

Free Speech, the Mighty Defense against Liabilities for Intentional Torts

–Comment on the “Public Concern” Test for Free Speech in a U.S. Supreme Court’s Tort Action–*

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I . Introduction

Free speech is a fundamental right of individuals who can express their thoughts without restraint of governmental authorities or of other individuals. However, when free speech of one individual violates private rights of the other individual, may the former raise a defense of free speech in order to avoid tort liabilities raised by the latter or may the latter challenge the former’s free speech defense?

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In March, 2011, the United State Supreme Court re-ensured that the First Amendment of the U.S. Constitution protects free speech as long as it is for public concern even if it might cause some mental stress to a victim by such speech.¹⁾ The case was brought by father of a deceased military serviceman, contending that the father was suffering from emotional distress because of the speech made by a group of picketers in his son's funeral service. When the family funeral was held, a group of fundamentalist church members assembled near the funeral service area, by picketing and shouting anti-homosexual slogans against the military and the Catholic Church clergy. The deceased military serviceman was not a homosexual, and the cause of his death was not related to AIDS or homosexuality.

The Court rejected the father's tort claims including intentional infliction of emotional distress and invasion of privacy. One of the main reasons to overturn the trial court decision for the father is that the contents of the picketing were for public concern, not against private individuals. The Court accepted the picketers' argument that what they protested was not against the deceased military serviceman nor the father, but against the military policies or homosexuality in the military. The Court concluded that since the messages of the picketing are just for public concern on homosexuality, the picketing can be considered as free speech which is protected under the First Amendment, and the picketers are free from tort liabilities.

This case is worth reviewing since it attempts to resolve the legal dispute where fundamental rights under the Constitution conflict with private rights under the state tort liabilities law. In addition, this U.S case is similar to a recent Korean Supreme Court's tort case which applied the 'public matter' analysis in denying a defamation claim against the movie maker related to

1) Snyder v. Phelps, 131 S.Ct. 1207(2011).

Silmido, a movie of which story was based on a historical incident in Korea.²⁾ Such two cases prove or even imply that the legal conflict between constitutional rights and tort liabilities might be common or have constantly occurred, and free speech argument can be generally raised or contended as defense for tort liabilities.

This paper is a comment which mainly aims at introducing the U.S. legal principles to deal with such conflicting matters. The paper reviews factual and procedural backgrounds of this funeral demonstration case, and explores how free speech is being treated as a defense against intentional tort actions. Then, the Court's "public concern" test under the First Amendment of the U.S. Constitution will be examined, by comparing the majority opinion and the dissenting opinion of this Supreme Court decision.

II. Overview of Factual and Procedural Backgrounds in a Funeral Picketing Case

The respondents of this case are the founder and members of the Westboro Baptist Church("Westboro" or "Church") in Topeka, Kansas which has picketed military funerals for 20 years, to publicize their belief that "God

2) Korea Supreme Court, 2007-*da*-3483, July 15, 2010. The main purpose of this paper is not to compare the two different tort cases in Korea and the U.S, nor their "public interest" or "public concern" analyses respectively. Learning part of U.S. legal principles on free speech may be helpful for those who later do research a comparative study on free speech as well as Koreans residing in the U.S. who may have to raise free speech defense since the freedom of speech and of the press are also accorded to aliens residing in the U.S. 16A Am. Jur. 2d Constitutional Law § 485(2011).

hates the United States for its tolerance of homosexuality, particularly in America's military" and condemning the Catholic Church clergy for child-molesting scandals.³⁾ After the Church in Kansas learned that a funeral of a military serviceman would be held in Maryland, the respondents announced in advance its picketing plan at the funeral, and traveled to Maryland to demonstrate at the funeral in order to express their belief against the military.

The petitioner of this case is Albert Snyder, father of a military serviceman, Matthew Snyder, who died in Iraq in the line of duty. He attended his son's funeral held in a Catholic Church in Westminster, Maryland.⁴⁾ On the day of funeral service, he passed by the picketing area to attend the funeral. He did not know whether Westboro's picketing was related to his son's funeral at the time, and saw the tops of signs of pickets displayed by Westboro. However, after the funeral when Westboro's picketing demonstration was aired on television, he learned that the picketing and messages on the

3) The respondent-defendants in this case are Fred Phelps who founded the Westboro Baptist Church, his daughters who were in the picketing, and the Westboro Church itself. The Church has 60 to 70 members. Among them, 50 members are Fred Phelps's children, grandchildren, or in-laws. The Church's picketing has been targeting at military homosexuality, scandals of Catholic Church clergy related to child molesting, Jews, Muslims, etc. Westboro Church established a web site, www.godhatesfags.com, in order to publicize its religious viewpoint. 131 S.Ct. 1207, 1210; *Snyder v. Phelps*, 580 F.3d. 206, 211 (2009); See also www.godhatesfags.com. In addition, Westboro Baptist Church involved in many other courts' cases related to its picketing and demonstration. In a case of Kentucky's *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006), Westboro successfully challenged the Kentucky funeral picketing law putting 300 feet buffer zone against picketing like Westboro. 1 *Smolla & Nimmer on Freedom of Speech* § 5:11.50.

4) 580 F.3d. 206, 211(2009).

pickets were related to his son's funeral. Subsequently, he suffered emotional distress because of the offensive and adverse messages used in the picketing. Therefore, he filed a tort action against the Westboro Church.

The following facts show the picketing demonstration, which can be considered as 'speech' done by the Church, regarding what is said, where is done, and how is performed.

1. What Speech was made by the Church

Near the funeral of the military serviceman, Westboro, the alleged tortfeasor, made an anti-homosexuality demonstration against the military and the Catholic Church. Westboro displayed placards with signs of statements like: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs,"⁵⁾ "Fag Troops,"⁶⁾ "Semper Fi Fags,"⁷⁾ "God Hates Fags," "Maryland Taliban," "Fags Doom

5) IED(improvised explosive device), "known as a roadside bomb, is a homemade bomb constructed and deployed in ways other than in conventional military action. ... IEDs may be used in terrorist actions or in unconventional warfare by guerrillas or commando forces ... In the second Iraq War, IEDs were used extensively against coalition forces and by the end of 2007 they had become responsible for approximately 63% of coalition deaths in Iraq. ... They are also used in Afghanistan by insurgent groups, and have caused over 66% of the coalition casualties in the 2001-present Afghanistan War." http://en.wikipedia.org/wiki/Improvised_explosive_device.

6) 'Fag' is an "offensive term for an openly homosexual man," <http://www.et-house.com/>. Like a faggot which is a disparaging term to call "a male homosexual," <http://www.merriam-webster.com/dictionary/faggot>.

7) 'Semper fidelis' is a latin term, meaning, "always faithful." It is a motto of the United States Marine Corps. <http://www.merriam-webster.com/dictionary/semper%20fidelis>.

Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” and “Priests Rape Boys.”⁸⁾ Some pickets contained statements, like “You are Going to Hell,” and “God Hates You,” which seem to be more personal than public.⁹⁾

In addition to the picketing demonstration done at the funeral, a few weeks after the funeral, one of the Westboro picketers posted a message on Westboro’s Web site¹⁰⁾ about the picketing and “containing religiously oriented denunciations of the Snyders.”¹¹⁾ The published “epic” on the web site, entitled “The Burden of Marine Lance Cpl. Matthew Snyder,” stated that “Albert Snyder and his ex-wife taught Matthew to defy his creator, raised him for the devil, and taught him that God was a liar.”¹²⁾

2. Where and How the Speech was made

The Church members picketed on public land approximately 1,000 feet from a Catholic Church where the funeral was held.¹³⁾ The picketers displayed signs showing the above-mentioned messages for 30 minutes before the funeral started.

8) 131 S.Ct. 1207, 1213, 1216–1217.

9) *Ibid*, 1213, 1216–1217.

10) www.godhatesfags.com, The web site shows photos of their picketing activities and pickets. Some pickets contain illustrations showing male figures’ sexual act.

11) *Ibid*, 1214, n. 1. This posting was one of the basic facts in the trial court, but the majority of the Supreme Court did not take this posting message into consideration in its fact analysis for Westboro’s intentional acts at “Snyder’s son’s funeral” since the petitioner failed to mention this fact in its certiorari petition to the Supreme Court. *Ibid*. Thus, the Supreme Court only concerns the messages on the picketing.

12) 580 F.3d. 206, 212.

13) 131 S.Ct. 1207, 1213.

Before its picketing demonstration, they notified the Maryland local authorities in advance of their intent to picket at the time of the funeral. While picketing, they followed the guidance of local law enforcement officers, and complied with local funeral picketing law. There were no yelling or no violence.¹⁴⁾ The picketing demonstration was aired on TV at night after the funeral.

3. How the Father Learned the Messages done by the Church

The funeral procession passed within 200 to 300 feet of the picket site.¹⁵⁾ The petitioner could see the tops of the picket signs as he drove to the funeral, but he did not see what was written on the signs at that time. However, he learned the messages that night when he was watching a news covering the picketing.¹⁶⁾

In addition, regarding the Internet posting referring his family members, “Snyders,” done by one of the picketers a few weeks later after the funeral, the petitioner found the posting through an Internet search for his son’s name.

4. How this Tort Action had been Decided

The father filed a diversity action in a Maryland district court against Westboro, the Kansas church, alleging state tort claims including intentional infliction of emotional distress.¹⁷⁾ The district court held Westboro liable

14) *Ibid*, 1213.

15) *Ibid*, 1214.

16) *Ibid*, 1213.

17) Since the plaintiff, Snyder, is a Maryland resident while defendants are Kansas residents, this suit had been tried at federal courts, starting at the

for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. A jury awarded the father with millions of dollars in compensatory and punitive damages.¹⁸⁾ Thus, Westboro challenged the district court's decision, claiming that its picketing would be fully protected under the First Amendment of the U.S. Constitution. Subsequently, the court reduced the punitive damages award, but the Westboro Church's liability on the tort claims was not overturned.¹⁹⁾

Therefore, Westboro appealed. At the appellate level, the U.S. Court of Appeals for the Fourth Circuit reversed the district court's decision, finding that Westboro's statements of the signs in the picketing were for public concern, and consequently were constitutionally protected speech under the First Amendment.²⁰⁾

Consequently, the father petitioned the Supreme Court. Finally, the Court held in favor of Westboro, concluding that (1) "in light of content, form, and context, speech of church members ... was of public concern and

U.S. District Court for the District of Maryland. Snyder alleged five state tort law claims, such as defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. However, the District Court awarded Westboro summary judgment on claims of defamation and publicity given to private life, concluding that Snyder could not prove the necessary elements of those torts. *Ibid*, 1214.

18) The awards were US\$2.9 million in compensatory damages and US\$8 million in punitive damages. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571(D.Md. 2008).

19) *Ibid*, 571. The punitive damages award was remitted to \$2.1 million.

20) 580 F.3d 206, 226. "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." U.S.C. Const. Amend. 1(Freedom of Religion, Press, Expression).

therefore was entitled to special protection under the First Amendment,” and (2) “father was not a captive audience at the funeral, for purposes of captive audience doctrine.”

Thus, in the next section of this paper, the majority Court’s reasoning for free speech under the “public concern” approach will be examined, such as what is the requirement for the cause of intentional torts actions including intentional infliction of emotional distress, and how free speech can be a defense against state intentional torts rights given to aggrieved individuals. Moreover, such majority opinion will be compared with one dissenting opinion of the Court, which distinguished some of major facts of this case from the majority’s point of view.

III. Free Speech as a Defense against Liabilities for Intentional Torts

The basic analysis done by the Supreme Court is to determine whether Westboro Church’s picketing and its messages in the picketing are for the public which can be exempted from the accusation of intentional torts by Westboro. Initially, the petitioner alleged five state tort law claims, such as defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The claims for defamation and publicity given to private life were stricken out at earlier stage of the court proceeding since the petitioner could not prove the cause of actions of these claims. Thus, the Supreme Court decided on whether the Westboro Church is liable for three tort claims, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.

In case of intentional infliction of emotional distress, the Restatement (Second) of Torts states:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress:
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.²¹⁾

Thus, a cause of action of intentional infliction of emotional distress arises when a defendant causes severe emotional distress, intentionally or recklessly, by extreme and outrageous conduct of the defendant to a plaintiff. It is required that the defendant must intend severe emotional harm and such harm must result.²²⁾ In Maryland, in order to win the state's intentional infliction of emotional distress, the plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous

21) The Restatement (2nd.) of Torts, Sec. 46.

22) Dan B. Dobbs, *The Law of Torts: Practitioner Treatise Series*, Vol. 2(West Group, 2001), p. 826. the defendant must intend severe emotional harm(or recklessly risk it) and such harm just in fact result. Intent, as elsewhere in the law of torts, can be shown either by evidence that the defendant that such harm was substantially certain to occur. The Restatement says that a reckless or willful attitude will also suffice to meet the requirement. Neither intent nor recklessness alone suffice to make out the case; the conduct itself must be outrageous. Dobbs, *Ibid*, p. 826.

conduct that caused the plaintiff to suffer severe emotional distress.²³⁾

Even if such requirements on a state tort cause of action are met, the defendant may raise a constitutional defense since the “Free Speech Clause of the First Amendment ... can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.”²⁴⁾ If there is a defense on the intentional tort, the tortfeasor will not be liable.

The Supreme Court did not decide whether Westboro’s picketing signs or statements were outrageous unlike the jury in the district court who recognized outrageousness in the Westboro’s picketing activities. Instead, the Court implied that “a jury is unlikely to be neutral with respect to the content of the speech” in a case like this Westboro case.²⁵⁾ Citing the *Hustler* case partially, the Court viewed that outrageousness is a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the juror’s tastes or views, or perhaps on the basis of their dislike of a particular expression.”²⁶⁾ The Court added that a jury may pose a real danger of becoming an instrument for the suppression of vehement, caustic, and unpleasant expression.²⁷⁾ Subsequently, the Court recommended that “we must tolerate insulting, and even

23) 131 S.Ct. 1207, 1215.

24) *Ibid*, 1215.

25) *Ibid*, 1219.

26) *Ibid*, 1219; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 881(1988). In *Hustler*, a parody portrayed Falwell in a drunken incestuous tryst with his mother in an outhouse. The Court in *Hustler* held that the state’s interest in protecting Falwell, a public figure who is a nationally known minister, from emotional distress was insufficient to deny First Amendment protection and criticism of public figures will not always be reasoned or moderate. John R. Vile, *Essential Supreme Court Decisions: Summaries of Leading Cases in U.S. Constitutional Law*(Rowman & Little field Publisher, 2010), p. 271.

27) 131 S.Ct. 1207, 1219.

outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”²⁸⁾

Accordingly, the Court concluded that “[w]hat Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.”²⁹⁾ Thus, the Court denied Westboro’s liability on intentional infliction of emotional distress.

In case of liabilities of intrusion upon seclusion and civil privacy, the Court struck down such claims under the captive audience doctrine.³⁰⁾ The petitioner argued that he was a member of a captive audience at his son’s funeral, and thus, the church is liable. However, the Court contended that “the captive audience doctrine only sparingly to protect unwilling listeners from protected speech,” by quoting other decisions which allowed the captive audience doctrine in cases of a homeowner who received offensive mails to his home and of an individual not to be disturbed by the picketing before or about his residence.³¹⁾

The Court analyzed that Westboro’s picketing was not at the Catholic church where the funeral service was held, and the petitioner did see only the tops of the picketing signs when he drove to the funeral. The Court pointed out that the picketing did not interfere the funeral service. The Court concluded that the petitioner was not a captive audience, and therefore, would not recover from intrusion of seclusion. Furthermore, since the petitioner

28) *Ibid*, 1219.

29) *Ibid*, 1219.

30) The appellate court treated these two torts with intentional infliction of emotional harm, and did not recognize such tort liabilities as a whole since Westboro was entitled to be protected under the First Amendment, *Ibid*, 1219.

31) *Ibid*, 1220.

is not entitled for recovery from intentional infliction of emotional distress and intrusion of seclusion, he cannot recover for civil conspiracy since the claim for civil conspiracy was based on the above two torts.³²⁾

As reviewed above, the Court set aside all these three tort liabilities of Westboro, by considering Westboro's picketing as 'free speech,' based on the public concern test. Thus, in the next section, how the Court analyzed the speech as public concern will be discussed, by comparing the majority opinion and the dissenting opinion in the Court.

IV. "Public Concern" Analysis

1. Analysis of the Majority Opinion

The majority of the Supreme Court concluded that Westboro's picketing was speech of public concern, not of private matter, which was entitled to a special protection under the First Amendment, and thus such free speech relieved Westboro from tort liabilities. In determining whether the speech done by Westboro can be considered for the public, the majority only analyzed the messages contained on the pickets Westboro posted during its picketing near the funeral service. By raising a federal court's rule which does not allow the Supreme Court to deal with questions not presented in the petitioner's certiorari petition for the Court's review, the majority did not consider another Internet message about the petitioner's family, "Snyders," posted by one of Westboro Church picketers.³³⁾

32) *Ibid*, 1220.

33) *Ibid*, 1214, n. 1.

The majority relied on precedents to establish its legal backgrounds for special protection of free speech. “[S]peech on ‘matters of public concern’ ... is at the heart of the First Amendment’s protection.”³⁴⁾ And the “First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”³⁵⁾ The Court regarded “speech concerning public affairs” as more than self-expression and the “essence of self-government.”³⁶⁾ Thus, it viewed that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”³⁷⁾

Then, the majority sought what speech can be considered as ‘public concern.’ It stated that “[s]peech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community, ... or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”³⁸⁾ It added that “[t]he arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”³⁹⁾

In order to decide whether speech is of public or private concern, the Court argued that it needed to examine the content, form, and context of that speech ‘as revealed by the whole record.’⁴⁰⁾ It also emphasized that in considering content, form, and context, no factor is dispositive, and it

34) *Ibid*, 1215.

35) *Ibid*, 1215.

36) *Ibid*, 1215.

37) *Ibid*, 1215.

38) *Ibid*, 1216.

39) *Ibid*, 1216.

40) *Ibid*, 1216.

is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.⁴¹⁾

Based on these legal principles to test “public concern” in speech, the Court analyzed the content, form, and context of messages on the Westboro’ picketing, before it concluded that Westboro’s signs “plainly related to broad issues of interest to society at large, rather than matters of ‘purely private concern’.”⁴²⁾

In terms of the content of Westboro’s picketing messages including “Fags Doom Nation,” “Priests Rape Boys,” and the previously mentioned signs, the Court regarded the placard messages by Westboro as “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy” which are ‘matters of public import.’⁴³⁾ It further added that “[t]he signs certainly convey Westboro’s position on those issues, in a manner designed, ..., to reach as broad a public audience as possible.”⁴⁴⁾

The Court saw that even the signs on the pickets like “You’re Going to Hell” and “God Hates You” which “were viewed as containing messages related to Matthew Snyder or the Snyders specifically,” would not change the fact that “the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”⁴⁵⁾

Regarding the context analysis of a speech, the Court argued that the connection between Westboro’s picketing and the petitioner’s son’s funeral did not change the nature of Westboro’s speech. The Court found that

41) *Ibid*, 1216.

42) *Ibid*, 1216.

43) *Ibid*, 1217.

44) *Ibid*, 1217.

45) *Ibid*, 1217.

Westboro actively addressed anti-homosexuality issues with honest belief that such issues were public ones. The Court concluded that even if such issues might hurt the petitioner, the public nature of such issues has not been changed.⁴⁶⁾

In terms of manner of a speech, the Court started with the principle that even protected speech is not be permissible in all places and at all times.⁴⁷⁾ Thus, the Court checked where, when, and how Westboro picketed.

The majority was not bothered by the fact that Westboro chose Matthew Snyder's funeral as its picketing site since the military funeral may "increase publicity of [Westboro's] views ... because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies."⁴⁸⁾ Even though the picketing in a family funeral might hurt the dead soldier's family member, and if "Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street," its picketing can be protected since it picketed in a public forum.⁴⁹⁾

To determine how and where Westboro conducted its picketing, in an appropriate or reasonable manner, the Court applied the Maryland law which prohibits picketing within 100 feet of a funeral service or funeral procession. Then, it concluded that Westboro's speech should be protected since Westboro abided by the local demonstration regulations, "peacefully ... at a public place adjacent to a public street" before the funeral.⁵⁰⁾ Since the 'public streets' can be considered as a 'traditional public forum,' Westboro's

46) *Ibid*, 1212.

47) *Ibid*, 1218.

48) *Ibid*, 1217.

49) *Ibid*, 1217-1218. More detailed public forum analysis can be referred in Philip J. Prygoski, *Constitutional law*(St. Paul: West, 2010). pp. 347-356.

50) 131 S.Ct. 1207, 1218.

picketing in public land was appropriate when it tried to communicate to the public its views on matters of public concern.⁵¹⁾

The analysis done by the majority of the Court is somewhat interesting when it is compared with a dissenting opinion written by Justice Alito. The next part will look over what factors are treated differently in the majority opinion and a dissenting one.

2. Analysis by a Dissenting Justice

The dissenting Justice started with his opinion, stating that “[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”⁵²⁾ He pointed out that the petitioner is not a public figure, but a private person, a parent who lost his son in a military action, suffering from “an incalculable loss,” and who is deserved to have an “element” right to bury his son in peace rather than being exposed to the public as a “tumultuous media event” with Westboro’s “vicious verbal attacks that make no contribution to public debate.”⁵³⁾

In terms of manner to exercise freedom of speech, the dissenting opinion pinpointed that Westboro could have expressed its views on anti-homosexuality in some other places and time rather than at the funeral service of the petitioner’s son. It stated that Westboro could have had “limitless” choices to express its views, by writing and distributing books or texts, creating video and audio recordings, speaking to individuals or groups, or picketing peacefully in “countless” public locations including the U.S.

51) *Ibid*, 1218, n. 4.

52) *Ibid*, 1222.

53) *Ibid*, 1222.

Capitol, the White House, the Pentagon, the U.S. Naval Academy, any Catholic church “where no funeral was taking place,” etc.⁵⁴⁾ Despite unlimited picketing locations available, why Westboro chose to picket at the funeral in Maryland is quite an interesting fact in this case.

Here, the dissenting Justice noted Westboro’s publicity-seeking strategy. In order to draw public attention, Westboro Church members have picketed at about 600 military funerals, funerals of police officers, fire fighters, victims of natural disasters, accidents, and shocking crimes. Such strategy worked to draw media to Westboro’s picketing, and Westboro obtained even free air time by negotiating the media to cancel its protests at funerals, such as a “9-year-old girl killed in the shooting spree” and five Amish girls killed by a crazed gunman.”⁵⁵⁾

Even in this Snyder case, Westboro made a press release, stating that it was going to picket at the funeral of the petitioner’s son, Matthew Snyder, because “God Almighty killed [him]. ... He died in shame, not honor-for a fag nation cursed by God.”⁵⁶⁾ Thus, the media knew about the funeral beforehand and did cover the funeral as a news.

Furthermore, as the dissenting Justice noticed, Westboro’s picket signs, such as “God Hates You” and “You’re Gong to Hell”, might have been interpreted by some viewers that God might have caused Matthew’s death “in retribution for his sins” as “God’s judgment” because he might have been a homosexual.⁵⁷⁾ In addition, the dissenting opinion considered the Internet posting message by the Westboro’s members as a personal attack to the Snyders.

54) *Ibid*, 1222–1224.

55) *Ibid*, 1224–25.

56) *Ibid*, 1225.

57) *Ibid*, 1225.

Accordingly, the dissenting Justice concluded that Westboro's speech at the funeral picketing and others are not matters of public concerns, "specifically attacked Matthew Snyder" because he was a Catholic and a member of the United States military. Thus, the Justice viewed that "while commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not."⁵⁸) Since Westboro's speech is not for public matters, it cannot be protected as free speech. Thus, Westboro should be liable for the petitioner's intentional tort claims because Westboro has no defense on such tort liabilities.

V. Views on the Court's Decision

This Supreme Court case is somewhat distinctive and even surprising in many aspects.

First of all, this free speech case is involved between the two private individuals, not between governments and individuals. Most traditional cases on freedom of expression are related to actions or regulations of state or federal governments which prohibit free speech or interfere individuals' rights to exercise their freedom of expression where the First Amendment issue is related to protections under the Fourteenth Amendment.⁵⁹)

58) *Ibid*, 1226.

59) John E. Nowak and Ronald D. Rotunda, *Constitutional Laws*(Thomson-West, 2004), p. 1130; "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.

However, this Supreme Court decision is not a case on whether the Maryland funeral picketing law to regulate picketing demonstration near funeral violated or restricted Westboro's rights to express their views by picketing. This is a case about free speech done by a private organization, Westboro Baptist Church, invaded other private person's rights to enjoy peace or not to be mentally disturbed by other's conduct at the time of mourning and grief for the deceased family member.

In relation to state funeral picketing laws, the interesting point is that the Supreme Court appeared to rely on state laws to control picketing and demonstrations at funeral like Westboro's whether such picketing is disruptive or disorderly performed in non-conformity with the state's funeral picketing laws. Picketing activities like Westboro contributed to enacting funeral picketing laws in forty states and the federal government.⁶⁰⁾

However, such funeral picketing laws have been challenged by the protesters like Westboro and several constitutional scholars, contending that funeral picketing laws might infringe upon free speech rights. For example, a Kentucky state court struck down its state funeral picketing law putting a 300-foot buffer zone between funeral attendees and protestors when Westboro opposed it, by arguing that such restriction was content-based regulation.⁶¹⁾ Again Westboro successfully defied the enforcement of a

Const. Amend. 14, Sec. 1.

60) Stephen R. McAllister, "Funeral Picketing Laws and Free Speech," *University of Kansas Law Review*, Vol. 55(2007), p. 575.

61) "The Church, led by its controversial preacher, Fred Phelps, unapologetically preach hatred and embrace the condemnation of all those they offend. Outraged at the perceived cruel insensitivity and verbal assaults from these funeral protests and desiring to protect the privacy of families grieving the death of a loved one, 31 states had enacted or had considered laws restricting when and where picketers may demonstrate at funerals." 1 *Smolla & Nimmer*

Missouri law banning protests at funerals and cemeteries by one of the U.S. Circuit Courts.⁶²⁾

Ironically, such funeral picketing laws appear not to function well to regulate any possible outrageous conducts or messages by protesters like Westboro. These Westboro-related court decisions recognized free speech for demonstrators like Westboro, but failed to protect family members of funerals or funeral attendees who are disturbed by unwanted interference by demonstrators.

Likewise, this Supreme Court decision for Westboro resulted in giving a free way for a demonstrator who exercises its 'tortious' free speech to harm other personal interests or rights as long as such tortfeasor makes speech on 'public' matters or issues that the general public is concerning. The public nature of speech can also be easily recognized when the tortfeasor obeys local government's picketing regulations on speech in terms of time, place, and manner of expressing speech.⁶³⁾ Therefore, the inflicted private person has no recourse to protect his rights and to be away from the tortfeasor's speech.

In addition, the majority opinion plainly emphasized the 'public concern' matters of Westboro's demonstration, but disregarded the fact that Westboro touched upon private matters of one family members who are not public figures at all. If Westboro wanted to express its public-concerning views

on Freedom of Speech § 5:11,50(Limits on picketing and demonstrations at cemeteries and funerals); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 983–984 (E.D. Ky. 2006).

62) 1 *Smolla & Nimmer on Freedom of Speech* § 5:11,50.

63) In the U.S. case law, the government can place reasonable time, place and manner restrictions on speech without regard to content. Nowak and Rotunda, *op. cit.*, p. 1132.

on anti-homosexuality at a private person's funeral, there should be some connection between Westboro's funeral picketing and the funeral on homosexuality issues. The deceased military man is not homosexual at all. However, the majority denied the necessity of such connection.⁶⁴⁾

As the dissenting opinion pinpointed, Westboro has attempted to utilize 'any' funeral, whether it is related to homosexuality or not, in order to enhance its publicity effect as a means of communicating its views on anti-homosexuality with the public. Even though Westboro's intent is to publicize its opinion, but if such intent resulted in victimizing other family, it can be regarded as reckless conduct enough to impose tort liabilities on Westboro. Even the free speech defense, that Westboro's views are on public matters, should have been narrowly applied if some of the Westboro messages in its pickets could be interpreted as private attacks rather than public opinion.

The majority opinion appears not to be interested in what impacts of Westboro's conduct in its picketing and publicity activities. Westboro's conduct through its demonstration and other publicizing activities appeared to have created negative speculations on the petitioner and his family members. The picketing itself might have had limited viewers at the scene, but the media coverage of the picketing and the Internet posting must have spreaded the stories on the petitioner and his family members against their wish.

For example, a picketing demonstration of anti-homosexuality in a 9-year-old girl's funeral might create indelible speculations or negative images of the girl's family members. They might have severely suffered from negative or unreasonable speculations pouring on them regarding the causes of the girl's death. People might think that they are responsible for her death, that she might have been infected with AIDS because of their

64) 131 S.Ct. 1207, 1217.

negligence, or that she got her HIV virus from one of her family members, etc. In extreme cases, because of these unreasonable speculation, family members might have been extradited from their communities, physically or mentally, and even emotionally distressed because of that.

The society is full of vicious speakers who freely express themselves on public matters without considering others' private rights or situations. Some free speech even contains false or speculative information which ends up with wrong accusations of the victims. This majority opinion tried to persuade that the aggrieved individual should tolerate the tortfeasor's speech even though the speech is insulting to the afflicted individual as long as it is done for the public. This case resulted in abridging other fundamental rights of private persons, such as enjoyment of privacy, given by the state tort laws while a fundamental right of free speech under the U.S. Constitution is upheld.

Unlike the dissenting opinion which acknowledged Westboro's outrageous conduct on a private person through its exercise of free speech, the majority opinion emphasized the 'public concern' approach to analyze Westboro's tort liabilities, and finally exempted the Church from its liabilities. The majority refused to review Westboro's picketing messages in details, neither to consider its Internet message from the beginning which directly mention 'Snyders' and include the petitioner himself, and so it could be speech of 'private' matters.

It is wondering whether the majority opinion might have differently come to its conclusion: (1) if the Internet message, which is rather private than public, had been considered in determining the 'public concern' analysis since the Internet message is closely related to the picketing when it is posted by one of the picketers who expressed his views in the picketing as well

as on the Internet; and (2) if the father had learned message contents of the pickets when passing by the picketing demonstration.

In sum, the majority appeared to be reluctant to rule on the contents of the message like other free speech cases since content-based regulation can be easily concluded as unconstitutional.⁶⁵⁾ While the majority failed to balance private and public interests, the dissenting opinion is rather convincing since it attempted to balance out personal interests and public rights, by considering all relevant facts related to picketing including the personally attacking Internet posting message.⁶⁶⁾ Although the majority opinion of this Court case reiterated special protection of free speech, its dissenting opinion well addressed the necessity to protect individuals from vicious and slanderous speech if such speech is made to those who are not public figures regarding their ‘private’ matters.

VI. Conclusion

The U.S. Supreme Court decision is somewhat disappointing since it asks for an individual, who are not a public figure, to tolerate even speculative speech against him and his family member when such speech causes him

65) “Subject to a small number of exceptions ..., laws that ban speech because of the content rarely survive constitutional challenge.” Jacqueline R. Kanovitz, *Constitutional Law*(LexisNexis, 2010), pp. 50–51.

66) See Jeffrey Shulman, “Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability,” *Cardozo Law Review de novo*, Vol. 2010, p. 344; Alan Brownstein and Vikram David Amar, “Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?” *Cardozo L. Rev. de novo*, Vol. 2010, p. 387.

to suffer from severe mental distress. As a result of this Court's decision, free speech can be regarded as a might defense for tortfeasors against intentional tort actions of individuals even if their privacy has been invaded by intentional or reckless conduct by free speech of the tortfeasors.

Through the analysis of the Court's decision, this paper attempted to find answers to the following questions: how private individuals can be protected when they suffer from 'free speech' which might harm their individual rights; whether individuals should be patient with any speech as long as such speech is of public concern because it is specially protected under the Constitution; or whether the free speech for public concern always prevails any rights of individuals to enjoy their mental peace, privacy, reputation, etc. The answers to these questions are clearly for those who claim the right of free speech for the public concern or interest, resulting that public, constitutional rights prevail private, tort claims.

Living in a society where people can freely express their opinions in public forums, on the Internet, and other means of mass communications, by recklessly spreading others' personal or private information, it is wondering whether any private individuals can be free from any malicious, defamatory free speech when individuals are unexpectedly targeted or victimized. The concern on how to protect one's privacy from the other's free speech is not just limited to picketing events at funeral. The Court's 'public concern' test in the free speech analysis can be utilized in other similar speech or expressions like demonstrations, writings or depictions of one individual's views which might attack or defame other individual's privacy or reputation with intentional tortious acts.

As shown in the U.S. Supreme Court's 'public concern' debates, it is not easy to clearly draw the distinction line between public and private

matters. Even if so, such ‘public concern’ application in determining free speech should be more cautiously and limitedly exercised, especially in case of speech related to ‘private’ persons.

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[국문초록]

표현의 자유, 불법행위책임에 대한 강력한 항변사유

- 미국 대법원의 표현의 자유에 대한
‘Public Concern’ 적용에 관한 판례 평석 -

최영란*

2011년 3월 미국 연방대법원은 망인(亡人)의 장례식장 주변에서 망인과 관련된 시위로 인하여, 그 가족에게 정신적인 고통을 준 시위주동자에 대해 미국 헌법상 보장된 ‘표현의 자유(freedom of expression’ 또는 ‘free speech)’를 인정하는 판결을 내렸다.

웨스트보로 침례교회(Westboro Baptist Church)는 미국 군대 내에서 행해지는 동성애(homosexuality)와 가톨릭 신부의 아동 성희롱에 항의하는 시위를 20여 년간 벌이고 있는 극단주의적 성향이 있는 교회로, 교회의 동성애에 대한 항의 시위를 인터넷 등의 매체를 통해 알리기 위해, 장례식이 거행되는 곳을 전국적으로 찾아다니면서, 동성애 반대집회를 열어 동성애에 대한 교회의 견해를 홍보해 왔다.

이 판례에서는 웨스트보로 교인들이 이라크 전투에서 사망한 군인의 장례식장 근처에서 항의시위를 벌이면서, “동성애 군대,” “동성애자가 나라를 망치고 있다,” “(동성애자는) 지옥에 가라,” “신이 (동성애자를) 저주(증오)한다” 는 등의 문구가 담긴 풋말(picket)을 전시하여, 장례식에 참가한 군인의 아버지가 정신적으로 고통을 받았고, 이에 ‘고의에 의한 정신적 고통(Intentional Infliction of Emotional Distress),’ 사생활 침해 등

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을 이유로 교회를 상대로 ‘고의에 의한 불법행위(intentional tort)’ 소송을 제기하였다.

그러나 연방대법원은 웨스트보로 교회에게 불법행위책임을 묻지 않고, 교회의 시위는 표현의 자유에 의해 헌법상 보호를 받기 때문에, 고의에 의한 불법행위 책임에서 면책이 된다고 판결하였다. 교회의 시위(내용)가 헌법에서 보장된 권리(표현의 자유)인가를 판단하기 위해, 대법원은 ‘public concern(공공의 관심 또는 이해)’라는 기준을 적용하였다. 대법원은 교회의 시위는 ‘동성애’의 문제점을 제시한 것으로 공적인 문제에 해당하여, 시위에서 사용된 낱말의 내용에 의해 피해자가 정신적인 고통을 당하였다 할지라도, 교회의 표현의 자유는 보장되어야 한다고 보았다. 표현의 자유는 고의에 의한 불법행위에 대한 항변사유가 되기 때문에, 교회는 불법행위 책임을 면하게 된다.

대법원의 다수의견은 교회의 시위에 사용된 ‘동성애’에 관한 낱말 내용은 사회에서 심각하게 우려되는 공적인 문제점을 언급한 것이지, 군인(망인)이나 군인의 아버지인 ‘사인(私人)’을 개인적으로 공격하는 것이 아니라는 점과, 교회는 시위를 하면서, 메릴랜드 주의 ‘장례식(에서의) 시위(규제)법(funeral picketing law)’에 따라 평화롭게 시위를 했기 때문에, 교회는 표현의 자유를 보장받아, 군인 아버지에 대해 불법행위 책임이 없다고 하였다.

이에 대해 대법원의 소수의견은 원고인 군인의 아버지가 공인(公人)이 아니라 사인인 점, 교회에서 군인과 군인 아버지를 비방하는 글을 교회의 인터넷에 올린 점, 교회가 세인의 관심을 모으기 위해, ‘장례식’을 자신의 교회를 홍보하는 장소로 삼아, 동성애와 무관한 사람들의 장례식장에서 시위를 하는 점 등을 들어 교회의 불법행위책임을 역설하였다.

이 판례는 헌법에서 보장된 표현의 자유와 불법행위책임을 물을 수 있는 사인의 권리와 충돌이 발생할 경우, 이에 대한 해결 원리로 ‘public

concern' 원칙을 적용하여, 공공의 관심이나 이해가 있는 'speech'는 보장된다는 원칙을 고수한 판례이다. 이 글에서는 대법원의 다수의견과 소수의견을 비교, 분석하면서, 사인의 권리가 '표현의 자유'에 의해 침해되는 것을 인정한 미국 최고 법원의 판결논리를 검토한다.

주제어 : 미국 헌법, 표현의 자유, 불법행위, 고의에 의한 불법행위, 공공성, 공공의 이해, 시위규제법

