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The Right to Aggravate

The published opinion is out in *Snyder v. Phelps*, 131 Supreme Court 1207 (2011), where the question was presented as to whether the First Amendment shields members of a church from tort liability for picketing near a soldier's funeral service with signs reflecting the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment.

The picketers carried signs stating "God Hates the USA/Thank God for 9/11" and similar insanity. Many of the slogans were attacks on the Catholic Church, such as "Pope in Hell" and "Priests Rape Boys."

The picketing took place within a 10x25 foot plot of public land adjacent to a public street, behind a temporary fence. The picketers complied with police instructions in staging their demonstration. The plot was 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. None of the picketers entered church property where the funeral was held or went to the cemetery. Conservative Chief Justice Roberts, who wrote the opinion for the majority, noted that the picketers did not yell or use profanity and there was no violence associated with the picketing.

The suit was originally brought by Albert Snyder, whose son Matthew was killed in Iraq in 2006. Snyder's suit argued that the demonstrations at his son's funeral inflicted intentional emotional harm and should be prohibited. The Snyder family won a verdict against the church on claims of intentional infliction of emotional distress, intrusion upon seclusion and civil conspiracy claims. The jury awarded \$2.9 million in compensatory damages and \$8 million in punishment damages.

The Supreme Court held by an 8 to 1 majority that the jury award should be thrown out based upon the First Amendment. The Free Speech Clause of the First Amendment states: "Congress shall make no law... abridging the freedom of speech." The Supreme Court found this to be a defense in state court suits, including suits for intentional infliction of emotional distress.

The Court distinguished between "purely private" speech as opposed to "debate on public issues." Justice Roberts recited the formula that speech deals with matters of public concern when it can be considered as addressing "political, social, or other concern to the community." The key to the decision was the finding that the "content" of the protesters' signs "plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'" Matters related to the failure of our Nation, homosexuality in the military and scandals involving the Catholic Church are matters of public import.

The majority noted that even protected speech is not permissible in all places and at all times, but may be reasonably regulated as to time, place and manner. In this case, however, "simply put, the church members had the right to be where they were." At 1218. The protesters complied with police guidelines with respect to the location of picketing and the protesters behaved themselves. Relying upon prior decisions such as *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989) the majority explained:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. At 1219.

The fact that the message of the protesters was "outrageous" is not sufficient to overcome First Amendment protection. Indeed, the church members were entitled to "special protection" under the First Amendment regardless of the outrageousness of the position espoused by the picketers.

The Court tended to be as “conservative” as it could by stating that the holding is “narrow”, and limited to the particular facts before the Court. The majority was clearly influenced by the fact that the behavior of the protesters did not disrupt the funeral.

One of the so-called liberals on the Court, Justice Breyer, concurred in the decision but noted that a state can sometimes regulate picketing, even picketing on matters of public concern.

Justice Alito’s dissent represented a lone cry in the wilderness. Justice Alito attempted to define the speech at issue not as speech but rather as an attack. Personal abuse and the infliction of injury, urged the Justice, are not protected by the First Amendment to the Constitution. The “speech” regarding Matthew Snyder was purely personal conduct, and arguably therefore was not entitled to protection. The strategy employed by the protesters inflicted “severe and lasting emotional injury on an ever-growing list of innocent victims.” At 1226.

Justice Alito wrote: “I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.” (Emphasis added). Although Alito eventually characterized the protesters’ action as “speech,” rather than conduct, he opined that it is directed to a private person, and does not have a legitimate public aspect. Alito’s view in effect morphed from suggesting that the action of the church members was not speech at all to saying it was not acceptable speech. Finally, he claimed that the church’s activity was speech simply not entitled to First Amendment protection.

It is rare that an opinion of the United States Supreme Court commands such a large majority, including virtually all of the conservatives and liberals on the court. If that many members of the Supreme Court say that something is right or wrong, is it necessarily so? Gershwin may have been correct when he wrote in Porgy and Bess “It ain’t necessarily so,” but once the United States Supreme Court has ruled by such a large margin, it certainly is the law of the land.

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