

If you think kneeling during the national anthem is offensive to the military, you should read the Supreme Court's decision in Snyder v. Phelps

The return of professional sports to our television screens late this summer has come with renewed attention to the Black Lives Matter social justice movement.

"Black Lives Matter" is painted on the court for every NBA game and the players are allowed to sport social justice slogans on the back of their jerseys.

In Cincinnati, where I live, star slugger Joey Votto donned a Black Lives Matter t-shirt during batting practice and [joined some of his teammates](#) in kneeling during the National Anthem. Meanwhile, in my hometown of St. Louis, pitcher Jack Flaherty [drew the ire of several Cardinals fans](#) after he became outspoken about social justice issues. In particular, it was the suggestion of kneeling during the anthem that sparked most of the outrage on social media, because (among other things) it was deemed offensive to the U.S. military, and [reignited the controversy from 2017](#) over Colin Kaepernick and other NFL players who knelt.

As a U.S. Army veteran myself, I found the suggestion (especially by those who have not served) that kneeling during the anthem is somehow disrespectful to veterans, or anti-military, as intellectually misplaced. Of course, I do not speak for all members and veterans of the U.S. armed forces, and there is no consensus among military people about the

issue. Also, as a journalist and now, journalism professor, I tend to be pretty thick skinned even when my professional group is the target of insulting expression. After all, free expression – one of the foundational freedoms the U.S. was built upon – does not require us to be respectful when airing our grievances.



The St. Louis Cardinals play at home during a game last season. (Photo by Jeffrey Blevins)

However, *assuming arguendo* that kneeling during the National Anthem is disrespectful to the military, what would contemporary jurisprudence tell us about balancing offensive expression with honoring those who have served in the armed forces? That brings us to the U.S. Supreme Court's 2011 decision in *Snyder v. Phelps* (562 U.S. 443).

The Westboro Baptist Church of Topeka, Kansas had been picketing outside the funerals of military personnel killed in

the Iraq and Afghan wars. The father of one of the fallen soldiers, Albert Snyder, had filed a civil suit against Westboro Baptist for intentional infliction of emotional distress. While Snyder won a trial court decision and was awarded \$10.9 million in damages, a federal appeals court and the U.S. Supreme Court overturned the decision. In an 8-1 ruling, the Supreme Court held that Snyder was not entitled to a civil award because the First amendment protects from tort liability those who stage peaceful protests on matters of public concern, even near funerals of military personnel.

While peaceful in their physical behavior, the protesters brandished signs with patently offensive messages directed toward the fallen troops as their loved ones grieved, such as "Thank God for dead soldiers," "You're going to hell," and "God Hates You," as well as other slurs aimed at gays. Apparently, It was the Westboro Baptist's belief that God had damned the U.S. for its acceptance of "homosexuality."

Although, its argument was ultimately unsuccessful, the American Legion (an organization made of up of armed forces veterans, which this author is a member of) filed an *amicus curiae* brief that maintained funerals are private and sensitive matters that have historically been as sacrosanct as homes and hospitals. Specifically, the Legion argued that burial rites have been respected in almost all civilizations, and long before the First Amendment.

However, the Court was ultimately not persuaded by these appeals to privacy, sensitivity, or even a call for common decency and respect for U.S. soldiers killed in combat. When balancing the right to present clearly offensive expression against the sanctity of funerals – even for military personnel – the interests of free expression prevailed.

Now, let's apply the Court's reasoning in Snyder v. Phelps to the matter of athletes kneeling during the National Anthem. Arguably, kneeling during the anthem is not even in the same

league of offensive expression as the messages the Westboro Baptist Church displayed outside of funerals for soldiers lost during war. At the same time, not standing for the anthem is still offensive to some.

Personally, as a veteran and an American Legion member, I would never kneel during the anthem or the presentation of the American flag. Even though I strongly support the cause of social justice for which these players are drawing attention, this form of expression would not be right for me, personally. I can only imagine the emotional effect that the anthem and the flag has on veterans who have seen some of the fellow soldiers come back home in coffins draped with the stars and stripes. (For the sake of accuracy, I was fortunate enough not to have seen combat during my time in the Army. While I did a tour in Korea from 1989-1990, my experience was more like an episode of the television sitcom, *M*A*S*H*; it was mostly comedy with only a little tragedy sprinkled in). My point here is only that I understand why some veterans might find kneeling during the anthem offensive.

Nonetheless, ideas about what is offensive are far too personal for even the Supreme Court to decide on national standards for what is acceptable when constitutionally protected expression and peaceful protests are involved. The First Amendment does not pick sides in our debates – it simply, but importantly, affords us the liberty to have them.

While seeing others not standing for the anthem might be offensive to some individuals, no one is physically harmed by watching (or knowing that) some other person knelt. Rather than obsessing about our dismay over the form of expression others may choose, perhaps we should focus our attention on the substance of the message itself. If the First Amendment is inclusive enough to even protect the right to display hateful expression toward soldiers killed in combat, then we can surely tolerate a quiet form of protest against institutional racism.

Jeffrey Layne Blevins is a professor and head of the Journalism Department at the University of Cincinnati and a freelance opinion writer (@JeffBlevinsPhD).