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Their Own Private Hell

Will the Supreme Court's evolving view of privacy undermine the First Amendment?

By Dahlia Lithwick

Posted Tuesday, March 8, 2011, at 6:09 PM ET

In the long parade of reprehensible Nazis, inveterate potty-mouths, and flag burners in First Amendment history, Fred Phelps and his hate-bot family may now take their place at the front of the line. Last week the Supreme Court reluctantly handed the miscreant Phelps family a victory, finding that vicious protests are protected speech, even when they take place at the private funeral of a private individual.

Neither Chief Justice John Roberts' majority opinion in the case nor Justice Samuel Alito's angry lone dissent, adds much to existing doctrine or precedent. What makes both opinions interesting is what they leave out. The majority opinion focuses on the fact that the Phelps' speech is a matter itself of "public concern," while the dissent contends that it is targeted solely at the Snyder family. Both sides make unspoken assumptions about whether funerals are private places, however; assumptions that suggest a lot about their changing and rather personal views of the difference between public and private spaces in America.

Roberts simply asserts that the funeral protest occurred "at a public place" and that "the church members had the right to be where they were." Alito, for his part, assumes that the military funeral of a private citizen is a private space. As he puts it in his dissent, "They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) … They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.)" Continues Alito, "There is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone."

Roberts, in other words, is focused on the fact that the protesters complied with all the time, place, and manner regulations; confined their activities to a public street; and neither entered the church nor disrupted the funeral. Alito, meanwhile, emphasizes that the protesters selected a space as close as possible to the intimate space in which a parent has a right "to bury his son in peace," and then crafted the event to inflict maximum harm with maximum publicity.

The court deliberately sidestepped the question of whether the media plays any kind of role in converting private spaces into public ones. Thus, the court deliberately carved out of the case one of most interesting and important questions it had raised: Has the media left any truly private spaces left in America? The court did not address the television coverage of the protest or the nasty

"epic" posted by the church on the Internet, which attacked the Snyder family in personal terms. As the majority declared, in setting these novel issues aside, "Internet postings may raise distinct issues in this context."

This was the question Justice Stephen Breyer most wanted to address, both at oral argument and in his concurring opinion in the case. As Breyer indicated in a television interview last fall, he is open to the possibility that television and the Internet have the ability to amplify private speech until it inflames. A private act can transform the entire world into a crowded theater, in his view, and he suspects that the First Amendment might not protect Quran burning or other acts that might drive listeners to violence. In Breyer's view—and it's clear from his dissent that Alito agrees—the Internet has created the possibility of a kind of First Amendment butterfly effect, wherein a Quran burning in a Florida parking lot can launch a revolution half a world away. They suspect that the line between public and private speech has been blurred, if not obliterated, by new technologies and they are each frustrated that the court still pretends otherwise in its First Amendment cases.

It's hard to believe that all the justices themselves, who are consistently learning that there are no private places in which to speak, don't realize some of the truth of what Breyer and Alito say. Just last weekend, Justice Clarence Thomas went to a private event in Charlottesville, Va., sponsored by the Federalist Society at the University of Virginia's law school and proceeded to deliver strongly worded remarks about recent attacks on his wife, him, and (by extension) the legitimacy of the court. Tapes of the speech were immediately leaked to *Politico*, and, soon thereafter, new questions arose about the justice's impartiality.

It's not clear whether Thomas wanted these remarks to become public. One has to imagine he didn't. What is clear is that justices who believe that they can keep some remarks private fail to understand a central fact of public life in 2011 (or 2010, or 2009, or …): Everything a justice says or does in front of an audience today could be on YouTube tomorrow. The justices, more than anyone, should heed Breyer's warning that the Internet turns the whole world into a crowded theater and stop shouting "fire"—even when they think they're shouting in private.

Alito learned this same lesson last year when he attended a fundraiser for the *American Spectator*. Approached by a journalist trying to understand why a justice was participating in a partisan event, Alito was baffled, explaining, "It's not important that I'm here." Which wasn't the question, exactly. What the exchange illustrated was a technological and generational clash. There may have been a time when justices used to be able to attend such events in secret, but it has passed. The court's ethics rules are concerned with the *appearance* of bias, and the new media has enabled us all to see precisely how conflicted and enmeshed many of the justices appear.

This cuts both ways, of course. Conservative activists have argued that Justice Ruth Bader Ginsburg is compromised because of her participation in partisan liberal events. If the gotcha videos and the accusations and counteraccusations continue to fly, by the time the court finally gets the case about the constitutionality of President Obama's health care law, the only people who will be allowed to hear it will be two law clerks and the guy who works in the mailroom. The more we learn about the justices' formerly private lives, the more nervous we get about the integrity of the institution. The question now, is what the justices plan to do about that.

What some of them seem poised to do is restrict more speech. I have argued that Thomas and Alito tend to view the American public and the media largely through the prism of their own confirmation hearings—which they found to be painful and humiliating. They both appear to believe that allowing a camera into a room transforms any event into a "raucous media event" (to use Alito's language from the Westboro Church opinion). As Shon Hopwood suggests, in describing the Snyder funeral in his dissent, Alito could have been describing his own experience with the press at his hearings. And I suspect that they will continue to find that whenever the media intrudes into private places, "the wounding process" (again, quoting Alito) is inevitable.

If they see service at the Supreme Court as nothing more than a string of unpleasant gotcha moments and embarrassing reprisals, then Alito and Thomas's retreat from public view makes a kind of sense. In Thomas' case, this has been a decades-long endeavor. In Alito's case, as Jeffrey Rosen observed, he clearly "cares more about the government's ability to protect a range of privacy values—including dignity, anonymity and community standards of decency—than anyone else on the court." But more and more it appears that both justices, and Breyer although for different reasons, carry a suspicion about the inherent incivility of public discourse that comes with an impulse to shut down more speech. In other words: If you think that the justices' own experiences with the media and their shrinking sense of personal privacy aren't affecting them, think again. As they come to the realization that there are indeed no more private spaces in America, some justices might be more inclined to chip away at the First Amendment to protect what's left of them.

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Article URL: http://www.slate.com/id/2287234/

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