

Snyder v. Phelps

Michael Sean Winters | Oct. 6, 2010 | Distinctly Catholic

Fred Phelps has his day in court today. The hateful bigot-pastor from the Westboro Church in Kansas was sued for protesting at the funeral of Lance Corporal Matthew Snyder by Snyder's parents on the grounds that he invaded their family's privacy and inflicted emotional distress on the family. Pastor Phelps and his congregants, who tend to share bonds of blood affinity to an unhealthy degree as well as the bonds of their distorted understanding of Christianity, protest at the funerals of American military personnel. They believe these brave men and women deserved to die because America tolerates homosexuality. So, while wearing tee-shirts that read "God Hates Fags," at the funerals they wear signs that read "Thank God for IEDs." How to put this in the most Christian manner possible? Phelps and his family/parishioners are beneath contempt.

But, in America, even those whose statements are beneath contempt are not beyond the reach of the First Amendment. In this case, Phelps's hateful speech is clearly political speech which should, and does, enjoy even greater legal protection. Phelps is crazy but he is no dummy. His ugly diatribes were not directed specifically at Snyder, who was not gay, or at his family, they were directed at the government and the public more generally. He did not violate any trespassing laws which, I am guessing, make the invasion of privacy charge moot. If Phelps had crashed the funeral parlor or the church, they could be arrested for trespassing.

Privacy, by now, is a well-established right in the jurisprudence of the court, but it will never be an entirely secure right, because it is unmentioned in the Constitution. Yesterday, in an unrelated case, some members of the bench were sniffing around the right to privacy with a clear view to knocking it off its constitutional pedestal, but it is doubtful there are five members willing to support a frontal assault on it. The right to free speech certainly should trump it.

The emotional distress issue is different. This is a fairly new tort, arising at the end of the 19th century in England. The first, classic case involved a man who told a woman her husband and child had been killed, even though they were perfectly fine. The woman collapsed and sued. This tort is, therefore, close to the most famous exception to the First Amendment: No one has a right to shout "Fire" in a crowded theater when there is no fire. Or, think of it as a version of assault. Battery is when the clenched fist strikes the nose and it is almost always linked to the charge of assault, as in assault and battery. But, what if the fist stops inches from the nose? Can an assault charge still be prosecuted if, say, the owner of the nose faints from the close encounter and hurts his head when it hits the pavement?

In 1988, the Supreme Court rendered a decision based on the tort of the intentional infliction of emotional distress. In the case, *Hustler Magazine and Larry Flynt v. Jerry Falwell*, the high court overturned a lower court ruling, and a prior jury verdict, that has awarded Falwell claims based on a vicious ad parody that appeared in *Hustler* magazine. The ad was a spoof on the then-current Campari ad campaign in which interviewees discussed their "first time" drinking Campari, but the ads were filled with sexual innuendo suggesting one's loss of virginity. In the *Hustler* parody, Falwell was portrayed as losing his virginity to his mother in an outhouse. It was vulgar and inflammatory in the extreme. The Court's ruling, however, was based on the fact that Falwell was a public figure and public figures are subject to a higher degree of public scrutiny and scorn, including the

kind of vulgar parodies Hustler made famous.

The current case similarly involves speech that is vulgar and inflammatory in the extreme. And, it involves private persons: The Snyders did not sign up to be a part of anyone else's political campaign. But, their son did sign up to protect the right to free speech that is at the heart of this case. I am baffled at why the Court took the case, and the oral arguments may enlighten us on that score. This is not a tough call, even if it is an ugly call: Rev. Phelps deserves to burn in hell for his hatefulness but he does not deserve to have his First Amendment rights circumscribed. I am not a lawyer, still less a legal scholar, but I think the Court should affirm the lower court's decision.

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