

3309

MC 3080—Freeman

Term Paper: Free Speech at a Funeral

The case discussed involves Reverend Fred Phelps of the Westboro Baptist Church organizing a protest outside the funeral of a deceased soldier, Lance Corporal Matthew A. Snyder. Rev. Phelps and his congregation picketed outside the funeral as a means of protesting gay rights. According to Wisconsin ordinance 947.011, any disruption of a funeral or memorial service stated in the ordinance within 500 feet or 60 minutes preceding and immediately following the funeral or service is prohibited. The issue brought before the Court is whether this ordinance impedes on Phelps and his congregation's right of free speech protected under the First Amendment. The court rules that it does.

Even though Westboro's messages are questionable and in no way redeeming at a soldier's funeral, this issue is still important. Free speech is always a top priority in this country, as it is the basis on which this country was founded. Before proceeding with the decision and reasoning, it is necessary to state that in no way does the court support or condemn the messages conveyed at Lance Cpl. Snyder's funeral. The concern is with the law and constitutionality of the ordinance which prohibited Westboro's congregation from saying these things in the first place.

When faced with a possible constitutional issue of free speech, it is important that the facts fulfill a specific legal standard. First, a state actor must be involved. A state actor is defined as "a state employee who is acting under the color of state law." In this case, Wisconsin police

are state actors, as they arrested seven church members after the protest and those members were charged with violating the ordinance.

The second criterion is an obvious one: is speech involved? Speech can be broadly defined as anything written or spoken, which is meant to convey a particularized message; and in this case, it is the speech of the Westboro Baptist Church protestors and Rev. Fred Phelps that is being limited. Specifically, it is Rev. Phelps statements saying that IEDs are God's indirect punishment of immoral behavior, namely homosexuality, among the American military ranks.

The third and most important criterion involves the level of scrutiny which must be applied to the issue. Regarding this case, it is pertinent that Strict Scrutiny be applied. Strict scrutiny should be applied to cases where the state actor is attempting to stop the actual message being conveyed altogether, also called a "content-based" regulation. Content-based regulations impose on "what you say, rather than where you say it." If the government has a compelling interest to stop the speech and if the regulation is deemed overbroad, vague or underinclusive, strict scrutiny is applicable. In this case, the police and the Wisconsin ordinance 947.011 indeed have a governmental interest to stop the speech to protect the funeral proceedings and grieving of a fallen soldier and their families. The ordinance's stipulations may be deemed overbroad in that it stops more speech than allowed. It seems that Wisconsin Governor Jim Doyle thinks this is a "content-neutral" regulation where the ordinance is not regulating the speech, but where the speech is said, in this case, at a funeral or memorial service. As he said: "The families have a right to a time in which they can grieve and express their admiration and respect for these fallen soldiers." However, the preceding ordinance to the one under review, 947.01, defines the disruptive behavior 947.011 prohibits at a funeral. The fact that the actual speech is defined and deemed inappropriate makes the ordinance facially unconstitutional. It moves into the "content-

based” category of strict scrutiny. Instead of just regulating the place of protest, it is also regulating the expressions said and the negative connotations those expressions convey. If military comrades of Lance Cpl. Snyder were at his funeral waving American flags and praising his military service, I do not believe the police would have enforced Wisconsin ordinance 947.011, even though this behavior would qualify as disruptive and thus violate the ordinance. It is this fact that makes the ordinance content-based, rather than content-neutral. If the behavior outside of a funeral was something of praise and admiration, we do not mind the disruptive factor, however, when it is something we do not agree with, police do not think twice about enforcing the law. That is the problem.

The main question is still at large: Is it acceptable that the speech being conveyed by Phelps and his followers is being prohibited? It is decided that no matter how heinous or potentially offensive the message is, the message itself is protected under the free speech rights of the First Amendment of the United States Constitution.

However, with a similar case decided in 1992, the Supreme Court introduced “fighting words” as grounds for heinous speech to be limited. In *R.A.V. vs. City of St. Paul*, *R.A.V. and others* burned a cross in an African-American’s yard, and *R.A.V.* was arrested and charged with violating a St. Paul, Minnesota ordinance prohibiting such behavior. The majority opinion explained that the behavior and the words expressed were “not a prohibition of fighting words that are directed at certain persons or groups...but rather a prohibition of fighting words that contain ‘bias-motivated’ hatred.” In this case, Scalia cites Justice Frankfurter in his concurring opinion in *Niemotko v. Maryland*: “Fighting words are thus analogous to a noisy sound truck: Each is a mode of speech,” but neither has, in and of itself, a claim upon the First Amendment. He continues saying, “As with the sound truck, however, so also with fighting words: The

government may not regulate use based on hostility--or favoritism--towards the underlying message expressed.” In other words, the “fighting words” concept introduced in *R.A.V.* gives the opportunity to limit offensive speech. Depending on the context and situation in which the words are said, the words may not be protected under the First Amendment, as they could potentially incite violence. In this case, the Westboro group had bias-motivated hatred against the homosexual community and used Lance Cpl. Snyder’s funeral as an outlet to express their views. The phrase, “wrong place, wrong time” is most applicable in this situation. Even though the speech is protected under the First Amendment, the motivation behind the words expressed could be limited under the concept of fighting words.

It could be argued the Westboro protests were not fighting words because the protesters were 200 feet away from Lance Cpl. Snyder’s funeral proceedings and their protests were not even heard by Albert Snyder, the father, until later on a news broadcast. The principle of fighting words is addressed as a means to possibly prevent this from happening at another funeral. In this specific case, fighting words is not the main issue; it is the enforcement of an ordinance that does not address the concept.

In addition, a funeral is the last place you want a group of radicals protesting your loved one’s sexual lifestyle. A family definitely has the right to mourn the loss of a loved one and for a group to deem their protests and heinous speech appropriate is nothing less than repulsive. As Wisconsin Governor Jim Doyle said, Phelps and his followers "have a constitutional right to state their opinion, as totally bizarre as this one is. But the families have a right to a time in which they can grieve and express their admiration and respect for these fallen soldiers." Albert Snyder, father of the fallen soldier said he was targeted by the Kansas-based anti-gay group and ruined his only chance to mourn the loss of his son. We agree and are sympathetic to the

Governor and Mr. Snyder; however, we must remember our job and place as a court. The court must interpret whether the law is correct, not letting emotional predispositions get in the way.

With this notion, it is appropriate to cite Justice Holmes in *U.S. v. Schwimmer (1928)* in his dissenting opinion. He eloquently states, "...but 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 is apparent that no one likes the idea of a radical group protesting against a loved one at a funeral, but those thoughts, expressions, speech, is just what Holmes is advocating that the First Amendment so wholly protects. If one digs into the background of *Schwimmer*, it would be discovered that Holmes was dissenting against the opinion in which the Court failed to recognize a pacifist as a naturalized citizen. Holmes, a "vigorous anti-pacifist" still fought for the woman's naturalization because it was not the Court's place to deny someone citizenship just because they do not agree with our form of government. It is precisely those thoughts that should be protected; without them, our country would be dreadfully boring. Indeed, the church members can protest somewhere else, but the ordinance did not stop at regulating the place, but the actual words expressed as well, and that is the problem under review.

When ruling in this way, it is important to look at the possible implications this would cause when looking to future circumstances. Saying that such heinous expressions are protected can open the doors for more extreme behavior in more inappropriate situations. That is why it is important to keep the concept of "fighting words" close in consideration. Fighting words entice the receiver of such expression to react in a possible violent manner. The Westboro protestors' words definitely fall into that category as they are implying major things in an extremely sensitive setting. Like *R.A.V. vs. City of St. Paul*, a "danger of censorship" lurks when the state

has sufficient means to control such hostility and decides to add the First Amendment to the equation. When weighing the consequences of letting this statute stay as a valid rule, it would indeed allow families to mourn at a funeral or memorial service, but the statute is so overbroad that in the long run, it would prevent more people from expressing their opinion. In the eyes of the law, that is more important. In no way is the death of a United States soldier something to be taken lightly, but the ordinance needs to be more narrowly tailored if Wisconsin still wishes to prohibit disruption of a funeral or memorial service.

The statute in question in the *R.A.V.* case was deemed to be content-based, as this one also has. It seems that the Wisconsin ordinance that is in question also attempts to define “disorderly conduct” that ends in a very vague definition, and essentially allows the police to deem anything questionable “disorderly conduct,” including certain telephone calls. This type of legislation is so wrongly written; not only it is a content-based statute that attempts to limit actual speech, but it gives the authorities power to enforce the statute at the least bit questionable expression, thought, or phone call. This is hardly acceptable and essentially gives police the power to control all speech on the streets of Wisconsin in addition to 500 feet from a funeral or memorial service.

As previously stated, there is no doubt of the unfortunate circumstances in which the Snyder family finds itself. A fallen soldier’s funeral should be respected in the utmost honor and reverence. This is not about denying a family’s right to privacy, but is insisting that the Wisconsin ordinance 947.011 be revised so that it strictly defines disorderly conduct and includes the “fighting words” standard outlined in *R.A.V. vs. City of St. Paul*. This is ordered as to protect the freedom of speech outlined in the First Amendment of the Constitution, including the thoughts we find offensive or not in accordance with our own beliefs. It would be easy to

agree with the arrests and charges of the Westboro protestors and Rev. Phelps, but the law protects their words and ideas; that idea must be upheld by the court. The arrest and charges filed against the seven church members are reversed.