

2010

# The First Amendment Protects Military Funeral Protests

Timothy Zick

*William & Mary Law School*, tzick@wm.edu

---

## Repository Citation

Zick, Timothy, "The First Amendment Protects Military Funeral Protests" (2010). *Popular Media*. 223.  
[https://scholarship.law.wm.edu/popular\\_media/223](https://scholarship.law.wm.edu/popular_media/223)

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
[https://scholarship.law.wm.edu/popular\\_media](https://scholarship.law.wm.edu/popular_media)



# The First Amendment Protects Military Funeral Protests

Military funeral protests are offensive, but protected free speech

By [TIMOTHY ZICK](#)

July 6, 2010

*Timothy Zick is a professor at the William & Mary Law School and author of the book, 'Speech Out of Doors'*

Free-speech controversies have often involved highly offensive and obnoxious expression: burning the U.S. flag, marching in Nazi regalia in a city populated by Holocaust survivors, and insinuating that a pastor had incestuous relations with his mother in an outhouse. But in each of these cases, the courts upheld the right to communicate the offensive message. Enter the Phelps family, who make up most of the congregation at the Westboro Baptist Church in Topeka, Kan. For years, they have conveyed homophobic and sacrilegious messages near the sites of military funerals. When the family of a Marine killed in action sued over one such protest, a jury thought this speech crossed the line. But a federal court of appeals held that the First Amendment protected the Phelps's noxious speech.

The case, *Snyder v. Phelps*, is not about the dignity or psychic well-being of the father of a fallen Marine. Nor is it solely about the fate of the decidedly unsympathetic speakers. As is often true when a dispute reaches the Supreme Court, the stakes are much higher.

On the line is more than half a century of legal precedents holding that governmental neutrality is critical to the functioning of a free marketplace of ideas, and that debate on public matters must be, as the Supreme Court said in *New York Times v. Sullivan*, "uninhibited, robust, and wide open." *Sullivan* involved the potentially crippling imposition of civil liability on a newspaper for making false statements about the conduct of Southern public officials during the civil rights era. The case demonstrated that the civil tort system poses as grave a threat to free speech as any government censor.

For very sound reasons, we have not allowed the government to determine, either through direct regulation or the tort system, which words are too offensive or what conduct too vile to be experienced in public. We have required that those offended avert their eyes, endure the offense, or engage in counter-speech. We have generally demanded that those in public sustain the psychic blows that speech can sometimes inflict. We have done all of this on the theory that tolerance of offense is far preferable to empowering a government censor to dictate a code of public manners or determine what qualifies as suitable discourse in the body politic. This approach makes our First Amendment exceptional among the speech regimes of the world.

If juries are empowered to enforce a code of decency and respect through high damage awards, then we must also permit government officials, high and petty, to haul boorish and insensitive speakers before the constable, the student disciplinary board, or the prosecutor. Do not assume, either, that this threat only applies to a few oddballs carrying on within eyesight or earshot of funeral ceremonies. Once the line of public decency is drawn, any speaker who crosses it may be punished. Further, the Web, where uninhibited discourse has been the norm, may be the next space slated for cleansing (indeed, the jury verdict in *Snyder* was based in part on a Web posting).

The speech activities of the Westboro church are undeniably repugnant. However, there are limits to what lawmakers can do to make the rest of us comfortable when we venture outside or online. A society that allows the imposition of million-dollar judgments for waving placards and posting opinions because a jury or judge finds them to be outrageous or offensive has lost confidence in its ability to shoulder the burdens that accompany freedom of speech. The ignominious Phelps family has reminded us that free speech is not free.

[Read why protests should not be allowed at military funerals](#), by *Walter Dellinger*, former acting solicitor general of the United States and attorney at *O'Melveny & Myers* in Washington, D.C.

- [Check out this month's best political cartoons.](#)
- [Follow the money in Congress.](#)
- [Become a political insider: Subscribe to U.S. News Weekly](#), our digital magazine.

**Tags:** [freedom of speech](#), [national security](#) [terrorism and the military](#), [military](#), [Supreme Court](#)

Copyright © 2013 U.S. News & World Report LP. Use of this website constitutes acceptance of our [Terms and Conditions of Use](#) / [Privacy Policy](#).

