

In God We Hate? Speech Rights and the Ruling in *Snyder v. Phelps*

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Mahatma Gandhi pointed out that it's easy enough to be nice to one's friends, "[b]ut to befriend the one who regards himself as your enemy is the quintessence of true religion. The other is mere business." In a similar vein, Justice Holmes, dissenting in *U.S. v. Schwimmer*, 279 U.S. 644, 654-55 (1929), noted that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." It's not difficult to accept noble and uplifting messages in pursuit of freedom of speech; the real test of the constitutional freedom comes when dealing with abhorrent, disgusting, and outrageous statements (and still more when that speech issues from the proponents of a church[1]).

The facts in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), have received extensive media coverage. In brief, Marine Lance Corporal Matthew Snyder was killed in Iraq and his funeral was held in Maryland. Fred Phelps and other members of his church decided to hold one of their protest pickets on public land in the vicinity of the funeral. Their signs included messages that "Fags Doom Nations," "God Hates the USA/Thank God for 9/11," "America is Doomed," "Priests Rape Boys," "Thank God for Dead Soldiers," and "You're Going to Hell." The protest took place more than 1,000 feet from the funeral, the funeral itself was not disrupted (and the group complied with local ordinances and police directions), and Matthew's father, Albert Snyder, admitted he did not see the details of the signs at the time.

Snyder filed a lawsuit against Phelps, his daughters (who participated in the protest), and the church, claiming intentional infliction of emotional distress, intrusion upon seclusion, civil conspiracy, and more. After a jury found the defendants liable for millions of dollars in compensatory and punitive damages, the defendants challenged the verdict and sought judgment as a matter of law, claiming that the First Amendment insulated them from state tort suit liability. The U.S. Court of Appeals for the Fourth Circuit held that the signs were fully protected speech. The First Amendment protected statements on matters of public concern that fail to contain a "provably false factual connotation," and rhetorical statements employing "loose, figurative, or hyperbolic language." The court held that "[n]otwithstanding the distasteful and repugnant nature of the words," no reasonable reader could interpret the signs as "asserting actual and objectively verifiable facts about Snyder or his son." Further, the signs did "not assert provable facts about an individual, and they clearly contain[ed] imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants [were] concerned." These matters of public concern included homosexuality in the military, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy.

Snyder sought review, arguing that *Hustler Magazine, Inc. v. Falwell* did not apply when the target was a private, not public, figure; that he had no rational connection to any of the purported "matters of public concern" that the defendants maintained they were protesting; that the First Amendment's freedom of speech outweighed freedom of religion and peaceful assembly; and that a person attending a family member's funeral constituted a "captive audience" who was entitled to state protection from unwanted communications.

In an 8-1 opinion, the U.S. Supreme Court affirmed, finding that, while "the picketing [was] certainly hurtful and [the defendants'] contribution to public discourse may be negligible," the speech was at a public place on a matter of public concern. "The 'content' of [the defendants'] signs plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern,'" and the setting or context used to make this message known — a funeral— did not convert or diminish the nature of the speech. The defendant church had protested at over 500 funerals by the time that Matthew Snyder was buried, indicating that the protest was not a personal attack over a private matter in the guise of public speech.

Although the case before the Court was based in state tort liability, the issue of funeral picketing is one that has involved local and state governments. As the *amicus* brief for the American Legion pointed out, Congress and over 40 States had enacted laws specifically regulating funeral protests,[2] as have several communities. In *Snyder*, the Supreme Court cautioned that protected speech was, nonetheless, "not beyond the Government's regulatory reach": picketing in public spaces was still "subject to reasonable time, place, or manner restrictions" that were "consistent with the standards announced in this Court's precedents."

Speech, the Court concluded, was powerful, causing joy or sorrow, or inflicting great pain. "[W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

Notes

1. As pointed out by the Fourth Circuit, the defendants in the case have established a website "identified as www.godhatesfags.com in order to publicize their religious viewpoint." 580 F.3d 206, 211 (4th Cir. 2009).
2. For more on this topic, see, for example, David L. Hudson Jr., *Funeral Protests*, First Amendment Center (Oct. 2009); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 101 (2007). ML