Should the Highest Court Protect the Ugliest Speech?

By Sean Gregory

This is Matt's day, Albert Snyder kept telling himself that March morning in 2006, hours before he laid his only son to rest. This is about Matt. Concentrate on Matt. Ignore them.

They were the seven protesters he had been warned about who were planning to picket his son's funeral. They had never met Lance Corporal Matthew Snyder. They didn't know much about him except that he had been killed in Iraq the week before. And yet they had flown more than 1,000 miles (1,600 km) to brandish signs saying things like "You're going to hell," "God hates fags" and "Thank God for 9/11." The 70 members of Westboro Baptist Church in Topeka, Kans., stage protests at military funerals around the country because they believe God is punishing troops for America's tolerance of homosexuality--even when those killed, like Matt, were not gay--and that all of God's judgments must be celebrated.

Al Snyder rerouted the funeral procession so his family wouldn't have to see the protesters, among them a 13-year-old girl with a blond ponytail who held a sign that said, "Thank God for dead soldiers." He wanted to spend the day thinking about his son, remembering Matt as the funny 20-year-old kid whose ears stuck out of his Marine cap. Or as a 3-year-old demanding a black little sister because he loved Rudy Huxtable on The Cosby Show.

But Snyder couldn't concentrate during the funeral. He kept wondering how much of the protest the 1,200 mourners had seen as they drove to the church in Westminster, Md. Later that day, at the home of Snyder's parents, someone flicked on a news report about Matthew's funeral. Snyder saw the protest signs. He heard Fred Phelps, founder of the Westboro church--most of its members are his relatives--spewing more hate. "Turn it off! Turn it off!" someone yelled. Too late.

Now, more than four years later, Snyder is still stuck on the day of Matt's funeral. "Every time I think of him, I think of these assholes," says Snyder. "I have to think of the shock that was on my daughter's face when she saw the signs. I have to see the hurt in my dad's eyes when his grandson gets killed and then he has to go through this." Time passed, but the pain remained. "To me, what they did was just as bad, if not worse, than if they had taken a gun and shot me. At least the wound would have healed."

Snyder ultimately sued Westboro, a move that set the stage for an epic First Amendment battle that reached the Supreme Cour. What exactly does the First Amendment protect--the Phelpses' right to freedom of speech or Snyder's rights to peaceful assembly and freedom of religion?
And what happens when these values are in conflict? In October 2007, a federal jury found Westboro members liable for intentional infliction of emotional distress, invasion of privacy and civil conspiracy against Al Snyder. It awarded Snyder $10.9 million in damages, which the judge eventually lowered to $5 million. But in September 2009, the Fourth Circuit Court of Appeals overturned the verdict, citing free-speech protections for the protesters. The appellate court added to the public outrage by ordering Snyder to pay the Phelpses' $16,510 in legal fees. Bill O'Reilly offered to pick up the tab; donations, many from veterans groups, more than covered it.

In the run-up to the Supreme Court argument in Snyder v. Phelps, attorneys general from 48 states and the District of Columbia--everywhere except Maine and Virginia--have sided with Snyder. They filed an amicus brief noting that "a war is a matter of public concern, but that does not give the Phelpses license to attack personally every soldier and every soldier's family." Forty-two Senators--including a rare concurrence of Harry Reid and Mitch McConnell--filed a brief on Snyder's behalf, arguing that the Fourth Circuit erred in overturning the verdict on the broader standard used in defamation claims against public figures. Snyder, they noted, is a private citizen.

On the other side, the ACLU and other free-speech advocates are supporting Westboro's right to offend, as are many news organizations. Chief among their arguments: having changed the route of the procession, Snyder did not directly encounter the picketers or any of their signs at his son's funeral. He saw and read about them afterward while watching the news and searching online.

Citing a 1988 Supreme Court decision that protesters cannot picket people's homes, the Sixth Circuit extended this so-called captive-audience doctrine to funerals, ruling that "unwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased."

Military funerals not only warrant that right but carry the added weight of mourning troops' ultimate sacrifice for their country. If Westboro protesters showed up at the funeral of a serial killer, they'd still be criticized: even a monster's family deserves that moment of peace. But the Phelpses have chosen to target military funerals in particular to draw the most attention, make the greatest impact and, in the process, cause the deepest wound as they celebrate death as if it were a sporting event. The Phelpses have developed a special brand of what 49 attorneys general call "psychological terrorism." Is the First Amendment really designed to protect that?

Fred Phelps, 80, almost became one of those soldiers he now disparages. He earned an appointment to West Point in 1946, but after going to a Methodist revival meeting, he decided to skip the Army and attend Bob Jones University. He founded Westboro in 1955. The
independent church, which the Southern Baptists Convention has roundly denounced, is not only anti-gay but also anti-Catholic (because priests are pedophiles), anti-Semitic (because Jews killed Jesus) and anti-America (because it's home to all these heathens). "You cannot preach the Bible," Phelps shouted at a recent service, "if you don't preach God's hate!"

The Phelps may be misguided, but they are not dumb. Income from their mainstream jobs--in human resources, nursing and so on--funds their protests. Eleven of Fred's 13 children have law degrees; Westboro is adept at pushing the boundaries of free speech. In July, for example, the church challenged the constitutionality of Nebraska's flag-desecration law, and a federal judge struck it down. Within the past two months, the Phelps also scored legal victories in Missouri, where judges ruled the state restrictions on funeral picketing unconstitutional. (See how Gainesville turned on its book-burning pastor.)

The family started picketing in 1991, when they protested at a Topeka park supposedly frequented by gays. They now picket everything from routine services at other churches to high school performances of The Laramie Project, a play about gay hate-crime victim Matthew Shepard. The family says it has held daily pickets for 1,004 consecutive weeks, often at funerals.

Why go after mourners? "Because they need me," Fred Phelps says calmly, leaning back in his office chair, wearing a black Adidas jacket. "These poor souls. What forum is more ideal when your message is that you have turned this country over to the sodomites?" When asked if hearing about a soldier's death really makes his heart swell with joy, Phelps nods as if he's just been offered a sandwich. "Because we've been telling people that God is going to do this to them. Because that's the way God rolls. The Phelps search the Internet for military funeral announcements, then notify local police before heading to a picket location. Usually, warnings trickle down from cops to families. Mostly in response to Westboro protests, 43 states have passed laws restricting the time or place of funeral picketing.

Only one thing boils Al Snyder as much as Fred Phelps does: the media and their support of Westboro's free-speech claims. In July, several news organizations, including the Associated Press, the New York Times and Dow Jones, submitted an amicus brief backing Phelps' right to protest. When it comes to free speech, the media essentially have no more rights than the average speaker on the street does. The concern is that if Fred Phelps can be held liable for offensive speech, what prevents a news outlet from being sued for commentary that someone finds hurtful?

Snyder says he is disgusted by the news industry's position on the case. "Most of these people have never served in the military, have never lost a child at war," he says, his face flushed, his voice rising. "And none of them, not one of them, has ever had to put up with the Phelps at
one of their children's funerals. You come back and tell me this is freedom of speech after they
do this to your kid

I shared Snyder's statement with David Tomlin, associate general counsel for the Associated
Press, who responded: "Well, most of that is beside the point." Tomlin, no fan of the Phelpses,
explained how the First Amendment often forces people to question if it's worth the ugliness it
so often exposes--and protects. It was Justice Oliver Wendell Holmes who wrote that the
Constitution was not designed to protect the thought we agree with but "the thought that we
hate." The Fourth Circuit, however, ruled that two categories of speech, when related to
matters of public concern, are protected by the First Amendment, even if the target is a private
citizen like Snyder. First are statements that fail to contain a "provably false factual
connotation." The Westboro signs were hurtful and wildly inappropriate--"God hates you," for
example--but you can't disprove God's hate.

The other category protected by the First Amendment that the appellate court cited covers
statements that employ "loose, figurative and hyperbolic language." So the more abstract and
outlandish the statement--"God hates the U.S.A."--the less likely it is that a reader will believe
it. The appellate court also held that since Westboro's signs were related, however loosely, to
issues like religion, gays in the military and the Iraq war, they were of public concern and thus
protected by the First Amendment. (See the top 10 gratuitously provocative acts.)

In rare instances when courts limit speech, they have long preferred that restrictions be based
on the truthfulness, rather than the offensiveness, of the language. But Snyder's lawyers, and
the attorneys general siding with him, contend that such a ruling creates a legal catch-22. A sign
bearing a heinous message like "Thank God for dead soldiers" couldn't be more harmful to a
parent at a military funeral, but it may enjoy First Amendment protection, since its message is
not a statement of fact. The attorneys general say they have a strong interest in the case
because it could have an impact on not only the constitutionality of the relatively new state
laws that limit picketing at funerals but also the laws--some of which have been around for over
a century--that let families of the deceased sue for intentional infliction of emotional distress.
As these state officials put it in their brief, the appeals court "created a perverse incentive for
emotional terrorists to be outrageous and extreme."

Aside from the sometimes cruel irony of First Amendment law, some specifics of Snyder's case
could hurt him. At the jury trial, Snyder won an invasion-of-privacy claim. But how, Justice Ruth
Bader Ginsburg wondered during the oral argument, could Snyder's privacy have been invaded
if Westboro picketed in an area at the edge of the church's property, some 200 to 300 ft. from
the rerouted funeral procession, as directed by law enforcement? Snyder insists that the stress
of dodging the Westboro group was an intrusion, that the protesters forced him to change the
funeral route and to practically sneak into a church he attended for years. Privacy law,
however, tends to require a stricter, "up in your grill" prying standard. The picketers were not inside the church, shouting above the priest. In fact, they left shortly after the service started.

Also, Snyder first saw what was on the protest signs on TV, not at the funeral. Yes, the Phelpses send out press releases about their upcoming protests, but should they be held liable for what the media choose to cover? And although the Phelpses posted an awful rant against Snyder on the Internet, they did not mail it to him or pin it on his door. He found it using Google.

"This case really cries out for 'just this once,'" says Tom Goldstein, an attorney who has argued 22 cases before the Supreme Court and publishes SCOTUS Blog. "We have to protect this family and the memory of the soldiers who gave their lives in the ultimate sacrifice. But it's very hard to write a legal rule like that."

Snyder insists he has no regret about pushing the lawsuit against the Phelpses. "If this is what I have to live with to stop them from doing it to other people, it's worth it threefold," he says. He can even laugh at some of the absurdity. Like when he had to stop watching the HBO drama Big Love, which chronicles a polygamist family in Utah, because the cultlike compound where some characters live reminded him of the Phelpses. Or when he hears that the Westboro founder called him pathetic. "Grow up, Fred," Snyder says. "You're 80. You're about to meet the devil when you die."