

## ***SNYDER v. PHELPS: A CAUTIOUSLY OUTRAGEOUS PROTEST***

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### **I. INTRODUCTION**

In *Snyder v. Phelps*,<sup>1</sup> the United States Supreme Court in a 8-1 decision authored by Chief Justice Roberts upheld the First Amendment right of a fundamentalist church, Westboro Baptist, and its members to picket the military funeral of Marine Lance Corporal Matthew Snyder, who was killed while on active duty in Iraq, and denied the tort claims of Snyder's father ("Snyder") for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy, thereby shielding the Westboro Baptist Church and its members from tort liability for its picketing activities.<sup>2</sup>

The purposes of this article are threefold: to examine the Supreme Court decision in *Snyder*, a cornucopia of classic First Amendment principles and cases, to highlight how it clarifies the *Falwell* rule providing First Amendment protection to political satire and parody, and to scrutinize the careful and well planned and executed protests of the Westboro Baptist Church, which in large part dictated the outcome of the case but diminished its importance as precedent.<sup>3</sup>

### **II. WESTBORO'S PICKET**

The facts in *Snyder* are straight forward. Fred Phelps founded Westboro Baptist Church in Topeka, Kansas, in 1955. Subscribing to a literal interpretation of the Bible, the church's congregation believes that God is offended by, and punishes the United States for its tolerance of, homosexuality, particularly in the military, and that God kills soldiers as retribution for that tolerance. In order to proselytize their view of God's position on homosexuality, church members have picketed nearly 600 military funerals. Learning of the scheduled funeral service

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<sup>1</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>2</sup> *Id.* at 1220.

<sup>3</sup> The majority opinion described the decision as "narrow" and "limited to the particular facts before us," noting "the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* One commentator seems to agree, observing the "case provided no basis for evaluating or providing guidance on the constitutionality of these common and repeatedly challenged restrictions on speech." Vikram David Amar, *A First Amendment Feast, or Perhaps a Smorgasbord, During the 2010 Term*, 8 A.B.A. PREVIEW 320, 327 (2011).

for Matthew Snyder in his hometown, Westminster, Maryland, Phelps decided to add Snyder's funeral to his list of military funeral protests. Phelps notified authorities of his plans to picket and received their instructions on staging the demonstration. Phelps and six family members (two of his daughters and four of his grandchildren, all of whom were members of the Westboro Church) traveled to Westminster, and conducted their protest within a 10-by-25 foot plot of public land adjacent to a public street behind a temporary fence in strict compliance with police instructions.<sup>4</sup> The protest site was approximately 1000 feet from the church in which the funeral service was conducted, and several buildings separated the two locations. The protesters did not enter the church or go to the cemetery. They did not shout, use profanity, or engage in violence. Their protest started about 30 minutes before the funeral. Phelps and his family members carried signs bearing such messages as "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're going to Hell," and "God Hates You." While the funeral procession passed within 200 to 300 feet of the picket site, only the tops of the signs were visible and Snyder did not see what was displayed on the signs until he watched the evening news on television.<sup>5</sup>

### III. SNYDER'S LAWSUIT

Snyder initiated suit against Phelps, his daughters, and the Westboro Church (collectively the Westboro Church) in federal district court, alleging five state tort claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Concluding that Snyder could not prove essential elements, the District Court granted summary judgment in favor of Westboro Church on the claims of defamation and publicity given to private life. The Court denied the Westboro Church's First Amendment-based motion for summary judgment on the remaining claims, and conducted trial on those claims. In his testimony, Snyder described the severity of his emotional injuries, stated he was unable to separate his memories of his son from the Westboro Church picketing, and said he frequently became angry, physically ill and distraught when he thinks about the Westboro Church activities. Expert witnesses buttressed Snyder's description of his emotional anguish, severe depression, and exacerbated health conditions.<sup>6</sup>

Finding Westboro Church liable on the claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, the jury returned a verdict in favor

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<sup>4</sup> *Snyder*, 131 S. Ct. at 1213. Representatives of the Westboro Church simultaneously picketed on public land next to public streets near the Maryland State House and the U.S. Naval Academy in Annapolis, Maryland. *Id.* That the Westboro Church was able to orchestrate, publicize and execute all three pickets and obtain and strictly follow police directives for conducting the pickets speaks to its organizational prowess.

<sup>5</sup> *Id.* at 1213-1214. The majority opinion also acknowledged that a few weeks after the funeral, one of the picketers posted a message on Westboro's website, [www.godhatesfags.com](http://www.godhatesfags.com), discussing the protest, reciting religious denunciations of the Snyders, and quoting lengthy excerpts from the Bible. The majority concluded that this posting, referred to by the parties as "the epic," was not properly before the court, because Snyder did not include it in his petition for certiorari. Hence, the epic could not support Snyder's tort claims. *Id.* at 1214. In his dissenting opinion, Justice Alito strenuously disagrees. In Alito's view, the epic was not a separate claim for damages, but a piece of evidence before the trial court which demonstrated the protestors attacked the Snyder family directly and buttressed Snyder's claim for intentional infliction of emotional distress. *Id.* at 1225-1226. Alito complains that the Court's "strange insistence that the epic is 'not properly before us,' means that the Court has not actually made 'an independent examination of the whole record.'"

<sup>6</sup> *Id.* at 1214.

of Snyder, awarding him \$2.9 million in compensatory and \$8 million in punitive damages. Resolving Westboro Church's post-trial motions, the District Court reduced the punitive damage award to \$2.1 million and left the remainder of the jury verdict intact.<sup>7</sup>

The Fourth Circuit Court of Appeals reversed the District Court, ruling Westboro Church was entitled to judgment as a matter of law, because its message was a matter of public concern and not untruthful, and therefore was fully protected by the First Amendment.<sup>8</sup>

#### IV. U.S. SUPREME COURT DECISION

The U.S. Supreme Court addressed the First Amendment issue with dispatch. Its first order of business was to decide whether the Westboro Church speech is of public concern, which, the Court said, "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,"<sup>9</sup> relates to matters of political, social or economic concern to the community<sup>10</sup> or addresses subjects of general interest to the public,<sup>11</sup> and is determined by independently examining the content, form and context of the speech.<sup>12</sup>

The content of the Westboro Church speech, the Court concluded, "plainly relates to broad issues of interest to society at large."<sup>13</sup> The messages on the protestors' signs, while falling short of refined commentary, address two prominent issues commanding intense public attention - permitting homosexuals to enlist in the military and the Catholic Church clergy sex abuse scandals - and convey Westboro's position on those issues to a broad audience.<sup>14</sup>

Although the majority opinion did not directly address the form of the speech, marching on public property, carrying messages printed on protest signs, and directing the message to the public surely mirror the classic form of First Amendment speech.<sup>15</sup>

Because the Westboro Church used the Snyder family funeral ceremony as the vehicle for concurrently delivering its message, the context issue was a bit less clear. Snyder argued intertwining the speech with the funeral and including a personal attack on the Snyder family made the Westboro Church speech private in nature.<sup>16</sup> The Court, however, would have none of

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1215, citing *Connick v. Myers*, 103 S. Ct. 1684 (1983) (firing assistant district attorney does not violate her First Amendment rights to engage in speech).

<sup>10</sup> *Id.* at 1216 citing *San Diego v. Roe*, 125 S. Ct. 521 (2004) (firing a police officer who offered for sale home-produced, sexually explicit videos showing himself stripping off a police uniform and masturbating did not violate the officer's First Amendment rights).

<sup>11</sup> *Id.* citing *Cox Broadcasting Corp. v. Chon*, 95 S. Ct. 1029 (1975) (striking down a Georgia statute which prohibited the publication of the identity of a rape victim), and *Time, Inc. v. Hill*, 87 S. Ct. 534 (1976) (erroneously reporting that a play portrayed suffering endured by family members at hands of escaped convicts cannot support an invasion of privacy action in the absence of knowing or reckless falsity in publishing the article).

<sup>12</sup> *Id.* citing *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (false statements in a credit report viewed by five subscribers do not involve matters of public concern requiring the showing of actual malice to recover in a defamation claim), and *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984) (describing the sounds of a Bose speaker as wandering around the room in a product review are insufficient to support a finding of falsity or reckless disregard of the truth in a product disparagement claim).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1217.

<sup>15</sup> In addressing the context of the Westboro message, the Court emphasized the protestors picketed peacefully in a public space adjacent to a public street and that such a space is accorded "special position in terms of First Amendment protection." *Id.* at 1218.

<sup>16</sup> *Id.*

it, and ruled that connection between Westboro Church's speech and the funeral did not "transform the nature of Westboro's speech."<sup>17</sup> Rather, the Snyder funeral ceremony was merely the occasion for delivering its message, and the protesters did not interfere in any way with the funeral.<sup>18</sup> Further, while the picketers' speech can be viewed in part as a personal attack on the Snyder family, Westboro Church had long engaged in a similar pattern of speech and had no prior relationship or conflict with the Snyders, thereby precluding the argument that the Westboro Church sought to immunize its conduct from liability by falsely claiming First Amendment protection.<sup>19</sup> Moreover, the Court reasoned, the decision to conduct the protest in connection with a funeral service was designed to maximize publicity of the Westboro message, and did not render that message private and less entitled to First Amendment protection.<sup>20</sup> Most importantly, Westboro's speech, although hurtful and dismaying, was disseminated peacefully at a public place adjacent to a public street, a location deemed to be the "archetype of the traditional public forum,"<sup>21</sup> in strict compliance with the time, place, and manner restrictions imposed by the police.<sup>22</sup> Accordingly, the Court concluded Westboro's speech "was at a public place on a matter of public concern" and was entitled to "special protection" under the First Amendment, even if the expression was viewed in many eyes as misguided or even hurtful.<sup>23</sup>

The Court then turned its attention to the three tort verdicts returned in Snyder's favor. With respect to the intentional infliction of emotional distress, the Court took exception to the District Court's instruction that Westboro could be found liable for the tort if the jurors determined the picketing was "outrageous," thereby permitting the jury to find Westboro liable if the picketers' message conflicted with the jurors' subjective tastes or views. This determination was unacceptable, the court ruled, because it permitted the jury to eradicate the special protection provided speech on the basis of its reaction to that speech.<sup>24</sup>

The jury's finding on intrusion upon seclusion and civil conspiracy claims faced the same fate but for a different reason: the ability of the audience to avert its eyes and avoid the speech.<sup>25</sup> The Court observed:

[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.<sup>26</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The court noted: "Simply put, the church members had a right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence." *Id.* at 1218-1219.

<sup>23</sup> *Id.* at 1219., citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 115 S. Ct. 2338 (1995) (requiring organizers of annual Boston Day parade to include a contingency from the Irish-American Gay, Lesbian, and Bisexual Group of Boston under the Massachusetts public accommodation law violated the First Amendment rights of the parade organizers to shape their message as they chose).

<sup>24</sup> *Id.* This issue is discussed more fully in Part V which examines the U.S. Supreme Court decision in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988).

<sup>25</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>26</sup> *Id.*

While acknowledging the captive audience doctrine has been sparingly applied to protect unwilling listeners from protected speech, the doctrine could not assist Snyder, because the Westboro Church “stayed well away from the memorial service,” Snyder did not see the text printed on the picketers’ signs, and there was no interference with the funeral service. Hence, the Court concluded, the First Amendment precluded recovery by Snyder for the torts of intrusion upon seclusion and civil conspiracy.<sup>27</sup>

Having determined that the First Amendment prohibits Snyder’s recovery for intentional infliction of emotional distress, intrusion upon seclusion, or civil conspiracy, the Court affirmed the judgment of the Fourth Circuit.<sup>28</sup>

## V. CLARIFICATION OF THE *FALWELL* RULE

*Snyder* provides an important clarification of the *Falwell* rule, which bars public figures from bringing civil actions for intentional infliction of emotional distress in the absence of actual malice.<sup>29</sup> *Hustler Magazine* published a parody in the form of an interview with Jerry Falwell, a nationally recognized religious leader and political and public affairs commentator, in which he confesses his first sexual experience occurred in a drunken rendezvous with his mother in an outhouse. Falwell filed an action against the publisher for libel, invasion of privacy and intentional infliction of emotional distress. The District Court granted a directed verdict in favor of *Hustler Magazine* on the invasion of privacy claim, and the jury found against Falwell on the libel claim, because the ad could not be understood as describing actual facts or events. The jury returned a verdict in favor of Falwell, however, on the infliction of emotional distress claim, and that verdict was upheld by the District Court when it denied *Hustler Magazine*’s motion for judgment notwithstanding the verdict.<sup>30</sup>

The Fourth Circuit Court of Appeals affirmed the judgment against *Hustler Magazine*, rejecting its argument that public figures must demonstrate actual malice in order to recover for intentional infliction of emotional distress, just as public figures are required to demonstrate actual malice to recover for libel under the *New York Times* rule.<sup>31</sup>

The U.S. Supreme Court reversed the Fourth Circuit.<sup>32</sup> Recognizing the First Amendment’s dual role in maximizing the free flow of ideas and opinions on matters of public interest and concern and protecting the individual’s right to speak one’s mind and engage in

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1221.

<sup>29</sup> The rule was established by the U.S. Supreme Court in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988) (“We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e. with knowledge that the statement was false or with reckless disregard as to whether or not it was true”).

<sup>30</sup> *Id.* at 878.

<sup>31</sup> *New York Times v. Sullivan*, 84 S. Ct. 710 (1964). The Fourth Circuit interpreted the *New York Times* decision as requiring a heightened level of culpability in the knowing or reckless conduct standard, concluded the heightened level of culpability was satisfied when the jury found *Hustler Magazine* acted intentionally or recklessly, and rejected the contention that the ad parody did not describe actual facts and therefore was an opinion protected by the First Amendment. In other words, as long as the publisher intended to inflict serious emotional injury and the publication was outrageous and did in fact cause emotional distress, it did not matter whether the publication was fact or opinion or whether it was true or false. *Falwell*, 108 S. Ct. at 879, 880.

<sup>32</sup> *Falwell*, 108 S. Ct. at 883-884.

robust political debate,<sup>33</sup> the Court acknowledged free speech will necessarily involve criticism of public officials and public figures, and such criticism may contain vehement, caustic and unpleasant attacks and misstatements of fact.<sup>34</sup> For that reason, the Court explained, the *New York Times* rule restricted defamation claims of public officials and public figures to those instances in which the published statement was false and the publisher knew it was false or acted in reckless disregard of its falsity.<sup>35</sup>

The Court then ruled that the same standard should be applied to claims of public figures for intentional infliction of emotional distress, i.e. the public figure is required to establish the statement allegedly causing emotional distress was false and that the publisher of that statement knew it was false or acted in reckless disregard of its falsity. Otherwise, the court reasoned, “political cartoonists and satirists would be subjected to damages awards without any showing that their work defamed its subject,” simply because it - like the most successful cartoons and caricatures through the ages - was designed and calculated to hurt the feelings of the public figure who is the subject of the cartoon or satire.<sup>36</sup> Furthermore, the Court noted, permitting public figures to recover for intentional infliction of emotional distress simply because the jury finds the publication was outrageous permits the jury to impose liability on the basis of its subjective tastes or views or the degree to which it disliked the expression. Such a standard cannot survive the Court’s “long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.”<sup>37</sup> Accordingly, the Court concluded that Falwell as a public figure could not recover against *Hustler Magazine* for the tort of intentional infliction of emotional distress without showing that the publication contains a false statement of fact made with actual malice. Because the interview was parody, the publication could not be understood as a false description of actual facts, in the absence of which Falwell could not recover.<sup>38</sup>

Notably, because the *Falwell* opinion involved a public figure and the Court made numerous references to his status as a public figure throughout its opinion, it was unclear whether the same rule would be applied to private persons. *Snyder* provided the opportunity to answer that question.<sup>39</sup> The Westboro Church argued it was immune from liability for intentional infliction of emotional distress, because its picketing addressed public issues and because its signs, like parody and satire, cannot be said to make a false statement of fact. Snyder argued the requirement of a false statement of facts applied to defamation actions but not claims for intentional infliction of emotional distress and that, if the Court adopted such a requirement,

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<sup>33</sup> *Id.* at 879.

<sup>34</sup> *Id.* at 879-880.

<sup>35</sup> *Id.* at 880.

<sup>36</sup> *Id.* at 880-881.

<sup>37</sup> *Id.* at 882 citing NAACP v. Clairborne Hardware Co, 102 S. Ct. 3409, 3423 (1982) (“Speech does not lose its protected character . . . because it may embarrass others or coerce them into action”), and FCC v. Pacifica Foundation, 98 S. Ct. 3026, 3038 (1978) (“The 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 offence, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas”).

<sup>38</sup> *Falwell*, 108 S. Ct. at 882-883. The court’s conclusion was directly supported by the jury’s finding on the libel claim that the ad could not be understood as describing actual facts or events.

<sup>39</sup> See Alan Raphael, *Does the First Amendment Allow the Father of a Dead Soldier to Receive Tort Damages from Picketers at his Son’s Funeral?*, 1 A.B.A. PREVIEW 8, 10-11 (2010), which provides a helpful review of legal decisions forming the background of this issue.

it should be applied to public officials but not public figures.<sup>40</sup> The Court agreed with the Westboro Church, and applied the *Hustler* rule to a private person.<sup>41</sup> While this clarification is significant, it is perhaps the only important aspect of the decision.

## VI. SHORTCOMINGS OF MAJORITY OPINION

Except as noted above in Part V, *Snyder* lacks value as a First Amendment precedent. The Westboro Church has significant experience in organizing and conducting its protests, invariably works closely with local police in developing time, place and manner restrictions for its picketing, and closely adheres to those restrictions. Protestors following those practices will rarely if ever find themselves stripped of First Amendment protections. Further, it should not be surprising that similar message-making tactics in expressing views on public issues will be protected by the First Amendment and insulated from tort liability, precisely because the message is extreme, wears the cloak of hyperbole, and cannot easily be said to be true or false, thereby qualifying as opinion.

That *Snyder* lacks value as precedent might be fortunate, because the reasoning in the majority opinion employs an overly simplified two-step process: (1) determine whether or not the speech in question qualifies as a matter of public or private concern, and (2) provide the maximum protection to the speech if it qualifies as public speech. Further, the majority opinion uses satisfaction with certain conditions of speech – 1000 feet from the funeral service, neither seen nor viewed by funeral attendees, full cooperation with local police and compliance with all of their directives, and directing the speech to the public at large – to determine the speech was public speech, thereby making the classification of speech as public or private concern as the primary consideration. This approach causes one commentator concern: “If all of these conditions are satisfied, it is not clear that classifying speech as a matter of public or private concern should be the primary or controlling factor in the Court’s analysis.”<sup>42</sup>

The commentator makes his point by providing two examples: (1) a speaker who strongly dislikes a co-worker stands on a soapbox in a public park and proclaims his co-worker is a horrible person, hated by God and deserving of hell upon his demise; and (2) members of the Westboro congregation place phone calls to the Snyder family both before and after the funeral service and deliver the same messages that appeared on the picketers signs and are matters of public concern.<sup>43</sup> Under Chief Justice Robert’s reasoning, the former speech might very well be classified as a matter of public concern, because the speech took place in a public park located some distance from the workplace of the co-worker and is addressed to a public audience. The latter speech, the content of which is of public concern, might be deemed to be unprotected harassment under the U.S. Supreme Court decision upholding restrictions on abortion protesters from picketing in residential areas to protect the privacy of homeowners and residents.<sup>44</sup>

The same commentator also questions the Court’s insistence that, because the Westboro protesters “had the right to be where they were” in communicating their message, they could not held liable for intentional infliction of emotional distress. That insistence might permit a jury to

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<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Falwell*, 105 S. Ct. at 883.

<sup>42</sup> *Amar supra* n. 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* citing *Fritz v. Shultz*, 108 S. Ct. 2495 (1988) (upholding a municipal ordinance prohibiting antiabortion picketing before or about the residence or dwelling in residential areas to keep the antiabortion message from intruding upon residential privacy and quiet enjoyment of the home).

find protestors liable for intentional infliction of emotional distress if the state passed a content-neutral restriction prohibiting protestors from coming within 100 feet of the funeral service and the protestors violated that restriction.<sup>45</sup> While the content of the speech is the same, the jury is not permitted to determine whether the speech is outrageous if the protestors complied with the 100-foot restriction but may be permitted to assess its outrageousness if they violated that restriction.

## VII. WESTBORO CHURCH ACTIVISM

As noted above in Part VI, the U.S. Supreme Court decision in *Snyder* lacks value as a precedent largely because the outcome was preordained by the Westboro Church's extensive experience in conducting protests, working closely with local authorities in developing time, place and manner restriction for its pickets, and adhering closely to those restrictions. What is perhaps less well known is the extensive legal background and experience of Phelps family members and their willingness to engage in litigation to secure the right to proselytize their message. Indeed, although the membership of the Westboro Church numbers is small, and many of its members are closely related, it has garnered extensive media coverage of its hateful messages throughout the country by carefully selecting the events it pickets, scrupulously organizing its protests to comply with legal requirements, and aggressively pursuing judicial relief when appropriate.

Rev. Fred Waldron Phelps Sr., the father of thirteen children and founder of the Westboro Church, earned his law degree from Washburn University in 1962, and practiced law as a civil rights attorney, until he was disbarred by Kansas for perjury and ultimately agreed to stop practicing law in federal courts in 1989 after multiple charges of false testimony were leveled against him.<sup>46</sup> Eleven of Rev. Phelps' children hold law degrees. While four are estranged from the family, most of the rest live in the family compound and practice law in a Topeka, Kansas, law firm, the revenue from which helps pay for travel costs as the church holds demonstrations across the country. They also earn thousands in fees from lawsuits filed against the communities that try to prohibit or stymie their public demonstrations.<sup>47</sup>

According to the Southern Poverty Law Center (SPLC), Rev. Phelps has used his passionate opposition to homosexuality as the focal point of his crusade. In an undated pamphlet, Phelps said, "America is doomed for its acceptance of homosexuality. If God destroyed Sodom and Gomorrah for going after fornication and homosexuality then why wouldn't God destroy America for the same thing?"<sup>48</sup> His campaigns against homosexuality have created enormous animosity throughout the country, especially after picketing the funerals of four children killed in a bus crash in Huntsville, Alabama, in 2006, and threatening to visit the funerals of five Amish girls who were executed that same year in a one-room schoolhouse in Nickel Mines, Pennsylvania.<sup>49</sup> The Westboro Church is perhaps best known for picketing the

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<sup>45</sup> *Id.* The U.S. Supreme Court acknowledged such a restriction was passed in Maryland following the Westboro Church picketing activities during the Snyder funeral service. *Snyder*, 131 S. Ct. at 1218.

<sup>46</sup> *Fred Phelps*, THE SOUTHERN POVERTY LAW CENTER, INTELLIGENCE FILES, accessed on December 28, 2011, at <http://www.splcenter.org/get-informed/intelligence-files/profiles/fred-phelps>.

<sup>47</sup> Barbara B. Hagerty, *A Peek Inside the Westboro Baptist Church*, NPR, accessed on December 28, 2011, at <http://www.npr.org/2011/03/02/134198937/>.

<sup>48</sup> *Fred Phelps* supra n. 46.

<sup>49</sup> The Westboro Church decided against picketing the Amish girls' funerals in exchange for airtime on the nationally syndicated Mike Gallagher Show. *Anti-Gay Kansas Church Cancels Protests at Funerals for Slain Amish Girls*,



funeral of Matthew Sheppard, a 21-year-old gay student who was beaten to death in Laramie, Wyoming, and whose death inspired the play *The Laramie Project*. Phelps and his church members have also picketed Sonny Bono, Bill Clinton's mother, Frank Sinatra, Bob Dole, Jerry Falwell, the Ku Klux Klan, and Santa Claus.<sup>50</sup>

In 2005, the Westboro Baptist Church began to target the funerals of servicemen killed in Iraq and Afghanistan, attributing their deaths to a vengeful God bent on punishing the United States for condoning homosexuality. According to one member of the Westboro Church, "Military funerals are pagan orgies of idolatrous blasphemy where they pray to the dunghill gods of Sodom and play taps to a fallen fool"<sup>51</sup>

Notably, the Westboro Church members are well steeped in combating local and state restrictions on public demonstrations. Mark Potok, director of the Southern Poverty Law Center's Intelligence Project, which profiles hate and extremist groups in the United States, insists the Westboro Church is both well organized and perfectly capable defending its Constitutional rights in court. "They know their First Amendment rights very well, and they've been very good at defending them," Potok admitted.<sup>52</sup>

Shirley Phelps-Roper, one of the daughters of Rev. Phelps and perhaps the most visible of the Westboro Church activists, has ample experience and success arguing freedom of expression cases. Phelps-Roper filed a lawsuit requesting an injunction against the enforcement of a Nebraska statute requiring protesters to remain several hundred feet away from a funeral or memorial service. When that injunction was denied, she appealed to and her sister, Margie Jean Phelps, argued the case before the Eighth Circuit, which in a per curiam decision determined Phelps-Roper would likely succeed on the merits of her facial challenge, reversed the district court, and remanded the matter for further proceedings.<sup>53</sup>

This legal victory came on the heels of another Phelps-Roper's success challenging the Nebraska flag burning bill. Phelps-Roper was arrested in 2007 for flag desecration, disturbing the peace, child abuse and contributing to the delinquency of a minor for her activities during a demonstration at a National Guardsman's funeral in Bellevue, Nebraska.<sup>54</sup> Bellevue officials claimed Phelps-Roper encouraged her 10-year-old son to trample on the American flag, wore an American flag around her waist as a skirt, and allowed the material to drag on the ground. Phelps-Roper filed a lawsuit challenging the flag burning law. Nebraska Attorney General Jon Bruning during a conference call with the federal district court agreed the Nebraska laws was unconstitutional, clearing the way to the issuance of an injunction preventing Nebraska from enforcing the law.<sup>55</sup> Authorities eventually agreed to drop the charges against Phelps-Roper and the city of Bellevue offered Phelps-Roper \$17,000 to dismiss her lawsuit.<sup>56</sup>

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FOX NEWS (October 26, 2006), accessed on December 28, 2011, at <http://www.foxnews.com/story/0,2933,217760,00.html>.

<sup>50</sup> *Fred Phelps* supra n. 46.

<sup>51</sup> *Id.*

<sup>52</sup> *Hagerty* supra n. 47.

<sup>53</sup> Margery A. Beck, *Court Strikes Down Nebraska's Funeral Picketing Ban*, ASSOCIATED PRESS (October 20, 2011), accessed on December 28, 2011, at <http://www.columbiaindian.com/stories/2011/10/20/court-strikes-down-nebraskas-funeral-picketing-ban/>. See *Phelps-Roper v. Troutman*, 662 F.3d 485 (8<sup>th</sup> Cir. 2011). The Westboro Church obtained the same result in *Phelps-Roper v. City of Manchester*, 658 F.3d 813 (8<sup>th</sup> Cir. 2011), although the Civil Liberties Union argued the case on behalf of Westboro Church.

<sup>54</sup> See Shirley Phelps-Roper peacefully cooperating with authorities making the arrest in this video: <http://www.youtube.com/watch?v=zpiobTQ-VGM>.

<sup>55</sup> *Neb Officials Agree Flag Desecration Law is Unconstitutional*. ASSOCIATED PRESS (July 21, 2010), accessed on December 28, 2011, at <http://archive.firstamendmentcenter.org/speech/flagburning/news.aspx?id=23179>. The basis

Margie Jean Phelps, Shirley's sister and another family lawyer, commented on the Nebraska's authorities' decision to press charges. "This is a fool's errand that they're on, and they'll bankrupt the state in the process," she said. "We go to public right-of-ways in the midst of public discussions and have a dissenting view. That's supposed to be the essence of what makes this nation unique - that a little church in the middle of the nation can go to a public street in the midst of a public debate and have a wildly unpopular, dissenting view."<sup>57</sup> Notably, Margie Jean Phelps represented Fred Phelps, her father, in *Snyder* and argued on his behalf before the U.S. Supreme Court.<sup>58</sup>

The Westboro Church's experience in the law has helped the church group prevail on numerous occasions. Jonathan Phelps, son of Rev. Phelps and another attorney, emphasized the importance knowing the law in face of scathing opposition. "We research the law carefully. That's mostly what I do is make sure our people know the law, that law enforcement know what our people intend to do, and sometimes make sure that law enforcement know what the law is."<sup>59</sup>

## VIII. CONCLUSION

The U.S. Supreme Court decision in *Snyder*, while an interesting and familiar review of well established First Amendment principles, is neither surprising nor important. Except for its application of the *Falwell* rule to private persons, the opinion does not break new legal ground and will not likely have a significant impact on future First Amendment cases, largely because of the careful manner in which the Westboro Church works with local authorities to plan and execute its protests and ensure compliance with the First Amendment. If nothing else, *Snyder* demonstrates how effectively careful, advance preparation protects those rights.

The Westboro Church's success in *Snyder* and its ongoing achievements in publicizing its venomous hatred of homosexuality, however, cannot be attributed solely to First Amendment principles. Rather, the Westboro Church's victories are also the result of the masterful linkage of their message with otherwise highly publicized events, intimate knowledge of First Amendment law, the legal savvy of Phelps family members, and their aggressive pursuit of judicial relief whenever their First Amendment rights are in jeopardy.

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of *Bruning's* concession was *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (defendant's act of burning American flag during protest rally was expressive conduct within protection of First Amendment, and Texas could not justify prosecution of defendant based on its purported interest in preventing breaches of peace or to preserve flag as symbol of nationhood and national unity).

<sup>56</sup> *Phelps-Roper Strikes Deal*. ASSOCIATED PRESS (August 23, 2011), accessed on December 28, 2011, at [http://m.cjonline.com/news/local/2010-08-23/phelps\\_ropers\\_strikes\\_deal](http://m.cjonline.com/news/local/2010-08-23/phelps_ropers_strikes_deal). Phelps-Roper subsequently withdrew a civil rights lawsuit against Sarpy County prosecutors for her and her son's arrest. Her civil rights lawsuit is described in *Phelps-Roper: Rights Violated*. ASSOCIATED PRESS (August 9, 2010), accessed on December 29, 2011, at [http://cjonline.com/news/local/2010-08-09/phelps\\_ropers\\_rights\\_violated#.TvpsuJ3BaU](http://cjonline.com/news/local/2010-08-09/phelps_ropers_rights_violated#.TvpsuJ3BaU).

<sup>57</sup> *8th Circuit strikes down Neb.'s funeral picketing ban*, ASSOCIATED PRESS (October 21, 2011), accessed on December 29, 2011 at <http://www.firstamendmentcenter.org/8th-circuit-strikes-down-neb-s-funeral-picketing-ban>.

<sup>58</sup> *Snyder*, 131 U.S. at 1212.

<sup>59</sup> Patrick Rogers, *Ignore or Engage?*, CONNECT SAVANNAH (May 17, 2011) accessed on December 29, 2011, at <http://www.connectsavannah.com/news/article/104249/>.