

## Law

### **A constitutional right to inflict harm**

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It would be very easy to avoid wasting my time howling in the wilderness and not bother stating why I agree with other lone wolves (namely, Justice Samuel A. Alito Jr. and the members of the jury that returned a multimillion-dollar verdict against the Westboro Baptist Church), who expressed the belief that the First Amendment does not give Fred Phelps and other members of his family congregation the constitutional right to inflict deliberately the extreme pain which every court in *Snyder v. Phelps* agreed, and no human being disputes, Albert Snyder suffered when the Phelps targeted his son's funeral and attacked his dead child with an unrelenting and brutal fury.

It also would be very easy to join the ranks of the many lawyers, scholars, and other legal pundits whose pontifications I've read about since this case was decided, all of whom have agreed with the view of the 8-1 majority that this case involves "speech" on "a matter of public concern" and is governed by the settled rule that such speech "is entitled to 'special protection' under the First Amendment" and "cannot be restricted simply because it is upsetting or arouses contempt."

But join I won't and howl away I must, because I don't agree with the majority's characterization of what this case is about.

Stating in the first paragraph of the opinion that "[t]he question presented is whether the First Amendment shields the church members from tort liability for their speech in this case," the majority a few pages later rejected the dissent's "attempts to draw parallels between this case and hypothetical cases involving defamation or fighting words," and, instead, expressed its agreement with the view of the U.S. Court of Appeals for the Fourth Circuit in this case that "there is 'no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or 'fighting words.'"

Really? Obscenity and fighting words may be in the eyes of the beholder, but as Justice Stewart stated in his immortal concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), “I know it when I see it.” *Id.* at 197. This may be the first and last time I ever agree with Justice Alito about anything, but no matter how the Phelps’ “speech” in this case is characterized, their words should not be allowed, as his dissenting opinion states, to inflict intentionally “severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”

The jury had good reason for finding that the Phelps’ words were “outrageous” and “intolerable in a civilized community” — in accordance with the requirements of the Maryland tort of intentional infliction of emotional distress — because there was no dispute in this case that they were.

In addition to bearing signs reading “God Hates Fags,” “Semper Fi Fags,” “Fags Doom Nations,” and “Fag Troops,” the Phelps brought other signs to Matthew Snyder’s funeral stating, “You’re Going to Hell,” “God Hates You,” and “Thank God for Dead Soldiers,” and that Matthew was “in Hell — sine die.”

Following the funeral the Phelps posted on the Westboro Baptist Church website an “epic” in which they addressed Matthew’s parents directly and stated that they “raised him for the devil,” “RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery.”

The majority opinion did not consider this website posting in its analysis for procedural reasons, but the jury certainly did in holding the Phelps liable for \$8 million in punitive damages.

Stating that “speech cannot be restricted because it is upsetting or arouses contempt,” the majority concluded that outrageousness “is a highly malleable standard” and that the “risk” in this case was “unacceptable,” that the jury was “unlikely to be neutral with respect to the content of the speech.” But whether the Phelps’ attacks on the Snyder family are labeled as obscene or fighting words, the Phelps’ “speech” had no constitutionally protected content. Properly exercising the constitutional obligation to conduct an independent examination of the record ensures there is no unacceptable risk that a person will be penalized for expressing ideas which are protected by the First Amendment.

### **Silver lining**

As a result of the Supreme Court’s decision in this case, we can expect to read a lot more about the Phelps family in the months and years ahead. But as disturbing as that thought might be, there is a silver lining in the constitutional rule emerging from this case which allows them to inflict the maximum harm possible on others with their unleashed vitriol and hate.

One day, as sure as the sun rises in the east and sets in the west, there will be a funeral for

the esteemed leader and founder of the Westboro Baptist Church. And thanks to Fred Phelps and his family, all of us can come and bring any sign that we want wishing him a fond farewell.

Sure, a multimillion-dollar verdict affirmed on appeal would have been nice for the Snyder family. But the Phelps family's gift to all of us is priceless.