rights.[11]

II. WALKING THE THIN LINE BETWEEN FREE AND HARMFUL SPEECH

Freedom of speech is one of society's most cherished rights. But when free speech is left unfettered, it can come at a significant cost that society can't afford to pay. As a result, the Supreme Court has attempted to balance the interests between freedom of speech (especially the press) and freedom to avoid speech.[12] In the Supreme Court's initial attempt to protect both of these interests, the court created separate standards of proof for "public" and "private" citizens trying to prove defamation claims.[13]

New York Times v. Sullivan looked to protect free speech by allowing the press to criticize public figures that were intimately involved in all the most pressing public questions.[14] Before *New York Times*, the only defense to libel was proving false statements to be true. The Supreme Court realized in *New*

---

citizens don't have to prove "actual malice" standard because they have less access to effective channels of communication to counteract false statements and are therefore more vulnerable.).

[9] *See*, *e.g*. Frisby v. Schultz, 487 U.S. 474 (1988)(ruling that residents are have a right to privacy in their homes.); *see also* Hill v. Colorado, 530 U.S. 703 (2000)(ruling that patients have right to avoid unwanted speech when approaching an abortion clinic).

[10] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[11] *See* Shulman, supra note 7, at 30.

[12] *See id*. at 10.

[13] *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)(Public plaintiff; must prove 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)(private plaintiff; proving a certain level of culpability set by the states.).

[14] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

York Times that "allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred."[15] The requirement of having to prove the impossible true even if it was true, would lead to mass self-censorship that would have a "chilling effect" on the industry.[16] Out of this fear, the Supreme Court created a rule barring "public officials from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[17] This created a high bar for recovery on defamation claims requiring the plaintiff to prove that the newspaper was actually at fault.[18]

Although the Supreme Court appreciated the need for an uncensored press that wouldn't be afraid to go head on with high ranking public figures,[19] they realized that this need must be balanced with that of the private citizens who can't easily protect their reputations from the press.[20] Accordingly, in 1974 the Supreme Court decided *Gertz v. Robert Welch*, to determine how to balance the counteractive needs for free public debate on important social issues with personal privacy.[21] In *Gertz*, the majority determined that in order to protect private citizens from the press they must not be held to as high a burden of proof as the actual malice standard used for public officials.[22] Instead, the new standard of recovery would be based on proving a certain level of culpability set by the states. However, to protect the press damages would be limited to actual injury and punitive damages would be barred.[23]

The Supreme Court reasoned that private citizens must be protected because they don't have the same access to "channels of effective communication" as public figures, and therefore it is much harder for private individuals to counteract false statements and restore their good name.[24] Furthermore, public figures and public officials enter the public arena by choice and therefore voluntarily open themselves to the prospects of bad press,

---

[15] *Id*. at 279.
[16] *Id*. at 279-80, 300.
[17] *Id*. at 279-80.
[18] *Id*.
[19] *Id*. at 300.
[20] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) ("The first remedy of any victim of defamation is self-help ... 'Public officials and public figures usually enjoy significantly greater access to the channels of effective communication' ... 'Private individuals are therefore more vulnerable to injury'...").
[21] Gertz, 418 U.S. at 323.
[22] *Id*. at 345-46.
[23] *Id*. at 346.
[24] *Id*. at 344.

whereas private citizens have no choice in the matter.[25]

Then in *Dun & Bradstreet v. Greenmoss Builders,*[26] the Supreme Court was posed a new question. When an issue is of no interest to the public and is a purely private concern, should it be granted the same First Amendment protection as speech of public concern? The Supreme Court determined that speech of a purely private concern is of less constitutional value.[27] Therefore, defamation claims involving speech of purely private concern don't need to meet the "actual malice" standard to recover damages, presumed and punitive.[28]

After determining the appropriate level of protection to offer speech that could be proven false, the Supreme Court shifted focus towards determining how much to protect speech of public importance that can't be proven false.[29] In 1987, the Supreme Court confronted this issue with *Hustler Magazine v. Falwell,* a case determining if an offensive parody (suggesting that Reverend Falwell's "first time" was with his mother in an outhouse) was protected by the First Amendment against libel and IIED claims from prominent public figures.[30] The court easily disposed of the libel claim because the parody was understood not to portray any actual facts.[31] But the analysis of the IIED claim was more interesting. Recognizing that not all speech is of equal constitutional importance,[32] the majority analyzed the history of political cartoons, such as Nast's famous Boss Tweed cartoon, and recognized their "prominent role in public debate" and their need for First Amendment protection.[33]

Since Falwell was a "public figure", the majority required proof of "actual malice" to claim IIED for statements that "could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated."[34] The Supreme Court couldn't allow a public figure to recover on an "Outrageous" standard of proof because it did not meet the appropriate level of First Amendment protection required of *New York Times,* and would not offer sufficient "breathing space".[35] However, the Supreme Court never determined whether the "actual malice" standard would be applied to IIED claims for

---

[25] *Id*. at 345.
[26] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).
[27] *Id*. at 759.
[28] *Id*. at 761.
[29] *See* Hustler Magazine, Inc., v. Falwell, 485 U.S. 46 (1988).
[30] *Id*.
[31] *Id*. at 49.
[32] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).
[33] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54 (1988).
[34] *Id*. at 57.
[35] *Id*. at 56-57.

outrageous public speech directed at "private" individuals.[36]

In the wake of *Hustler*, the Supreme Court recognized the need to protect private citizens by determining what types of non-factual statements would receive constitutional protection. In *Milkovich v. Lorain Journal Co.*,[37] the Supreme Court determined that opinions were not universally protected by the First Amendment against defamation claims, because "expressions of "opinion" may often imply an assertion of objective fact"[38] and could be equally damaging to one's reputation. Therefore "statements on matters of public concern must be provable as false before there can be liability under state defamation law."[39] Further, the statement must seriously suggest something harmful and can't just be loose, figurative or hyperbolic language.[40]

III. ORIGIN OF *SNYDER V. PHELPS*

For over 15 years, the Westboro Baptist Church (WBC), led by the Phelps family, has been promoting their bigoted message that God is punishing America for its tolerance of homosexuality.[41] However, the WBC never got much attention until recently when they began picketing soldier's funerals.[42] The WBC pickets soldier's funerals because they offer wide media attention and because "funerals are the perfect time to spread its message because they are events at which people consider their own mortality."[43] In response to the WBC's tactics, over 29 state legislatures have now written ordinances to protect mourning funeral attendees from protestors.[44] Phelps has challenged some of the anti-picketing statutes with mixed results.[45]

---

[36] *See* Shulman, supra note 7, at 13.

[37] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

[38] *Id*. at 18-19(If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth ..."In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar.").

[39] Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

[40] Id. at 21.

[41] Ashby Jones, *To What Degree Does the Constitution Protect Hurtful Speech?*, WALL ST. J. L. BLOG (Mar. 9, 2010), http://blogs.wsj.com/law/2010/03/09/to-what-degree-does-the-first-amendment-protect-hurtful-speech/.

[42] Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 303-05 (2008).

[43] *Id*. at 312.

[44] *Id*. at 340.

[45] *Compare* Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008) (First Amendment rights outweighed state's interest.) *with* McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (State's interest in banning funeral picketing was legitimate but ordinance extensive.) *and* Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008) (Funeral picketing

Despite the legislation, the WBC continues to preach their hateful message at soldier's funerals, but now do so according to the terms of the various state ordinances.[46] On March 10th, 2006 Phelps along with members of the WBC picketed the funeral of Marine Lance Corporal Matthew A. Snyder.[47] The WBC protested using signs with general messages as "God Hates the USA," "America is doomed," "Pope in hell," and "Fag troops." Along with other sign with messages that could've been directed at the Snyder's family such as "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers."[48] After the funeral, the WBC published an "epic" called "The Burden of Marine Lance Corporal Matthew Snyder" with vicious religious language directed at the Snyder Family suggesting that that Albert Snyder and his ex-wife "taught Matthew to defy his creator" and "raised him for the devil".[49]

Despite not noticing any of the WBC's activities during the funeral services, Albert Snyder still suffered severe emotional distress after viewing their protest on TV and finding the "epic" online.[50] Snyder sued the WBC for five separate tort claims. The district court ruled in favor of Snyder on the claims for IIED, invasion of privacy by intrusion upon seclusion and conspiracy. The district court denied the Snyder's defamation claim because it was religious opinion that would not open Snyder to public scorn.[51] The district court also denied Snyder's publicity to private life complaint because all information made public was already published in a newspaper obituary.[52]

Phelps appealed to the Fourth Circuit; they reversed. In its analysis, the Fourth Circuit determined that both Phelps's signs and the "epic" were constitutionally protected types of speech.[53] The court came to this conclusion by extending total tort immunity to two types of speech contained in the signs and "epic", statements of public concern that don't have a provably false factual connotation, and loosely figurative or hyperbolic language.[54]

---

statue is legitimate.).
[46] Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008).
[47] *Id*. at 571.
[48] *Id*. at 572.
[49] *Id*.
[50] *Id*.
[51] Snyder v. Phelps, 533 F. Supp. 2d 567, 572-73 (D. Md. 2008).
[52] *Id*. at 573.
[53] Snyder v. Phelps, 580 F.3d 206, 222-26 (4th Cir. 2009).
[54] *Id*. at 219-20.

IV. SNYDER HUSTLED BY THE FOURTH CIRCUIT

A. Should the Court's Two Sub-Categories of Protected Speech be Fully Protected from All Tort Liability?

Having to determine if Phelps's picketing was protected speech, the court quickly moves through the *Times-Gertz* line of cases and acknowledged the different burdens of proof for public and private individuals.[55] But after a quick reference to *Gertz*, the majority wrongfully abandons this train of thought for a "distinct but related line of cases" based solely on "type" of speech.[56]

In exploring this new line of cases, the majority determines "There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected."[57] The first category is statements of public concern that don't have a "provably false factual connotation''[58] and the second category is rhetorical statements employing ''loose, figurative, or hyperbolic language.''[59] However, the court's grant of full immunity from tort liability to these two classifications of speech seems unfounded based on the line of cases cited by the court.

The court justifies its two sub-categories by citing *Milkovich* and *Hustler*. But neither of these decisions shows any basis for such an exemption. *Milkovich* addresses both of the two sub-categories created by the court, but *Milkovich* was purely a defamation case with a holding limited to media defendants.[60] Therefore, granting *Milkovich* protection to a bigoted protestor with no press credentials was an unjustified extension of that holding.[61] The majority tries to cover up *Milkovich's* deficiencies by using *Hustler* as justification for granting full tort immunity to their two sub-categories of speech.[62] The court claims that *Hustler* demonstrates the Supreme Court's approval of extending First Amendment protection to other torts than defamation.[63] However, even though *Hustler* did extend First Amendment protection to IIED claims, *Hustler* only extended this protection to public figures, based on the rationality of *New York Times*.[64]

---

[55] *Id*. at 218.
[56] *Id*. at 218.
[57] *Id*. at 219-20.
[58] Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).
[59] *Id. at 20-21.*
[60] *Id*. at 19-20.
[61] *See* Shulman, supra note 7, at 19.
[62] Snyder v. Phelps, 580 F.3d 206, 218 (4th Cir. 2009).
[63] *Id*. at 218.
[64] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

The Supreme Court never ruled out extending *Hustler* IIED protections to claims where the plaintiff was a private individual, but it also didn't approve it.[65] Based on the Supreme Court's history of balancing free speech and private interest, it seems that the Fourth Circuit's extension of a *New York Times* based decision to a private individual would diverge from precedent. It seems more plausible to follow the lead of the district court and use a *Gertz* based analysis allowing tort claims to go forward under a lesser burden of proof to be determined by the states.[66]

B. Do Phelps's Actions Fall Under either of the Sub-Categories?

Using their two sub-categories of constitutionally protected types of speech, the court analyzed all of the signs and the "epic" to determine if tort liability could attach itself to any of Phelps's messages.[67] To do this, the court separated the signs into two groups.[68] The first group contained signs with speech of public concern including "God Hates the USA/Thank God for 9/11," "Fag Troops," "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags."[69] The court viewed these signs as of public concern because they addressed prominent social issues such as the Catholic Church scandal and homosexuals in the military. The court determined that "no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son." Further, the court found that even if these signs could be interpreted to state facts about Snyder or his son, they contained hyperbolic rhetoric to spark debate and were therefore protected speech.[70]

The second group contained the signs "You're going to hell" and "God Hates You".[71] Given the pronoun "You", these signs could be interpreted as being directed at Albert Snyder and his son. However, the court determined that even if the signs were personally targeting Albert Snyder and his son, they were constitutionally protected from tort liability because the signs did not "assert provable facts."[72] While the protection of the first group of signs seems reasonable in light of the courts two sub-categories of constitutionally protected speech, its protection of the second group seemed outright foolish. Both of the Fourth Circuits sub-categories were meant to protect speech of public concern.[73]

---

[65] *See* Shulman, supra note 7, at 13.
[66] Snyder v. Phelps, 533 F. Supp. 2d 567, 577 (D. Md. 2008).
[67] Snyder v. Phelps, 580 F.3d 206, 222-26 (4th Cir. 2009).
[68] *Id*. at 222-24.
[69] *Id*. at 222.
[70] *Id*. at 223.
[71] *Id*. at 224.
[72] Snyder v. Phelps, 580 F.3d 206, 224 (4th Cir. 2009).
[73] *Id*. at 219-20.

But, the signs in the second group appear to be of a purely private nature and therefore are of less constitutional value.[74]

The court's reasoning for granting protection to the "epic" was even more troubling. The "epic" was filled with statements of a private nature, blatantly directed at the Snyder family. Unlike the signs which used the ambiguous pronoun "you", the "epic" was titled ''The Burden of Marine Lance Cpl. Matthew A. Snyder'' leaving no doubt as to the target and nature of the speech.[75] Once again, the court ignored the private nature of the speech and incorrectly granted the "epic" protection because it contained rhetorical hyperbole.[76]

C. Should the First Amendment Have Been Analyzed? (Concurrence)

The concurring opinion by Judge Shedd declined to decide the case on a First Amendment basis, under the doctrine of constitutional avoidance.[77] Instead, he suggested a reversal of the lower court's decision solely on lack of sufficient evidence to prove either tort claim; a highly questionable decision considering the sufficiency claim was waived by Phelps.[78] As the majority points out, the right to waive the sufficiency defense was at the defendant's discretion and therefore the court was required to address the First Amendment issue.[79]

D. Tort Remedies are Necessary to Protect Private Victims from Harmful Speech

In denying all tort remedies to private citizens confronted with highly offensive rhetorical speech, the court failed to adequately "balance the rights of grieving families and the free speech rights of demonstrators, however disturbing and provocative their message."[80] Without tort remedies, the scale is tipped in a way that encourages protestors to become more belligerent because they have no fear of repercussions.[81] In fact, after the Fourth Circuit's decision the more outlandish and hurtful the message, the greater the protection.[82]

---

[74] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).
[75] Snyder v. Phelps, 580 F.3d 206, 224 (4th Cir. 2009).
[76] *Id*. at 224-25.
[77] *Id*. at 227.
[78] *Id*. at 216.
[79] *Id*.
[80] Bill Mears, *Justices to hear case over protests at military funerals*, CNN.COM (July 19, 2010), http://www.cnn.com/2010/POLITICS/03/08/homosexuality.protest/index.html.
[81] *See* Shulman, supra note 7, at 3.
[82] Id.

By allowing private citizens to make IIED claims against outrageous speech, it will protect private citizens from being targeted with unwanted outrageous messages at little cost to free speech.[83] As noted by Judge Shedd, IIED claims are extremely hard to prove and are "rarely viable."[84] "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[85] This sort of standard wouldn't harm free speech because much more than mere offense or insult would be needed for a claim to succeed.[86]

V. CONCLUSION

Snyder v. Phelps was a misguided decision that expanded First Amendment rights at great expense to private citizens. The Fourth Circuit took *Hustler* in an unexpected direction by unjustifiably expanding total tort protection to two new sub-categories of speech diverging greatly from the Supreme Court's goal of balancing free speech and privacy.[87] The Fourth Circuit failed to acknowledge the long-standing "Private"-"Public" distinction and as a result stripped private citizens of the only viable self-help remedy readily available to them, the courts.[88] Allowing IIED claims would have done little harm to First Amendment freedoms because there are high standard of proof.[89] The Supreme Court must reexamine this opinion and restore the equilibrium between free speech and privacy.

---

[83] *See* Brief for the State of Kansas, 47 Other States, and the District of Columbia as Amicus Curiae in Support of Petitioner at 4, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009)(No. 09-751).

[84] Snyder v. Phelps, 580 F.3d 206, 231 (4th Cir. 2009).

[85] Restatement (Second) of Torts § 46 cmt. d (1965).

[86] *See* Brief for the State of Kansas, 47 Other States, and the District of Columbia as Amicus Curiae in Support of Petitioner at 4, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009)(No. 09-751).

[87] Snyder v. Phelps, 580 F.3d 206, 219-20 (4th Cir. 2009).

[88] *See* Chelsea Brown, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 (2009).

[89] *See* Brief for the State of Kansas, 47 Other States, and the District of Columbia as Amicus Curiae in Support of Petitioner at 4, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009)(No. 09-751).