



"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

WHITE PAPERS

SNYDER V. PHELPS: THE PROBLEM OF CONTEXT

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On March 2, 2011, the Supreme Court handed down its decision in the highly controversial *Snyder v. Phelps*^[1] case. The case at bar involves Fred Phelps, who heads the Westboro Baptist Church of Topeka, Kansas and for two decades has led protests at various sites, among them over 600 military funerals. His demonstrations condemn the practice of allowing gays to serve in the military, argue that America is becoming "Sodom," and accuse the Catholic Church of scandals involving its clergy. In this case, Phelps and five others participated in demonstrations in Annapolis at the U.S. Naval Academy, the Maryland Statehouse, and the funeral of Marine Lance Corporal Matthew Snyder, who had been killed in Iraq. Unlike 43 other states and the federal government, Maryland did not have a law prohibiting demonstrations proximate to cemeteries. The Westboro group notified authorities of their planned demonstrations and was in compliance with state and local ordinances when they assembled 30 minutes before the funeral on a public street across from the cemetery. Their signs included such phrases as "Semper Fag," "Thank God for Dead Soldiers," "Fags Doom Nations," "Priests Rape Boys," and "You're Going to Hell."

Matthew Snyder's father saw the tops of the signs on his way into the cemetery, but did not learn what they said entirely until he watched the evening news later in the day. He filed a diversity action against Phelps, those who traveled with him, and the Westboro Church. Snyder won his tort at the jury trial and was awarded \$10 million. Phelps challenged the verdict on the grounds that his group's speech was protected by the First Amendment. The District Court upheld the verdict against, but reduced the damages by half. On appeal by Phelps, the decision was overturned by the Fourth Circuit of Appeals. Citing *Hustler Magazine, Inc. v. Falwell*, (485 U. S. 46, 50-51) the Appeals Court ruled that the Westboro Church's speech was protected from tort action by the First Amendment's protection of public discourse on public issues of concern. The Supreme Court granted certiorari and ruled 8 to 1 in favor of the Church with only Justice Samuel Alito dissenting.^[2] This commentary argues that if the Supreme Court had properly contextualized the communication of the Westboro group, it would have seen that enough of the speech at the funeral site was private and aimed at particular persons to warrant upholding the tort awarding damages for the imposition of "emotional distress" on Matthew Snyder's parents. In this commentary, I argue that context creates meaning and that a close reading of the words of the protestors in context constituted a personal attack, which should not have been afforded First Amendment protection. In terms of case law, I will rely solely on the cases and quotations cited in Chief Justice John Roberts' majority opinion to assure that this analysis is as objective as possible in rejecting his opinion. I hope to show that it falls of its own weight.

CONTEXT HELPS DETERMINE MEANING

The hermeneutic approach to the interpretation of discourse is well known in academic fields but not widely used in the law. Among others, Michael J. Hyde and I derived a method of analysis from the works of Husserl, Heidegger, and Gadamer.^[3] They point out that the primary task of hermeneutics is to reveal various proper understandings.^[4] Hermeneutic analysis functions to open texts to clearer meaning by relying on the context of linguistic possibilities for a given text and its author. Heideggerian understanding is based on close interpretation (hermeneutics) of a text within its context, where the context is determined phenomenologically. He and Gadamer advocate analysis of the situation that surrounds an artifact along with the text itself. In other words, hermeneutics examines the trees (texts) and phenomenology delineates the forests (contexts) out of which the text has grown. This is the "contextually fulfilled circle" of which Gadamer writes.^[5] One could also cite the voluminous work of E. D. Hirsch in which the intention of the author provides a context for determining meaning.^[6] Also relevant is *The Meaning of Meaning* by I. A. Richards and C. K. Ogden, with which communication scholars are familiar.^[7]

The method is not a far cry from the originalist method of interpreting the Constitution introduced by Justice Hugo Black, a staunch defender of the First Amendment. In his opinions, Black often argued that if passages in the Constitution were vague, they should be read within the context of the original intent of the authors of those passages. He used this hermeneutic method to advance his liberal agenda against the notion of "judicial restraint" embraced by Justice Felix Frankfurter and others on the Supreme Court at the time. Ironically, this method was eventually embraced by conservatives on the Supreme Court.

Allow me a digression at this point to make clear that while the current conservative majority on the Supreme Court often uses original intent to discover meaning, they will abandon that hermeneutic when it suits their purposes. *Snyder v. Phelps* is not the first instance of this phenomenon. In an important Second Amendment ruling, the Court disregarded very well founded arguments from original intent. Properly placing the Second Amendment in context, the Ninth Circuit Court of Appeals held that the Second Amendment did NOT prohibit states or the federal government from restricting the possession of guns. In that UNANIMOUS ruling, Judge Reinhardt relied on the conservative standards of contextual "original intent" and "strict construction of the Constitution." He concluded that the Second Amendment phrase "well-regulated" confirms that militia can only reasonably be construed as referring to a military force established and controlled by a government entity.^[8]

The Appeals Court traced the Second Amendment back through James Madison and the need for some states to protect themselves from disturbances within their borders. Shays rebellion in Western Massachusetts had threatened many states at that time, hence the right to empower the states to create their own militias. Both the Pennsylvania

Frame and the Massachusetts Constitution argued that the people have the right to keep and bear arms but only for "the common defense" authorized by their states. Thus, the Ninth Circuit rightly concluded that the Second Amendment allows states, not individuals, to form militias and thereby confer on individuals of the state the right to bear arms. The conservative majority on the Supreme Court overturned this ruling, ignoring its predilection for original intent.

That majority also ignored a second contextual argument often used to trim back certain rights granted in certain amendments. For example, while the First Amendment grants freedom of expression, it is restricted by a compelling government interest to prevent treason and defamation. With the Second Amendment, the compelling government interest is domestic tranquility ensured by reducing gun violence. Twelve thousand people a year in the United States are shot to death, that's about 33 a day. About 240 a day are injured by gun shots. Both categories include much domestic violence and many children, some who have found guns at home and some who have taken guns to school. With almost 500 handgun killings a year in Los Angeles alone, not to mention rapes that occur using a gun, assaults and the like, one would think an effective gun control system would be in place. Perhaps that is why in a previous case before the Supreme Court in 2008, even President Bush's U.S. Solicitor General Paul D. Clement said guns are subject to "reasonable regulation" by the government and that all federal restrictions on guns should be upheld. But the Supreme Court has terminated that possibility by ignoring these contextual factors in its narrow ruling ending gun control in Chicago.^[9]

They have now committed the same error in *Snyder v. Phelps*.

ROBERTS' ARGUMENTS

In his majority opinion, Chief Justice Roberts rightly points out that "Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern as determined by all the circumstances of the case" (*Snyder v. Phelps*, Slip. Op. p. 5). However, later in his opinion, he admits that "even protected speech is not equally permissible in all places and at all times" (*id.*, p. 10).^[10] Picketing of particular residences has been prohibited even when on public streets,^[11] as Roberts points out. Thus, might it be possible to hold people actionable for picketing a funeral? This issue becomes even more telling when Roberts admits that "the boundaries of the public concern test are not well defined."^[12] At best we are on shaky ground here and that is crucial when it comes to overturning a jury's verdict that was upheld by a district court, which had in fact happened in the *Snyder* ruling. Thus, and rightly, Roberts invites a hermeneutic approach when he writes, "Deciding whether speech is of public or private concern requires us to examine the 'content, form, and context' of that speech" (p. 7).^[13] I agree and intend to examine those circumstances to show the error of Justice Roberts' ruling by his own standard and to argue since Phelps' speech was private, it was not protected by the First Amendment.

First, Roberts argues that the demonstrators were engaged in public speech on a public street and, therefore, deserve First Amendment protection. In most cases, that is true. However, one wouldn't condone treason if it was committed in a public space. And couldn't a speaker make a personal attack and then embed it in public discourse to obtain First Amendment protection under Roberts' rule? In fact, *Snyder* made just such a claim against Phelps; Roberts summarizes *Snyder's* argument: "The church members in fact mounted a personal attack on *Snyder* and his family, and then attempted to 'immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church" (*id.*, p. 9). However, Roberts rejects the claim: "We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability" (*id.*, p. 9). I have to ask, why not? Shouldn't the Court parse public versus private rhetoric given the damages at stake? Why can't one break the discourse apart and treat each part separately for what that discourse says, and what damage it does? Why can't the Court examine the discourse in terms of its context including location and other communication from the offending group, and support exactly the analysis Roberts seeks to avoid. As Justice Alito points out in his dissent, "A physical assault may occur without trespassing; it is no defense that the perpetrator had 'the right to be where [he was]'...Neither classic 'fighting words' nor defamatory statements are immunized when they occur in a public place" (*dissent*, p. 11).

Second, Roberts points out that the demonstrators used the same rhetoric at the Maryland Statehouse and the United States Naval Academy that they did at the *Snyder* funeral; therefore, the rhetoric was general discourse on public issues and not a personal, private attack. This contention is enormously problematic. Location determines context in this situation. While demonstrations at a statehouse or a military academy can be seen as general public speech, those same signs become a personal attack when moved to the cemetery where a marine is being buried and the signs in context become a personal attacks on him and his wife. Those driving into the cemetery for the funeral could reach no other conclusion than that a marine was being defamed at his funeral. At the time of the demonstration, only Matthew *Snyder's* funeral was being conducted. The contention that this rhetoric is personal and not public is reinforced by the fact that it was an invasion of privacy. Does anyone believe that Phelps would have been on that street corner if Matthew *Snyder* was not being buried at that time? The fact is Phelps put out a press release stating that his group was going "to picket the funeral of...*Snyder*," whom he claim was killed by God. The release goes on to state that "[*Snyder*] died in shame, not honor—for a fag nation cursed by God.... [He is n]ow in Hell." The intent here can be seen as nothing but a personal attack. Justice Roberts himself admits, "The speech was indeed planned to coincide with Matthew *Snyder's* funeral" (*id.*, p. 15). Once in proximity to the grave site, Phelps' group is no longer engaging a broad public appeal; they are attacking the parents of a dead soldier, which their website also indicates was their intent (see below).

Roberts establishes the burden of proof for the privacy concern when he quotes from *Cohen v. California* that restriction of speech is "dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner."^[14] I can think of few events better able to justify privacy than the burial of a soldier by his family. And I can think of few invasions that would be more intolerable than associating the soldier and his family with Satan and the sins of the Catholic clergy, no to mention mislabeling his sexual preferences. This kind of personal attack, especially on a *captive audience in a private moment*, is not protected speech. As I have shown, the Supreme Court has regularly held that captive audiences can seek relief from imposed ideological or religious beliefs.

Third, using Roberts' logic, one could easily cover a vicious personal attack on another person by uttering it at

different places and times, and claiming it was not aimed at that person but his or her class in general. The lie is given to Phelps' claim in this regard when one examines the press release quoted above and what had been posted on his church's website. There one finds an attack directed at Matthew Snyder's parents, which reads:

God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the Lord his God—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil. Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.... Then after all that, they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked and sinful manner of life, putting him in the cross hairs of a God that is so mad, He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

While this posting may or may not be actionable, it demonstrates, as Justice Alito points out, that the discourse goes beyond "commentary on matters of public concern" and makes a personal attack on "private figures" (*dissent*, p. 9). It names the parents; it defames their child. There is no provable truth in these statements; hence, they are libelous pure and simple and caused emotional distress. Furthermore, Alito makes clear that these remarks and the signs at the cemetery are tantamount to fighting words which are not protected by the First Amendment under the *Chaplinsky* standard.^[15]

One other argument surfaces: Even if these words were not seen at the time of the funeral by Snyder's father, but later learned about over television, they still constitute an imposition of "emotional distress" and are not protected, thus, allowing the tort action. If you are libeled, it does not matter that you read the libel the moment it was issued; it only matters that you were defamed and became aware of it, that it is untrue and that it does damage to your reputation. Furthermore, the comments in the press release and on the web site contextualize the demonstration at the cemetery and convert that part of the day's demonstrations into a personal attack and fighting words outside protection of the First Amendment and therefore, rightly open to a tort for libel and emotional distress.

That leads to a final point: In the trial that Snyder won, the burden of proof he met was enormous. The law of torts, as Justice Alito points out, is very narrow with requirements that "are rigorous and difficult to satisfy" (*id.*, p. 2).^[16] The jury in Snyder's case was so instructed by the presiding judge, and yet Snyder prevailed. And in fact, in their appeals, Phelps' lawyers never contest the sufficiency of the evidence that Snyder provided to establish emotional distress. One would think that reversing the jury's decision that was upheld by District Court using "rigorous" standards would require better grounding than Roberts provides. The District Court upheld the findings of infliction of emotional distress, invasion of privacy, and civil conspiracy. The burden of proof rests with those who would overturn such a ruling. The presumption lies with Snyder, not with Phelps. As I quoted above, Roberts acknowledges that the boundaries of the "public concern test are not well defined." Giving Phelps the benefit of the doubt on the basis of ambiguous public speech concerns undermines a jury that met rigorous and clear standards.

Roberts rightfully points out, "To succeed on a claim for intentional inflictions of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress" (*id.*, p. 5). The fact is that Snyder's situation met Roberts' standard; the jury and the district court to which the case was appealed believed he had suffered emotional distress. Remarkably, Roberts' admits as much at various places in his opinion. On page ten, he writes, "The record makes clear that the applicable legal term—'emotional distress'—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief." Near the end of his opinion, he writes, "Westboro's funeral picketing is certainly harmful and its contribution to public discourse may be negligible Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain" (*id.*, pp. 14-15). Perhaps that is why Roberts writes that "Our holding today is narrow."

CONCLUSION

Roberts' opinion is not only narrow, it is terribly flawed. The demonstrators may have had a right to occupy a street corner, but what they said and wrote was not protected from tort action because it constituted a personal attack when read into its context including Westboro's web page and press release. Furthermore, the Snyders constituted a captive audience that had nowhere else to bury their son and the Court has often found that captive audience situations provide exceptions to First Amendment protection.^[17] The least the Supreme Court could have done on behalf of Snyder was remand the case for rehearing with instructions. But instead it ruled without consideration of context to support an interpretation of First Amendment law that is beyond reason.

There are two major consequences resulting from this decision. First, some states, such as Maryland and California, that had not already done so, have passed laws prohibiting demonstrations proximate to cemeteries. Second, the decision has provided a blue print for how to circumvent libel, slander, and emotional distress torts using the First Amendment and the broad interpretation of public speech provided by the Court as a guide. Unless this decision is reformed, one can expect an escalation of hostile and hateful communication.

ENDNOTES

[1]. 562 U.S. _____ (2011) Slip. Op.

[2]. We should not be intimidated by the 8-1 ruling, particularly when it comes to First Amendment rulings. In 1940, the Supreme Court ruled 8-1 in *Minersville School District v. Gobitis* that children who were Jehovah's Witnesses could be forced to say the pledge of allegiance. The lone dissenter was the Republican appointee, Harlan Fisk Stone. The *Gobitis* decision, written for the Court by Felix Frankfurter, a professor at the time, was reversed in *West Virginia State Board of Education v. Barnette* in 1943, but not before many Jehovah's Witnesses suffered at the hands of intolerant Americans. The 1969 decision in *FCC v. Red Lion* was unanimous

in restricting the rights of broadcasters versus rights given to newspapers. The decision was allowed to lapse with the suspension of the fairness doctrine eighteen years later. Only Justices Black and Douglas dissented in *Dennis v. U.S.* in 1951, a decision that was not reversed until the *Yates* ruling in 1957.

[3]. Michael J. Hyde and Craig R. Smith, "Heidegger and Aristotle on Emotion: Questions of Time and Space," in *The Critical Turn: Rhetoric and Philosophy in Postmodern Discourse*, Ian Angus and Lenore Langsdorf, eds. (Southern Illinois University Press, 1992): 68-99. Craig R. Smith and Michael J. Hyde, "Rethinking the Public: The Role of Emotion in Being-with-Others," *Quarterly Journal of Speech*, 77 (1991): 446-66.

[4]. Hans Georg Gadamer, "On the Scope and Function of Hermeneutical Reflection," G. B. Hess & R. E. Palmer, trans., in D. E. Linge, ed., *Philosophical Hermeneutics* (Berkeley, CA: University of California Press, 1976). (Original work published 1963).

[5]. Hans Georg Gadamer, *Truth and Method*, 2nd rev. ed., J. Weinsheimer & D. G. Marshall, Trans. (New York: Crossroad, 1989), p. 87.

[6]. See, for example, E.D. Hirsch, "Objective Interpretation," *PMLA* 75 (1960): 463-479.

[7]. (New York: Harcourt, Brace, 1923/1952).

[8]. *Silviera v. Lockyer*, 312 F. 3d, 1052, 2002.

[9]. *McDonald v. City of Chicago*, Slip. Op. No. 08-152 (2010).

[10]. Citing *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

[11]. Citing *Frisby v. Schultz*, 487 U.S. 474, 477.

[12]. Citing *San Diego v. Roe*, 543 U.S. 77, 83 (2004).

[13]. Citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 761 (1985).

[14]. 403 U.S. 15, 21 (1971).

[15]. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). See also *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

[16]. Citing Prosser and Keeton, *Law of Torts*, section 2, p. 61 (5th Ed, 1984), noting *Wilkinson v. Downton*, (1897), 2 Q.B. 57.

[17]. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Lee v. Weisman*, 505 U.S. 577 (1992); *Moore v. Ingrebreetsen*, 519 U.S. 965 (1996); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).