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## When Is Religious Speech Outrageous?: *Snyder v. Phelps* and the Limits of Religious Advocacy

Jeffrey Shulman\*

The Constitution affords great protection to religiously motivated speech. Religious liberty would mean little if it did not mean the right to profess and practice as well as to believe. But are there limits beyond which religious speech loses its constitutional shield? Would it violate the First Amendment to subject a religious entity to tort liability if its religious profession causes emotional distress? When is religious speech outrageous?

These are vexing questions, to say the least; but the United States Supreme Court will take them up next term—and it will do so in a factual context that has generated as much heat as light. On March 8, 2010, the Court granted certiorari in *Snyder v. Phelps*.<sup>1</sup> It is a tort case brought by a family grieving the untimely death of their son. It is a free speech case, testing the boundaries of the constitutional commitment to the marketplace of ideas. It is a religious liberty case that has made unlikely

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1. *Snyder v. Phelps*, 2010 WL 757695 (U.S. March 08, 2010).

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allies of those on opposite sides of the political and cultural divides that make our liberal democracy such a challenging enterprise.

The most common of legal commonplaces is that the First Amendment protects speech that some people—perhaps, most people—will find offensive. Indeed, the protection of offensive speech is one of the great hallmarks of our constitutional order, the stamp that establishes the genuineness and the generosity of our freedoms, including a longstanding tradition of religious liberty. It is no surprise that our courts, by training and instinct, want to protect the right to speak—and nowhere more so than where speech is religiously motivated. It may be this very protectiveness that led the Fourth Circuit to make such a mess of things.

The basic facts of the case are clear enough. Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. His funeral, held in Westminster, Maryland, was picketed by the Westboro Baptist Church. The church held signs that read, “You are going to hell,” “God hates you,” “Thank God for dead soldiers,” and “Semper fi fags.” Following the funeral, the church posted on its website ([godhatesfags.com](http://godhatesfags.com)) an “epic” entitled “The Burden of Marine Lance Cpl. Matthew Snyder.” Matthew’s burden, as the church saw it, was that he had been “raised for the devil” and “taught to defy God.” Matthew’s father, Albert Snyder, brought a civil action against the Westboro Baptist Church in federal district court, asserting a claim for intentional infliction of mental and emotional distress (among other causes of action).<sup>2</sup> He was awarded \$10.9 million in compensatory and punitive damages.

That judgment was reversed by the Fourth Circuit.<sup>3</sup> The court could have avoided the constitutional question by holding that Mr. Snyder failed to prove at trial sufficient evidence to support his tort claims.<sup>4</sup> But the court waded into murky doctrinal waters—and made them a whole lot murkier.

The court reasoned that the church’s speech was constitutionally protected unless a reasonable person would understand it to be communicating objectively verifiable facts. There are, the court went on to say, two categories of speech that cannot reasonably be interpreted as stating actual facts about an individual. The first is statements of public concern

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2. Snyder originally brought suit on five counts: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008). The district court granted defendants’ motions for summary judgment on the claims for defamation and publicity given to private life. *Id.* at 572-73. The court held, however, that the remaining claims raised genuine issues of material fact. *Id.* at 573.

3. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2008).

4. *See id.* at 227-33 (Shedd, J., concurring in the judgment).

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that fail to contain a provably false factual connotation. The second is rhetorical statements employing loose, figurative, or hyperbolic language. These statements are categorically protected, regardless of the plaintiff's status as a public or private figure.

Had the court gone no further, it would have generated confusion enough for sorting out by the Supreme Court. To begin with, Mr. Snyder was not making a defamation claim. So it is not clear why the dispositive question is whether the church's assertions were susceptible of being proved true or false. Nor is it clear why, whether the claim is defamation or emotional distress, the plaintiff's status as a private figure is irrelevant.

But the court gave short shrift to the complexities of the case law. It did not matter whether the church's statements were of public concern because they did not assert provable facts. They employed "hyperbolic rhetoric" to spark debate. The court noted that some signs (those reading "You're Going to Hell" and "God Hates You") could be interpreted by a reasonable reader as referring specifically to Matthew Snyder. No matter, because, as the court concluded, "[w]hether an individual is 'Going to Hell' or whether God approves of someone's character could not possibly be subject to objective verification."<sup>5</sup> With its single-minded focus on the factualness of the church's claims (again, the wrong focus for an emotional distress case), the court looked for contextual evidence that would support its conclusion that no reasonable person could think the church was asserting provable facts. Remarkably, it found that evidence in the very outrageousness of the church's speech:

The general context of the speech in this proceeding is one of impassioned (and highly offensive) protest, with the speech at issue conveyed on handheld placards. A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts. In addition, the words on these signs were rude, figurative, and incapable of being objectively proven or disproven. Given the context and tenor of these two signs, a reasonable reader would not interpret them as asserting actual facts about either Snyder or his son.<sup>6</sup>

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5. *Id.* at 224.

6. *Id.* Similarly, the court concluded that "the written Epic published on the website of the Church is also protected by the First Amendment, in that a reasonable reader would understand it to contain rhetorical hyperbole, and not actual, provable facts about Snyder and his son." *See id.*

With perverse illogic, the Fourth Circuit has created a legal incentive for religious speakers to be especially abusive and inflammatory: by its own calculus, the more “hyperbolic” the speech, the more it is constitutionally protected. But nothing in the law suggests that the First Amendment requires courts to engage in such hermeneutic gymnastics.

What the Westboro Baptist Church wants is the right to make any private individual the target of personal verbal assault about matters of private concern—and to do so with complete immunity from the law. The Supreme Court has said that speech about public officials or public figures, or speech about matters of public concern, may be constitutionally protected, even if it causes emotional distress (though even these forms of speech do not get absolute protection). But the Court has never held that the First Amendment protects personal invective “delivered in the milieu of religious practice.”<sup>7</sup>

This case tests the proposition stated in *Cantwell v. Connecticut* that “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.”<sup>8</sup> If the speech at question here was directed toward a private person and was not a matter of public concern—if, in other words, this case is about mere personal invective—there is no reason to grant the church constitutional protection.<sup>9</sup> If the church’s speech was targeted toward a most

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7. *Hester v. Barnett*, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987).

8. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). *See id.* at 309 (“One may, however, be guilty of [breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer.*”) (emphasis added); *cf.* *Cohen v. California*, 403 U.S. 15, 20 (1971) (“While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’”) (quoting *Cantwell*, 310 U.S. at 309).

9. The district court concluded that it was Defendants who thrust the Snyder family into the unwelcome glare of national media coverage, “transform[ing] a private funeral into a public event.” *Snyder v. Phelps*, 533 F. Supp. 2d 567, 577 (D. Md. 2008). The fact that Matthew’s funeral attracted public attention does not make him a public figure. “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167 (1979). Defendants’ reasoning would in effect nullify the Supreme Court’s precedents that establish the contours of the public figure doctrine. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *cf.* *St. Luke Evangelical Lutheran Church v. Smith*, 537 A.2d 1196, 1202-04 (Md. Ct. Spec. App. 1988) (plaintiffs’ objection to pastor at church meeting does not render her a public figure) (citing *Gertz* and *Firestone*). If there is no evidence that Matthew or his family assumed a prominent role in public controversy, *see Gertz*, 418 U.S. at 351, or that the Snyders sought to use Matthew’s funeral “as a fulcrum to create public discussion,” *see Wolston*, 443 U.S. at 168, the district court rightly rejected Defen-

unwilling listener, one who was held captive by special circumstances, there is even more reason why the church should be adjudged to have forfeited any claim to constitutional immunity from tort suit.<sup>10</sup>

Tort liability subjects religious entities to neutral and generally applicable principles of tort law. If the church's religious advocacy amounts to tortious conduct, it would be subject to suit, as would any other religious, or non-religious, group. But tort liability places no special burden on religious entities. Nor does the resolution of tort disputes necessarily involve any intermeddling in internal church affairs.<sup>11</sup> If anything, the Fourth Circuit treads on dangerous ground when it concludes that the church does not literally mean what it says. Because it focused on the factualness, and not the hurtfulness, of the church's statements, the court dismissed those statements as figurative and irreverent. That is an odd judgment. Certainly, the Westboro Baptist Church does not think its speech was mere rhetorical overkill. Irreverent? As distasteful as the church's language might be to others, its message is the heart—and, I suppose, the soul—of the church. This is a church that finds reverence in outrageousness.

Personally abusive speech directed toward a private target held hostage by special circumstances—this is not the type of speech that has merited immunity from tort liability. To find that such speech is constitutionally protected would not foster the robust debate sought by the Fourth Circuit. Rather, by protecting the personal vilification of private individuals, such immunity would work against a civic order where all

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dants' attempt to "bootstrap their position by arguing that Matthew Snyder was a public figure," *Snyder*, 533 F. Supp. 2d at 577.

10. When speech is forced upon "an audience incapable of declining to receive it," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring), the Court has not hesitated to uphold the regulation of expressive activity. See *Hill v. Colorado*, 530 U.S. 703 (2000); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Packer Corp. v. Utah*, 285 U.S. 105 (1932); cf. *Cohen v. California*, 403 U.S. 15, 21 (1971) (persons confronted with defendant's jacket bearing the words "Fuck the Draft" could have avoided "further bombardment of their sensibilities simply by averting their eyes"); *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978) (residents could "simply avoid" Nazi-affiliated party protest activities). If there are places outside the home where we need not be held hostage to verbal confrontation, the setting where we mourn the dead certainly must be one of them.

11. See *Jones v. Wolf*, 443 U.S. 595, 606 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox in N. Am.*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-17 (1929).

people are equally free to express their deepest beliefs. That freedom, like all freedoms, has its limits. In granting certiorari in *Snyder v. Phelps*, the Supreme Court may help us better understand the limits of religious advocacy.