

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

November 2012

# To Drink the Cup of Fury: Funeral Picketing, Public Discourse and the First Amendment

Steven J. Heyman

*IIT Chicago-Kent College of Law*, [sheyman@kentlaw.iit.edu](mailto:sheyman@kentlaw.iit.edu)

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [First Amendment Commons](#)

---

### Recommended Citation

Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse and the First Amendment*, 45 Conn. L. Rev. 101 (2012).

Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/313](https://scholarship.kentlaw.iit.edu/fac_schol/313)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# CONNECTICUT LAW REVIEW

---

VOLUME 45

NOVEMBER 2012

NUMBER 1

---

## Article

### To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment

STEVEN J. HEYMAN

*In Snyder v. Phelps, the Supreme Court ruled that the Westboro Baptist Church had a First Amendment right to picket the funeral of a young soldier killed in Iraq. This decision reinforces a view that has become increasingly dominant in First Amendment jurisprudence—the view that the state may not regulate public discourse to protect individuals from emotional or dignitary injury. This Article contends that this view not only sacrifices the law’s protections for individual personality but also undermines the normative foundations of public discourse itself. The Article then presents an alternative theory of the First Amendment which holds that the same values of human dignity and autonomy that support free speech also give rise to other fundamental rights. Thus, speakers should have a duty to respect the personality and rights of others. Drawing extensively on the record in Snyder as well as on other materials, the Article argues that Westboro’s funeral picketing should not receive First Amendment protection, for the picketing is intended to condemn the deceased and to inflict severe distress on the mourners in violation of their rights to privacy, dignity, emotional well-being, and religious liberty. Finally, the Article shows that although Westboro prevailed in Snyder, this may prove to be a Pyrrhic victory, for the Court also suggested that states can protect mourners through carefully drawn buffer-zone laws.*

## ARTICLE CONTENTS

I. INTRODUCTION.....	105
II. THE SUPREME COURT’S OPINION IN <i>SNYDER</i> .....	109
III. A CRITIQUE OF THE <i>SNYDER</i> OPINION .....	113
A. THE LOCATION OF THE SPEECH.....	113
B. THE AUDIENCES FOR THE SPEECH AND THE MESSAGES THAT IT WAS MEANT TO CONVEY .....	114
C. THE BASIS FOR THE PLAINTIFF’S EMOTIONAL DISTRESS.....	121
D. CONCLUSION .....	123
IV. PUBLIC DISCOURSE IN CONTEMPORARY FIRST AMENDMENT JURISPRUDENCE .....	123
A. THE SUPREME COURT’S APPROACH TO PUBLIC DISCOURSE.....	123
B. A CRITIQUE OF THE COURT’S APPROACH.....	125
1. <i>Abstraction</i> .....	126
2. <i>Protecting Free Speech at the Expense of Other Fundamental Values</i> .....	127
3. <i>Undermining the Normative and Practical Conditions of Public Discourse</i> .....	127
V. A LIBERAL HUMANIST THEORY OF THE FIRST AMENDMENT .....	129
A. THE PHENOMENOLOGY OF FREE SPEECH .....	130
1. <i>Private Speech</i> .....	130
2. <i>Public Speech</i> .....	132
B. THE JUSTIFICATIONS FOR FREE SPEECH AND OTHER RIGHTS.....	137
1. <i>External Freedom</i> .....	137
2. <i>Internal Freedom</i> .....	138
3. <i>Social, Political, and Cultural Freedom</i> .....	139
4. <i>Intellectual and Spiritual Freedom</i> .....	139
5. <i>Free Speech and Equality</i> .....	139
C. CONFLICTS OF RIGHTS .....	140
D. THE FIRST AMENDMENT AND CONTENT NEUTRALITY .....	141
E. A RESPONSE TO SOME OBJECTIONS .....	142
F. OTHER THEORIES OF PUBLIC DISCOURSE .....	146
1. <i>Robert C. Post’s Theory of Free Speech and Democracy</i> .....	146
2. <i>Justice Holmes and the Marketplace of Ideas</i> .....	149
VI. APPLYING THE LIBERAL HUMANIST APPROACH TO FUNERAL PICKETING IN ITS PARADIGMATIC FORM.....	151
A. THE GRIEF CAUSED BY THE DEATH ITSELF.....	152
B. THE IMPACT OF WESTBORO’S FUNERAL PICKETING .....	153
1. <i>Freedom from Severe Emotional Distress</i> .....	153
2. <i>Privacy</i> .....	154
3. <i>Personal Dignity</i> .....	156
4. <i>Religious or Spiritual Freedom</i> .....	156

C. THE VALUE OF FUNERAL PICKETING .....	157
1. <i>Should Westboro Have a First Amendment Right to Communicate with the Mourners?</i> .....	157
2. <i>Should Westboro Have a First Amendment Right to Communicate with the Public in a Way That Also Directly Impacts the Mourners?</i> .....	159
D. CONCLUSION .....	160
VII. APPLYING THE LIBERAL HUMANIST APPROACH TO THE FACTS OF <i>SNYDER</i> .....	160
A. WAS WESTBORO’S PICKETING ENTITLED TO FIRST AMENDMENT PROTECTION? .....	160
B. THE VAGUENESS OF THE TORT DOCTRINES EMPLOYED IN <i>SNYDER</i> .....	163
VIII. BUFFER-ZONE LAWS .....	164
A. THE CONSTITUTIONALITY OF BUFFER-ZONE LAWS .....	165
B. THE SIZE OF THE BUFFER ZONE .....	169
C. SANCTIONS FOR VIOLATION .....	172
IX. CONCLUSION .....	173
APPENDIX .....	175



# To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment

STEVEN J. HEYMAN\*

## I. INTRODUCTION

How far does the First Amendment's protection for freedom of speech extend?<sup>1</sup> May the law ever restrict speech because it causes emotional or dignitary injury to others? These were the central questions in the Supreme Court's recent decision in *Snyder v. Phelps*.<sup>2</sup> On March 3, 2006, a young Marine named Matthew Snyder was killed in the line of duty in Iraq.<sup>3</sup> One week later, Pastor Fred Phelps Sr. and several of his followers from the Westboro Baptist Church ("Westboro") picketed Matthew's funeral in Westminster, Maryland.<sup>4</sup> The demonstrators held up signs emblazoned with slogans like "Thank God for Dead Soldiers," "God Hates Fags," "You're Going to Hell," and "America is Doomed."<sup>5</sup> These signs reflected Westboro's belief that God was killing American soldiers to punish the nation for tolerating homosexuality and other conduct that the church regarded as sinful.<sup>6</sup>

Matthew's father, Albert Snyder, brought suit against Westboro and its members for the anguish that he suffered from their picketing of the funeral.<sup>7</sup> A federal jury held the defendants liable for the torts of intentional infliction of emotional distress ("IIED") and invasion of privacy and awarded Snyder five million dollars in compensatory and

---

\* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. A.B. 1979, J.D. 1984, Harvard. For thoughtful comments on earlier versions of this Article, I am grateful to Kate Baldwin, Felice Batlan, Mary Jean Dolan, Tom Lewis, Thomas McAfee, Mark Rosen, Christopher Schmidt, Adrian Walters, Christina Wells, and the participants in the Chicago-Kent Legal Theory Workshop. Sarah Marfisi provided invaluable research assistance.

In 2010, I served as an advisor to the plaintiff's lawyers in *Snyder v. Phelps* after the case reached the Supreme Court. The views expressed in this Article are solely my own.

<sup>1</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>2</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

<sup>3</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> 131 S. Ct. at 1213.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1214.

punitive damages.<sup>8</sup> In March 2011, however, the Supreme Court overturned this award on First Amendment grounds.<sup>9</sup> Writing for the majority, Chief Justice John G. Roberts Jr. acknowledged that Westboro's picketing had "inflict[ed] great pain" on Matthew's father and that "its contribution to public discourse may [have been] negligible."<sup>10</sup> Nevertheless, Chief Justice Roberts maintained that the protesters had addressed the public as a whole on matters of public concern while standing on public property that was located a considerable distance from the funeral.<sup>11</sup> Under these circumstances, he held that the picketing was entitled to the "special protection" that the First Amendment affords to speech on matters of public concern.<sup>12</sup>

The Chief Justice was careful to note that the decision was a "narrow" one that was "limited by the particular facts before [the Court]."<sup>13</sup> But the significance of the case goes far beyond that. Funeral picketing inflicts greater pain and distress on its targets than virtually any other form of expression. Thus, *Snyder* is likely to be regarded as a leading authority for the view that the First Amendment generally bars the state from restricting the content of speech on public issues in order to protect individuals from emotional or dignitary injury. Of course, there is nothing novel about this view—in recent decades, it has become the dominant position in First Amendment jurisprudence.<sup>14</sup> As the *Snyder* case shows, however, this position is deeply problematic, for it requires the Court to protect speech even when it causes great harm and makes little or no "contribution to public discourse."<sup>15</sup>

In this Article, I criticize the *Snyder* decision and the conception of free speech on which it is based.<sup>16</sup> After summarizing the decision in Part

---

<sup>8</sup> *Id.* Damages initially were set at \$10.9 million, but on a post-trial motion the district court judge reduced the award to five million. *Id.*

<sup>9</sup> *Id.* at 1215.

<sup>10</sup> *Id.* at 1220.

<sup>11</sup> *Id.* at 1217–20.

<sup>12</sup> *Id.* at 1219.

<sup>13</sup> *Id.* at 1220.

<sup>14</sup> See *infra* Part IV.A.

<sup>15</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>16</sup> For some valuable discussions of *Snyder* and the broader issue of funeral picketing, see Clay Calvert, *Defining "Public Concern" After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39 (2012) (discussing the concept of public concern in First Amendment jurisprudence); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575 (2007) (discussing funeral picketing legislation); Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295 (2008) (analyzing the balance between the interest in mourning and the right of free speech); Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193 (2010) (exploring the conflict between freedom of speech and the right to be let alone); Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CALIF. L. REV. CIRCUIT 71 (2010) (arguing that courts should

II, I argue in Part III that the majority fundamentally misunderstood the nature of Westboro's funeral picketing. As the group's own statements make clear, the message of God's hatred is not simply addressed to the public in general; it is also directed toward the mourners in particular. As Shirley Phelps-Roper has explained, Westboro's goal is to "put[] the cup of the fury and wrath of God to your lips and [to make] you drink it."<sup>17</sup> The real issue in cases like *Snyder* is whether there is a First Amendment right to address speech of this sort to the mourners at a funeral and thereby cause them profound emotional distress.

The majority did not directly confront this issue because it failed to appreciate the fact that Westboro's speech was directed to the mourners as well as to the public at large. However, the Court did articulate a view of the First Amendment that generally would preclude the state from regulating public-concern speech in order to protect individual dignity and personality.<sup>18</sup> In Part IV, I argue that this view not only gives short shrift to those values, but also tends to undermine the sphere of public discourse itself by negating the practical and normative conditions on which it depends.

In Part V, I outline an alternative theory of the First Amendment that seeks to overcome these problems. According to this view, which I shall call the liberal humanist approach, public discourse should not be understood as a realm in which all standards of civility and respect have been suspended, or as a marketplace that is capable of operating on its own and neutralizing harmful expression. Instead, we should understand public discourse as discussion among persons who recognize one another as free and equal members of a self-governing community. On this view, the right to free speech carries with it a duty to respect the personality and rights of others.

---

not recognize a claim for intentional infliction of emotional distress based on offensive speech); Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151 (2008) (examining the impact of funeral protest statutes on free speech); Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2001) (defending Snyder's claim for intentional infliction of emotional distress); Ronald K.L. Collins & David Hudson, *A Funeral For Free Speech?*,

LEGAL TIMES (Apr. 17, 2006) available at <http://archive.firstamendmentcenter.org/analysis.aspx?id=16775> (exploring whether funeral protests can be outlawed without violating the right to free speech); and the articles in the online symposium *Funerals, Fire, and Brimstone*, CARDOZO L. REV. DE NOVO, [http://www.cardozolawreview.com/index.php?option=com\\_content&view=category&layout=blog&id=21&Itemid=26](http://www.cardozolawreview.com/index.php?option=com_content&view=category&layout=blog&id=21&Itemid=26). On the regulation of funeral picketing after *Snyder*, see Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What is Next After Phelps?*, 61 AM. U. L. REV. 279 (2011); Christina E. Wells, *Regulating Funeral Protests After Snyder v. Phelps* (Mar. 12, 2012) (unpublished manuscript) (on file with author) [hereinafter Wells, "After Snyder"].

<sup>17</sup> *Hannity & Colmes* (Fox News television broadcast Apr. 18, 2006), transcript available at <http://media.pfaw.org/Right/PhelpsInterview.txt> (interview by Sean Hannity and Alan Colmes with Shirley Phelps-Roper).

<sup>18</sup> See *infra* Part IV.A.

In more general terms, the liberal humanist view holds that freedom of speech exists within a broader framework of rights, all of which are rooted in respect for human freedom and dignity and are intended to promote the full development and flourishing of human nature. The First Amendment should not be interpreted to protect speech that violates the rights of other people, except in situations where the value of the speech outweighs the value of the other rights with which it conflicts.

The Article then applies this theory to funeral picketing. In the interest of clarity, I begin in Part VI with the paradigmatic case of funeral picketing—a situation in which the protesters stand so close to the funeral that they are able to communicate with the mourners in a direct and immediate way. I argue that such picketing causes serious injury to the mourners and violates their rights to emotional well-being, privacy, dignity, and religious or spiritual liberty. The value of the speech does not warrant the injuries that it causes, because the protesters are not justified in communicating directly with the mourners and there is no need to stand so close to a funeral to communicate with the public at large. For these reasons, the First Amendment should not protect funeral picketing in its paradigmatic form.

In Part VII, I consider whether, under the liberal humanist approach, we should reach the same conclusion on the facts of *Snyder* itself. This is a much more difficult case because the protesters could not be seen or heard from the church where the service took place. However, Westboro's members regarded themselves as picketing the funeral; they could be seen from the procession; they sought to convey an intensely hateful message to the mourners; they succeeded in communicating this message, albeit in an indirect way; and their conduct resulted in severe emotional and dignitary injury. Once again, they lacked sufficient justification for acting as they did. On these grounds, I would hold that their actions were not protected by the First Amendment. At the same time, I agree with the majority that one of the requirements for IIED liability—a jury determination that the defendants' conduct was "outrageous"<sup>19</sup>—is simply too vague a standard to govern cases involving speech that to a substantial extent involves matters of public concern. Thus, although I believe that a state could restrict the defendants' conduct in *Snyder* without running afoul of the First Amendment, I agree that this conduct should not give rise to tort liability for IIED.

Finally, in Part VIII, I argue that the Court was right to suggest that the First Amendment allows the state and federal governments to enact buffer-zone laws that require protesters to stand a certain distance away from

---

<sup>19</sup> *Snyder*, 131 S. Ct. at 1219; RESTATEMENT (SECOND) OF TORTS § 46 (1965) [hereinafter RESTATEMENT (SECOND)].

funerals, and I contend that this position should be interpreted broadly to uphold laws that require the protesters to stand out of the mourners' sight and hearing, as the Court found that they did in *Snyder* itself.

## II. THE SUPREME COURT'S OPINION IN *SNYDER*

After describing the events surrounding Matthew Snyder's funeral, Chief Justice Roberts identified the critical issue as whether Westboro's speech was related to matters of public concern and thus entitled to the highest level of First Amendment protection.<sup>20</sup> To answer this question, he focused on the content of the speech.<sup>21</sup> The signs that Westboro displayed read as follows:

"God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."<sup>22</sup>

After quoting these signs, Chief Justice Roberts observed that:

While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed . . . to reach as broad a public audience as possible.<sup>23</sup>

Chief Justice Roberts conceded that "a few of the signs—such as 'You're Going to Hell' and 'God Hates You'—[could be] viewed as containing messages related to Matthew Snyder or the Snyders specifically."<sup>24</sup> But he insisted that "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."<sup>25</sup>

The Chief Justice then rejected the notion that the context in which the speech occurred should lead the Court to treat it as private rather than public: "The fact that Westboro spoke in connection with a funeral . . .

---

<sup>20</sup> *Snyder*, 131 S. Ct. at 1215.

<sup>21</sup> *Id.* at 1216–17.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1217.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

cannot by itself transform the nature of Westboro's speech."<sup>26</sup> He acknowledged that Westboro chose to picket where it did "to increase publicity for its views" and that this "choice added to Mr. Snyder's already incalculable grief."<sup>27</sup> But that did not change the fact that "Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street."<sup>28</sup> Like public streets and sidewalks, this space amounted to "a traditional public forum" that under longstanding doctrine could be freely used for "public assembly and debate."<sup>29</sup>

The Chief Justice recognized that the Court had previously "identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral."<sup>30</sup> For example, in *Frisby v. Schultz*,<sup>31</sup> the Justices upheld a ban on targeted picketing in front of a person's home,<sup>32</sup> while in *Madsen v. Women's Health Center, Inc.*,<sup>33</sup> they approved an injunction establishing a buffer zone around the entrance to an abortion clinic.<sup>34</sup> According to Chief Justice Roberts, however, *Snyder* was clearly distinguishable in two respects. First, the nature and the location of the activity were quite different than in the earlier cases:

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.<sup>35</sup>

Second, in cases like *Frisby* and *Madsen*, the restrictions were found to satisfy the requirements of content neutrality.<sup>36</sup> By contrast, Chief Justice Roberts maintained that "[t]he record [in *Snyder*] confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than [on] any interference with the funeral itself."<sup>37</sup> This point is made clear by the fact that "[a] group of

---

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1217–18.

<sup>28</sup> *Id.* at 1218.

<sup>29</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>30</sup> *Id.*

<sup>31</sup> 487 U.S. 474 (1988).

<sup>32</sup> *Id.* at 488.

<sup>33</sup> 512 U.S. 753 (1994).

<sup>34</sup> *Id.* at 776.

<sup>35</sup> *Snyder*, 131 S. Ct. at 1218–19. It is unclear why Roberts did not consider the repeated use of the word *fag* on the picket signs profane.

<sup>36</sup> *Id.* at 1218.

<sup>37</sup> *Id.* at 1219.

parishioners standing at the very spot where Westboro stood, holding signs that said ‘God Bless America’ and ‘God Loves You,’ would not have been subjected to liability.”<sup>38</sup>

For the majority, it followed that Westboro could not be held liable without violating one of the most basic doctrines of free speech jurisprudence: that speech on public issues “cannot be restricted simply because it is upsetting or arouses contempt.”<sup>39</sup> Under the First Amendment, the government may never “prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Indeed, ‘the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.’”<sup>40</sup>

According to the Court, these principles were especially threatened in the present case because liability for IIED requires a finding that the defendant’s conduct was “outrageous.”<sup>41</sup> The use of such a subjective and “highly malleable standard” poses a serious risk that juries will impose liability for speech that they dislike or are offended by—a risk that is “unacceptable” where the freedom of public debate is at issue.<sup>42</sup>

On these grounds, the Court rejected the plaintiff’s IIED claim.<sup>43</sup> His claim for invasion of privacy fared no better.<sup>44</sup> Snyder argued that Westboro’s speech should not be protected because he “was a member of a captive audience at his son’s funeral.”<sup>45</sup> In response, Chief Justice Roberts wrote:

In most circumstances, “the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”<sup>46</sup>

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citations omitted) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* On this point, the Court drew on its earlier decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), which held that outrageousness did not provide a sufficiently objective basis for imposing liability on the publisher of a parody that ridiculed a public figure.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 1219–20.

<sup>45</sup> *Id.* (citing Brief for Petitioner at 45–46, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751)).

<sup>46</sup> *Id.* at 1220 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (internal quotation marks omitted)).

This rule can be overcome only by “a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>47</sup> No such showing could be made here, the Court said, because “Westboro stayed well away from the memorial service,” and “there is no indication that the picketing in any way interfered with the funeral service itself.”<sup>48</sup>

Although the Chief Justice stressed the narrowness of the decision, he ended by articulating its broader meaning: although speech is “powerful” and is capable of “inflict[ing] great pain,” our nation has “chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>49</sup> At the same time, he indicated that the government may be allowed to adopt buffer-zone laws that restrict the location of funeral picketing, so long as those laws are content neutral and satisfy the standards that the Court has articulated for time, place, and manner regulations.<sup>50</sup>

In dissent, Justice Samuel A. Alito contended that Westboro’s speech went “far beyond commentary on matters of public concern” and constituted a “vicious verbal assault” on Matthew Snyder and his family.<sup>51</sup> “Our profound national commitment to free and open debate,” he argued, does not require us to protect this sort of speech.<sup>52</sup> In a concurring opinion, Justice Stephen G. Breyer agreed with Justice Alito that the state should sometimes have the power to protect against abusive speech.<sup>53</sup> In this case, however, Westboro’s speech had occurred “in a place where picketing was lawful,” it “could not be seen or heard from the funeral ceremony itself,” and only the tops of the signs could be seen from the procession.<sup>54</sup> Justice Breyer concluded that, under these circumstances, a decision upholding the tort judgment “would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State’s interest in protecting its citizens against severe emotional harm.”<sup>55</sup>

---

<sup>47</sup> *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* In this way, as Frederick Schauer remarks, *Snyder* represents one of “the clearest [statements] the Court has ever issued . . . about the extent to which the First Amendment protects even personally harmful speech.” Frederick Schauer, *Harm(s) and the First Amendment* 14 (Univ. Va. Law Sch. Pub. Law & Legal Theory Working Paper Series No. 2012-23), available at <http://ssrn.com/abstract=2030444>.

<sup>50</sup> *Snyder*, 131 S. Ct. at 1218.

<sup>51</sup> *Id.* at 1222 (Alito, J., dissenting).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1221 (Breyer, J., concurring).

<sup>54</sup> *Id.* at 1221–22.

<sup>55</sup> *Id.* at 1222.

### III. A CRITIQUE OF THE *SNYDER* OPINION

The majority opinion in *Snyder* rests on the following propositions: (1) that Westboro's picketing took place on public property far from the church and had little if any impact on the funeral; (2) that the expression was not a personal attack on the Snyder family but was addressed to the public on matters of public concern; and (3) that any emotional distress caused by the speech was based on its content and viewpoint. If one understands the facts in this way, *Snyder* is an easy First Amendment case which can be resolved by a straightforward application of conventional doctrine, and which is remarkable only because of the intense passions that it generates. As I shall now show, however, each of these three propositions is highly problematic.

#### A. *The Location of the Speech*

The majority stressed that Westboro's members "fully complied with police guidance on where the picketing could be staged" and that they stood "at a public place adjacent to a public street" which was "some 1,000 feet from the church, out of the sight of those at the church."<sup>56</sup> In this way, the opinion implies that the protesters were required to stand in a remote location and that their conduct did not encroach on the funeral in any way. This view of the facts is misleading in several respects.

First, Westboro itself played a significant role in determining where the protest took place. The funeral was held at St. John's Catholic Church, which consists of a number of buildings spread across a large campus in Westminster, Maryland.<sup>57</sup> The street address is 43 Monroe Street.<sup>58</sup> Westboro learned of Matthew Snyder's death and the location of his funeral from obituaries published in local news sources.<sup>59</sup> The group then notified the local authorities that it intended to picket at 43 Monroe Street, and the authorities—in consultation with a priest from St. John's—made arrangements for the group to demonstrate at that site.<sup>60</sup> Thus, Westboro's picketing took place "at the main entrance" to the St. John's campus,

---

<sup>56</sup> *Id.* at 1218.

<sup>57</sup> An aerial photograph of the church campus is reproduced in Supplemental Joint Appendix at SA-1, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751) [hereinafter Aerial Photograph].

<sup>58</sup> ST. JOHN WESTMINSTER, <http://www.sjwest.org> (last updated Dec. 1, 2011).

<sup>59</sup> Brief of Appellants, Appendix at 1945, *Snyder v. Westboro Baptist Church, Inc.*, 580 F.3d 206 (4th Cir. 2009) (No. 08-1026) [hereinafter Record] (opening statement of Shirley Phelps-Roper at trial). I am grateful to the plaintiff's counsel, Sean Summers, Esq., and his staff for making the record available to me.

<sup>60</sup> See Letter from Shirley Phelps-Roper to Chief Jeffrey Spaulding, Westminster Police Dep't (Mar. 8, 2006), in Record, *supra* note 59, at 3776; Record, *supra* note 59, at 2244–46 (testimony of Fr. Leo Patalinghug); Record, *supra* note 59, at 2281–82 (testimony of Maj. Thomas Long of Carroll County, Maryland Sheriff's Office).

although the funeral service itself was held at a building at the opposite end of the campus.<sup>61</sup>

Second, the trial testimony indicates that while the small strip of land on which the demonstration was held “technically . . . belongs to the county,” it is located immediately adjacent to the church’s property, appears to belong to that property, and is maintained by the church.<sup>62</sup> Third, although the funeral procession to the church normally would have used the main entrance, the clergy arranged for the procession to take an alternative route “[b]ecause we knew that there were going to be protesters at the main entrance” and “we didn’t want to have a confrontation” between the protesters and the family.<sup>63</sup> Even so, as the majority acknowledged, the procession passed within 200 to 300 feet of the protesters.<sup>64</sup> Albert Snyder testified that he saw the tops of the picket signs as the procession turned into the church campus, and that he had already learned that there would be protesters at the funeral.<sup>65</sup>

Fourth, the Court’s assertion that the protesters were standing “approximately 1,000 feet” from the building where the funeral occurred arguably is also overstated.<sup>66</sup> Finally, Westboro’s announcement that it would picket the funeral led to the deployment of a number of law enforcement and emergency vehicles, as well as to the gathering of a substantial media presence—facts that, in the plaintiff’s view, contributed to a “circus-like atmosphere during a solemn and religious occasion.”<sup>67</sup>

To be sure, none of these facts undermines the majority’s contention that the protesters were standing too far away to affect the funeral ceremony itself. But they do call into question the idea that the protest had no impact on the atmosphere surrounding the funeral.

#### B. *The Audiences for the Speech and the Messages That It Was Meant to Convey*

The lynchpin of the Court’s analysis is the contention that Westboro’s picketing related to matters of public concern and that it was not a personal

---

<sup>61</sup> Record, *supra* note 59, at 2244 (testimony of Fr. Leo Patalinghug); Aerial Photograph, *supra* note 57.

<sup>62</sup> Record, *supra* note 59, at 2242–43 (testimony of Fr. Leo Patalinghug).

<sup>63</sup> *Id.* at 2244.

<sup>64</sup> Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

<sup>65</sup> Record, *supra* note 59, at 2074–75 (testimony of Albert Snyder).

<sup>66</sup> Snyder, 131 S. Ct. at 1213. In preparation for the trial, the defendants measured the distance by walking along a series of paths that do not run directly from the protest site to the church. See Aerial Photograph, *supra* note 57. One of the measurements they obtained was 1,081 feet. *Id.* Using the same photograph, I would calculate the distance as approximately 800 feet as the crow flies.

<sup>67</sup> Petition for Writ of Certiorari at 2–3, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751); Record, *supra* note 59, at 2082 (testimony of Albert Snyder).

attack on the Snyder family.<sup>68</sup> The majority's discussion of this point is intertwined with another question that it does not clearly distinguish: who was the intended audience for the speech? On this point, the majority speaks as though the picketing was directed "to society at large," and it barely considers whether the speech was also directed to the family and other mourners.<sup>69</sup> These two points account for much of the force of the Court's argument—if speech is directed toward the public and relates to matters of public concern, then clearly no private individual should be able to interfere with it merely because he finds it upsetting. In this way the majority seems to treat Albert Snyder, rather than Westboro, as the interloper in this situation.

In this respect, the Court's view of the case is deeply distorted. An exploration of Westboro's own statements, both in this case and elsewhere, shows that its funeral picketing is addressed to—and directed against—not only the community in general but also the family and mourners in particular.

To understand Westboro's activity, we need some understanding of its theology and sense of its own mission.<sup>70</sup> Westboro is a Primitive or Old School Baptist church which was founded in Topeka, Kansas in 1955.<sup>71</sup> The church has about sixty members, most of whom are related by blood or marriage to its founder and pastor, Fred Phelps Sr.<sup>72</sup> The church subscribes to an extreme form of Calvinism, which holds that human nature has become utterly fallen and corrupt as a result of the sin of Adam.<sup>73</sup> The total depravity of mankind manifests itself in all forms of sin and especially in "sodomy," which Westboro regards as a fundamental and primordial transgression of God's law.<sup>74</sup> All human beings are deserving

---

<sup>68</sup> *Snyder*, 131 S. Ct. at 1216–18.

<sup>69</sup> *Id.* at 1216–17.

<sup>70</sup> The best account can be found in an ethnographic study of the group conducted by Rebecca Barrett-Fox over a six-year period. See Rebecca Barrett-Fox, "Pray Not for this People for Their Good": Westboro Baptist Church, the Religious Right, and American Nationalism, chs. 3–4 (Dec. 8, 2010) (unpublished Ph.D. dissertation, University of Kansas), available at [http://kuscholarworks.ku.edu/dspace/bitstream/1808/7738/1/BarrettFox\\_ku\\_0099D\\_11255\\_DATA\\_1.pdf](http://kuscholarworks.ku.edu/dspace/bitstream/1808/7738/1/BarrettFox_ku_0099D_11255_DATA_1.pdf) (discussing Westboro's theology, ministries, and mission); see also Wells, "After *Snyder*," *supra* note 16, at 6–9 (explaining Westboro's theology and practices).

<sup>71</sup> Westboro Baptist Church, *Who Are You, What Do You Do, and Why Do You Do It?*, GODHATESFAGS, <http://godhatesfags.com/faq.html#Who> (last visited Mar. 16, 2012); Barrett-Fox, *supra* note 70, at 39, 137.

<sup>72</sup> Barrett-Fox, *supra* note 70, at 103–05.

<sup>73</sup> *Id.* at 155–56.

<sup>74</sup> *Id.* Westboro's view of sodomy is rooted in Old Testament verses that call it an "abomination," see *Leviticus* 20:13, 22, as well as in the first chapter of St. Paul's *Letter to the Romans*, which declares that because human beings turned away from God and fell into idolatry, God "gave them up to uncleanness through the lusts of their own hearts, to dishonour their own bodies between themselves," especially through same-sex relations, *Romans* 1:18–27 (King James).

of eternal damnation, but God, in a sovereign act of grace and mercy, has elected to save a small number from the flames of hell.<sup>75</sup>

Westboro's members believe "that they are the only contemporary group that accurately understands and lives out God's commands, and are thus the only people who have a reason to hope that they will enter heaven."<sup>76</sup> The church is "the lone prophet of God's word" and has been appointed to preach the gospel of God's wrath to the world.<sup>77</sup> As Pastor Phelps explained at trial, the group believes that it has a duty not merely to proclaim this message to the public in general, but also to "go into the highways and the hedges . . . and the byways" and to "preach the gospel to every creature," "[w]hether they want to hear it or not."<sup>78</sup> The goal of this activity is not to convert others or to save their souls, for the church accepts a "hyper-Calvinist" doctrine of predestination which holds that God decided before the creation of humanity whom to save and whom to damn.<sup>79</sup> If an individual is destined for perdition, there is nothing that he or anyone else can do to change that fact.<sup>80</sup> Accordingly, Westboro does not call on sinners to repent, nor does it offer them salvation or pray for them to be saved.<sup>81</sup> Although the church's members hope that their words will bring some unknown members of the elect to God, they preach the message "not to help people find eternal salvation but to reveal to the world God's message of impending damnation."<sup>82</sup> In this way, they act in obedience to God's command and thereby gain some further assurance of their own election.<sup>83</sup>

Picketing is the "primary method" by which the church spreads its message.<sup>84</sup> Of course, this is a method that is designed to communicate not only with the public but also with the specific targets. That is unquestionably true of the picketing that Westboro conducts at locations other than funerals. For example, the church's website announced that,

---

<sup>75</sup> See Barrett-Fox, *supra* note 70, at 156–69 (discussing the Calvinist belief in limited atonement).

<sup>76</sup> *Id.* at 128.

<sup>77</sup> *Id.* at 216, 227–30.

<sup>78</sup> Record, *supra* note 59, at 2215, 2226 (testimony of Fred Phelps Sr.).

<sup>79</sup> See Barrett-Fox, *supra* note 70, at 160–64.

<sup>80</sup> *Id.* at 190.

<sup>81</sup> See *id.* at 141 n.405, 157, 190. Barrett-Fox reports that, in a recent sermon, Pastor Phelps imagined a bystander at one of Westboro's pickets asking, "What can we do?" Phelps's reply was: "Nothing. God is through with you. I'm through with you. Westboro Baptist Church is through with you." He "rather gleefully" added, "We're going to pray for you—that you'll go to hell, that you'll be smitten." Barrett-Fox, *supra* note 70, at 159 (quoting Fred Phelps, Sermon (Feb. 7, 2010)).

<sup>82</sup> Barrett-Fox, *supra* note 70, at 222, 229–30.

<sup>83</sup> *Id.* at 229.

<sup>84</sup> Westboro Baptist Church, *What Ways Have You Found to Spread Your Message?*, GODHATESFAGS, <http://www.godhatesfags.com/faq.html#SpreadMessage> (last visited June 27, 2012).

during a particular week in June 2011, its members would picket the following places (among others):

- a rock concert in Seattle, in order to convey “a message for those in attendance” about the evils of homosexuality;<sup>85</sup>
- an evangelical church in Auburn, Washington, to communicate a message that “[y]ou have caused the people to trust in lies to their destruction, and to your [own] damnation”;<sup>86</sup>
- a feminist march against rape called SlutWalk Seattle, to tell the participants that “if you’d quit dressing like sluts, you wouldn’t be treated like sluts,” and that “every rape is a punishment from God and a judgment upon you for your sins”;<sup>87</sup> and
- a United Jewish Fund event in Springfield, Illinois, “to preach some gospel truth . . . to the reprobate Jews.”<sup>88</sup>

According to Randall Balmer—a leading American religious historian who was called by Westboro itself as an expert witness in the *Snyder* case—when the church’s members engage in demonstrations of this sort, they seek to “confront” specific individuals “who [are] in particular need of some message,” and to do so in a way that is “militant, in your face, confrontational, [and] condemnatory.”<sup>89</sup>

In the case of funeral picketing, the individuals who are being confronted are the mourners. As Westboro explained in a 2005 open letter to lawmakers, the group is determined to “deliver [its] message to the people going to these events, whether inside or out. *That’s our intended audience . . .*”<sup>90</sup>

---

<sup>85</sup> Westboro Baptist Church Picket Schedule, <http://www.godhatesfags.com/schedule.html> (last visited June 16, 2011) (June 2011 version of the webpage on file with author).

<sup>86</sup> *Id.* The “lies” in question were “that God love [sic] everyone and Jesus died for the sins of all of mankind.” *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* As Barrett-Fox explains, Westboro holds the Jews responsible for the death of Jesus and describes them as “‘famous worldwide for being fag-enablers, babykillers, pornographers, adulterers, fornicators, and greedy idolaters.’” Barrett-Fox, *supra* note 70, at 249–56 (quoting Westboro Baptist Church, *Naughty Figs*, [JEWSKILLEDJESUS.COM](http://www.jewskilledjesus.com/naughtyfigs), <http://www.jewskilledjesus.com/naughtyfigs>).

<sup>89</sup> Record, *supra* note 59, at 2626, 2630 (testimony of Dr. Randall Balmer). The defendants called Balmer as an expert witness to testify that both their theology and their confrontational approach were in accord with the tradition of American Christian fundamentalism—a characterization that Balmer supported, though he frankly added that Westboro “pushes [that approach] to the outer limit.” *Id.* at 2626.

<sup>90</sup> Westboro Baptist Church, *A Message from Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding Her Counter-Demonstrations at Funerals of Dead Soldiers* 4 (Dec. 12, 2005), [http://www.godhatesfags.com/letters/20051212\\_legislation-message.pdf](http://www.godhatesfags.com/letters/20051212_legislation-message.pdf) (last visited Mar. 16, 2012) [hereinafter Westboro, *Message to Lawmakers*] (emphasis added). For this reason, the letter insisted that lawmakers would “go too far” if they established any buffer zone that was “more than about 100

At its core, Westboro's funeral picketing is intended to condemn the deceased and to celebrate his death. As the group's website explains, "the scriptures specifically tell the servants of God to find comfort and rejoice in His punishment of the wicked"<sup>91</sup>—a category that, according to Westboro, includes everyone but a small group of God's elect.<sup>92</sup>

Another goal of Westboro's funeral picketing is to hold "evil doers [such as the deceased or his family] up to public contempt, as a way to make an example of them so that others will not go that way, or engage in similar conduct."<sup>93</sup> In one of the most notorious incidents, Westboro picketed the funeral of Matthew Shepard, a gay college student who was tortured and murdered near Laramie, Wyoming in 1998, and proclaimed that he was in hell.<sup>94</sup>

The news release that Westboro issued before the Snyder funeral shows that these were among the central messages of that protest as well. Entitled "Thank God for IEDs," the news release asserted that Matthew had been killed by an IED (an improvised explosive device); that "[h]e died in shame, not honor—for a fag nation cursed by God"; and that he was now suffering eternal punishment in hell.<sup>95</sup>

The picketing in *Snyder* was intended to condemn not only Matthew himself but also his parents. This point emerges most clearly from an Internet posting entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder," which was written by Shirley Phelps-Roper several weeks after

---

feet" from a funeral. *Id.* A few months later, Westboro went further and denounced Maryland's effort to establish a 100-foot buffer zone. See *infra* text accompanying note 109.

<sup>91</sup> Westboro Baptist Church, *Why Do You Have Signs Saying "Thank God for 911," "Thank God for AIDS," "Thank God for Katrina," "Thank God for IEDs," "Thank God for Dead Soldiers," and Otherwise Thanking God for Things That Humans Think Are Bad?*, GODHATESFAGS, [http://godhatesfags.com/faq.html#Thank\\_God](http://godhatesfags.com/faq.html#Thank_God) (last visited June 27, 2012).

<sup>92</sup> See Record, *supra* note 59, at 477 (testimony of Rebekah Phelps-Davis) (stating that "99.9% of the population of this world" is destined for hell); Barrett-Fox, *supra* note 70, at 128–30.

<sup>93</sup> Westboro Baptist Church, *If God Hates Homosexuals as a Group, Why Do You Sometimes Aim Signs at Individual People, Not at the Group? How Can You Say That an Individual is in Hell?*, GODHATESFAGS, <http://godhatesfags.com/faq.html#Individuals> (last visited June 28, 2012) [hereinafter Westboro, *Individual People*].

<sup>94</sup> See Achy Obejas, *Student's Funeral Becomes Unity Rally*, CHI. TRIB., Oct. 17, 1998, at 1. Westboro's website maintains a "'perpetual[ ] memorial'" to Shepard which shows him burning in hell and warning viewers to listen to the church's message. See Barrett-Fox, *supra* note 70, at 242.

<sup>95</sup> Westboro Baptist Church, *Thank God for IEDs* (Mar. 8, 2006), in Plaintiff/Appellee's Supp. Appendix at 158a, *Snyder v. Westboro Baptist Church, Inc.*, 580 F.3d 206 (4th Cir. 2009) (No. 08-1026) [hereinafter Westboro, News Release]. This document is reproduced as the Appendix to this Article. See *infra* Appendix at p. 175.

In fact, Westboro was mistaken about the cause of Matthew's death. At trial, Albert Snyder testified that his son was killed when the Hum-V on which he was riding "flipped and crushed him"; there is no indication that this event was caused by a road-side bomb. Record, *supra* note 59, at 2063 (testimony of Albert Snyder).

the funeral.<sup>96</sup> This document, which the parties referred to as “the epic,” is Westboro’s own fullest account of the meaning of the protest.

In a central portion of the epic, Westboro addressed Matthew’s parents directly:

God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew . . . . In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.<sup>97</sup>

The epic then accused the Snyders of teaching Matthew “to defy his Creator, to divorce, and to commit adultery.”<sup>98</sup> By raising him in the Roman Catholic Church, “[t]hey taught him how to support the largest pedophile machine in the history of the entire world.”<sup>99</sup> Finally, Matthew’s parents “sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?”<sup>100</sup>

Taken together, the news release and the epic indicate that the protest was intended to rejoice in Matthew’s death and to proclaim that God had struck him down and sent him to hell to punish him for his sinfulness, as well as to punish his parents for their own sins and for the way in which they had raised him. These messages were expressed by many of the signs at the funeral, including “God Hates You,” “You’re Going to Hell,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Thank God for IEDs,” “God Hates Fags,” “Fag Troops,” and “Semper Fi Fags.”<sup>101</sup> These messages were specifically addressed to the Snyders, among others, and were also intended to “hold [them] up to public contempt” to discourage others from following their example.<sup>102</sup>

---

<sup>96</sup> Westboro Baptist Church, The Burden of Marine Lance Cpl. Matthew A. Snyder, *in* Record, *supra* note 59, at 3788 [hereinafter Epic].

<sup>97</sup> *Id.* at 3791.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* In a later post, Westboro described Albert Snyder as “an evil man who was not content to go to hell quietly after miserably failing his family,” but who “added to his crimes in that he sued the servants of the true and living God.” Record, *supra* note 59, at 2679–80 (testimony of Timothy Phelps, quoting statement posted on Westboro’s website).

<sup>101</sup> Snyder v. Phelps, 131 S. Ct. 1207, 1216–17 (2011).

<sup>102</sup> Westboro, *Individual People*, *supra* note 93. Matthew was not gay and there is no evidence that Westboro believed that he was. It might seem, then, that the last three signs were not directed at him personally, but only at the United States military or at soldiers who in fact were homosexual. Westboro’s members use *fag* in a broader sense, however. As Timothy Phelps explained at trial, they define the term to include not only “those that are actually engaged in homosexual behavior,” but also “those who aggressively advocate for and enable it.” Record, *supra* note 59, at 2348 (testimony of Timothy Phelps). On these grounds Westboro considers “all elements of [the military to be] fags

Westboro's picketing is directed not only toward the grieving family but also toward the other mourners. On its website, the church explains that it pickets funerals "[t]o warn the people who are still living that unless they repent, they will likewise perish. When people go to funerals, they have thoughts of mortality, heaven, hell, eternity, etc., on their minds. It's the perfect time to warn them of things to come."<sup>103</sup> Westboro acknowledges that, according to commonly accepted standards, its conduct may be regarded as "mean, hateful, [and] uncompassionate" toward the mourners, as well as "hateful and disrespectful of the dead."<sup>104</sup> The group replies, however, that according to its own standards "it would be infinitely more mean, hateful, [and] uncompassionate . . . to keep [our] mouth[s] shut and not warn you that you, too, will soon have to face God."<sup>105</sup>

Another target of the picketing in *Snyder* was the Catholic Church—not only the Pope and the church in general, but also the particular parish in which Matthew had been raised and in which his funeral was held. Westboro's news release stated that it would picket the funeral "at St. John's Catholic dog kennel."<sup>106</sup> Likewise, the epic declared that God had "killed Matthew so that His servants would have an opportunity to preach His words to . . . the whorehouse called St. John Catholic Church."<sup>107</sup> At the funeral, Westboro's anti-Catholic message was expressed by signs that read "Priests Rape Boys" and "Pope in Hell," as well as by more general signs like "God Hates You" and "You're Going to Hell."<sup>108</sup>

In many instances, Westboro's funeral picketing is also addressed to, and directed against, the local community or state in which it takes place. One of the signs in this case read "Maryland Taliban"—a sign that was meant to denounce the Maryland legislature for considering a bill (which was later enacted) to prohibit demonstrations within 100 feet of a funeral.<sup>109</sup> Westboro's members brought this sign not only to Matthew's funeral but also to the Maryland State House, where they protested on the same day.<sup>110</sup> The epic declared that the State of Maryland was seeking "to blot out the word of God from the landscape," and that God would respond by "blot[ting] out their young men."<sup>111</sup> Because the community rejected

---

including the troops," and signs like "Fag Troops" are intended to refer to all soldiers. *Id.* at 2332–33. The same point is made in a DVD entitled "Fag Troops" which Westboro submitted at trial. *Id.* at 3802–03.

<sup>103</sup> Westboro Baptist Church, *Why Do You Picket Funerals?*, GODHATESFAGS, <http://www.godhatesfags.com/faq.html#Funeral> (last visited July 7, 2012).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Westboro, News Release, *supra* note 95.

<sup>107</sup> Epic, *supra* note 96, at 3793.

<sup>108</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

<sup>109</sup> *Id.* at 1216; *see also* Record, *supra* note 59, at 2535 (testimony of Shirley Phelps-Roper).

<sup>110</sup> *Snyder*, 131 S. Ct. at 1213.

<sup>111</sup> Epic, *supra* note 96, at 3793.

the message that had been delivered to it by “[t]he servants of God,” “[i]t will be more tolerable for Sodom and Gomorrah in the Day of Judgment than for the people of Maryland.”<sup>112</sup>

Finally, Westboro’s funeral picketing is addressed to, and meant to condemn, America as a whole. As Pastor Phelps has explained, the signs seek to convey “the only righteous message for this evil nation that has gone the way of the Brokeback Mountain. God’s wrath is upon this nation. And he’s pouring out that wrath by killing these soldiers . . . and sending them back in body bags. And it’s only going to get worse.”<sup>113</sup>

In sum, the majority misconstrued the funeral picketing in *Snyder* when it asserted that Westboro was simply attempting to communicate with the public on matters of public concern such as the conduct and fate of our country. Instead, the picketing was directed toward, and was meant to condemn, the Snyder family, the mourners, and the local religious community, as well as the state and the nation as a whole.<sup>114</sup> As I shall now show, that is exactly how it was received.

### C. *The Basis for the Plaintiff’s Emotional Distress*

After focusing on the speakers and their message, the majority opinion moved on to the audience and how it received the speech. “The record,” Chief Justice Roberts asserted, “confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”<sup>115</sup> In this way, he suggested that the distress resulted simply from the controversial nature of the defendant’s religious and political views—something that clearly cannot justify a restriction on speech.<sup>116</sup>

Remarkably, however, Chief Justice Roberts cited no evidence from “[t]he record” to support his assertion.<sup>117</sup> In fact, the evidence goes the

---

<sup>112</sup> *Id.*

<sup>113</sup> Interview by Michael Smerconish with Fred Phelps on Scarborough Country (Apr. 11, 2006) (transcript available at [http://www.msnbc.msn.com/id/12285618/ns/msnbc\\_tv-morning\\_joe/t/scarborough-country-april/](http://www.msnbc.msn.com/id/12285618/ns/msnbc_tv-morning_joe/t/scarborough-country-april/)). On its website, Westboro explains that it pickets soldiers’ funerals because “with full knowledge of what they were doing, they voluntarily joined a fag-infested army to fight for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country.” Westboro Baptist Church, *Why Do You Picket Soldiers’ Funerals?*, GODHATESFAGS, [http://godhatesfags.com/faq.html#Soldier\\_Funeral](http://godhatesfags.com/faq.html#Soldier_Funeral) (last visited July 7, 2012).

<sup>114</sup> It may even be said that Westboro’s picketing is intended to condemn the entire world, for the group believes that nearly all human beings are predestined for hell. Indeed, on one of the church’s websites, a user can click on any part of an interactive map of the world to discover why God hates that particular country. Westboro Baptist Church, GODHATESTHEWORLD.COM, <http://www.godhatestheworld.com/> (last visited July 7, 2012).

<sup>115</sup> *Snyder*, 131 S. Ct. at 1219.

<sup>116</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>117</sup> See *Snyder*, 131 S. Ct. at 1219 (citing no evidence from the record).

other way. To be sure, Albert Snyder testified that he disagreed with the views held by Westboro's members, such as their condemnation of the United States and their belief that the Bible's message is one of hatred rather than love.<sup>118</sup> But he made clear that what upset him so deeply was not the general views that they held but the ways in which their conduct amounted to "an assault" on himself and his family.<sup>119</sup>

Snyder testified that on (or shortly before) the morning of the funeral, he had heard "that there were going to be some protesters there from the Kansas church," but that he did not know what the protest was about and did not give it much thought.<sup>120</sup> As the procession turned into the church campus, he "saw the top of signs," but he "couldn't see what they said [or] who was holding them."<sup>121</sup> An hour or two after the burial, he was standing with some family and friends in his parents' house when someone turned on the television to see the news.<sup>122</sup> Snyder hoped to see the funeral procession and the tribute that had been paid to his son by the people who had lined the route.<sup>123</sup> Instead, he was stunned to see Fred Phelps Sr. and Shirley Phelps-Roper expressing their hateful message.<sup>124</sup> At this point, and also while reading the newspaper the next day, Snyder saw what was written on the signs.<sup>125</sup>

Snyder testified that he was deeply upset by the signs that he interpreted to be an attack on his family. For example, he understood "Thank God for Dead Soldiers" to mean that the protesters "were thanking God my son was dead," and "You're Going to Hell" to refer to Matthew since "[h]e was the only dead one there."<sup>126</sup> Similarly, he took "Fag Troops" to be an assertion that Matthew was gay.<sup>127</sup> By contrast, Snyder testified that he was less bothered by signs like "God Hates the USA" and "God Hates Fags" because "they were more general" and were not directed

---

<sup>118</sup> Record, *supra* note 59, at 2116, 2119, 2154 (testimony of Albert Snyder).

<sup>119</sup> *Id.* at 2131–32, 2145.

<sup>120</sup> *Id.* at 2074, 2078–79. Snyder "thought they were going to be war protesters," rather than what they turned out to be. *Id.* at 2074.

<sup>121</sup> *Id.* at 2075.

<sup>122</sup> *Id.* at 2085, 2088.

<sup>123</sup> *Id.* at 2083, 2085. For a description of this tribute, see *infra* notes 371–72 and accompanying text.

<sup>124</sup> Record, *supra* note 59, at 2085–86 (testimony of Albert Snyder). Snyder explained that he was in such shock at that time that he could not recall the specifics of what the Phelps had said. *Id.* Presumably, it was along the same lines as other statements they made to the media that day. For example, after asserting that Matt's parents "hated him in life and they hated him in death," Shirley Phelps-Roper said, "I think these soldiers [who] went into this war were volunteering, knew this is a nation that flips off God every day. I say they all deserve death. I say thank God for dead soldiers." *Id.* at 2414–15 (newspaper article quoted during examination of Shirley Phelps-Roper).

<sup>125</sup> *Id.* at 2072, 2086–88 (testimony of Albert Snyder).

<sup>126</sup> *Id.* at 2086, 2113, 2119.

<sup>127</sup> *Id.* at 2087, 2120.

at his family.<sup>128</sup> In short, Snyder’s emotional distress was caused not by his disagreement with Westboro’s general political or religious views, but by what he regarded as their unbelievably “cruel” and “heartless” conduct in causing pain to a family in mourning and taking “the dignity away from” Matthew’s funeral, thereby “tarnish[ing] the memory of my son’s last hour on earth.”<sup>129</sup>

#### D. Conclusion

The Supreme Court fundamentally misunderstood the problem of funeral picketing in cases like *Snyder*. Westboro did not merely hold a demonstration that was “planned to coincide with Matthew Snyder’s funeral”<sup>130</sup>—a demonstration that was meant to address the public as a whole on issues of public concern, and that caused emotional distress only because of disagreement with the views it expressed on those issues. Instead, the Phelps stood immediately adjacent to the church campus to “picket [the] funeral”<sup>131</sup> in order to give thanks for Matthew Snyder’s violent death and to convey a message of God’s wrath to his family, friends, and religious community, as well as to the state and the nation. The plaintiff understood this message exactly as it was intended and thereby suffered severe emotional and dignitary injury. The question posed by the case is whether the First Amendment should be interpreted to protect speech that causes this sort of injury. The Court failed to come to terms with this issue, not only because of the way it read the record, but also because the Court’s approach to public discourse makes it very difficult to deal with problems of this sort.

### IV. PUBLIC DISCOURSE IN CONTEMPORARY FIRST AMENDMENT JURISPRUDENCE

In *Snyder*, the Court outlined a general view of the constitutional protections for public discourse, a view which the Justices have developed gradually over the past half-century and which is characteristic of contemporary First Amendment jurisprudence. In this Part, I describe this view and argue that it suffers from fatal flaws and contradictions—problems that clearly emerge when it is applied to funeral picketing.

#### A. The Supreme Court’s Approach to Public Discourse

The Court’s approach rests on a basic distinction between public and private speech. As Chief Justice Roberts explained in *Snyder*, speech on

---

<sup>128</sup> *Id.* at 2116–17, 2120.

<sup>129</sup> *Id.* at 2072, 2114, 2187.

<sup>130</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

<sup>131</sup> Westboro, News Release, *supra* note 95.

public affairs is essential to democratic self-government.<sup>132</sup> For this reason, it “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>133</sup> By contrast, the Constitution affords less rigorous protection to “speech on purely private matters” because restrictions on such speech do not pose a “threat to the free and robust debate of public issues” or interfere with “a meaningful dialogue of ideas.”<sup>134</sup>

On this view, the First Amendment’s ban on censorship applies most strongly within the realm of public discourse. According to the Court, “[t]he essence of this forbidden censorship is content control.”<sup>135</sup> For this reason, laws that regulate speech on the basis of its content are treated as “presumptively invalid.”<sup>136</sup>

More specifically, the Court has taken the position that the state generally may not restrict public-concern speech in order to protect other people from emotional or dignitary harm.<sup>137</sup> Thus, in *Hustler Magazine v. Falwell*,<sup>138</sup> the Court asserted that speech could not be restricted because it “may have an adverse emotional impact on the audience.”<sup>139</sup> In *Boos v. Barry*,<sup>140</sup> the Court held that the same principle barred the state from restricting speech to protect the “dignity” of other people.<sup>141</sup> Instead, the Justices said that “in public debate . . . citizens [generally] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”<sup>142</sup>

In these decisions, the Court has been guided by Justice William J. Brennan Jr.’s statement in *New York Times Co. v. Sullivan*<sup>143</sup> that the First

<sup>132</sup> *Snyder*, 131 S. Ct. at 1215.

<sup>133</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>134</sup> *Id.* (citation omitted) (internal quotation marks omitted). Although all of the Justices in *Snyder* seemed to accept these general principles, *id.* at 1216–17; *id.* at 1226–27 (Alito, J., dissenting), the Court merely paid them lip service a few months later in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). There, a 5-4 majority struck down a law banning the sale to minors of ultraviolent video games which hardly purported to address public affairs. *Brown*, 131 S. Ct. at 2732–33, 2741–42. The majority subjected the law to the same strict scrutiny that the Court applies to laws restricting public-issue speech. *Id.* Taken together, *Snyder* and *Brown* lead one to wonder how seriously the Court takes its assertions about the distinction between public and private speech.

<sup>135</sup> *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>136</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). For further discussion of the content-neutrality doctrine, see *infra* Part V.D.

<sup>137</sup> For a powerful defense of this position, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990). I discuss Post’s view below. See *infra* text accompanying notes 265–78.

<sup>138</sup> 485 U.S. 46 (1988).

<sup>139</sup> *Id.* at 55.

<sup>140</sup> 485 U.S. 312 (1988).

<sup>141</sup> *Id.* at 322.

<sup>142</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>143</sup> 376 U.S. 254 (1964).

Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>144</sup> As Justice Brennan later declared in *Texas v. Johnson*,<sup>145</sup> “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>146</sup>

In all of these cases, the speech related to public figures (*Hustler*), public officials (*New York Times*), the government itself (*Johnson*), or foreign officials and governments (*Boos*). But in some other decisions, the Court has extended these doctrines to speech that is directed against private persons. For example, in *NAACP v. Claiborne Hardware Co.*,<sup>147</sup> the Court held that speech did not lose its protected status simply because it might embarrass individuals or coerce them into supporting a civil rights boycott,<sup>148</sup> while in *Madsen v. Women’s Health Center, Inc.*,<sup>149</sup> the Court held that the First Amendment afforded some protection to insulting and abusive speech directed toward women entering abortion clinics or individuals who worked there.<sup>150</sup> *Snyder* goes even further: although it does not squarely confront the issue, it suggests that the First Amendment’s protections apply even to “vehement” and “caustic” speech that is directed against grieving family members who are about to bury a loved one.<sup>151</sup> In this way, the *Snyder* opinion brings out the main features of the Court’s approach in a very clear and striking manner. And it raises the question of whether that approach is in fact the best way to understand the freedom of speech.

#### B. *A Critique of the Court’s Approach*

The Court’s current approach suffers from several serious problems. Here I shall discuss three of them: (1) its use of abstract categories; (2) its protection of free speech at the expense of other important values; and (3) its tendency to undermine the foundations of public discourse itself.

---

<sup>144</sup> *Id.* at 270.

<sup>145</sup> 491 U.S. 397 (1989).

<sup>146</sup> *Id.* at 414.

<sup>147</sup> 458 U.S. 886 (1982).

<sup>148</sup> *Id.* at 910.

<sup>149</sup> 512 U.S. 753 (1994).

<sup>150</sup> *Id.* at 773–75.

<sup>151</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (stating that to allow juries to award damages for funeral picketing in cases like *Snyder* would pose an “unacceptable” risk of suppressing “vehement, caustic, and sometimes unpleasan[t] expression” that is protected by the First Amendment (citations omitted) (internal quotation marks omitted)).

### 1. *Abstraction*

The first difficulty with the Court's approach lies in its use of abstract categories. The *Snyder* majority insisted that "the overall thrust and dominant theme of Westboro's demonstration" related to matters of public concern.<sup>152</sup> For this reason, the speech could not be restricted simply because it caused pain or offense to the family.<sup>153</sup> In dissent, Justice Alito objected that "this portrayal is quite inaccurate," and that the personal attack on Matthew and his family was "of central importance."<sup>154</sup> As I have shown, however, Westboro's speech had both public and private dimensions: while the speech was meant to warn the nation of God's wrath, it was also meant to tell the mourners that God had struck down Matthew and sent him to hell for "his evil, wicked, and sinful manner of life" and that they were headed for the same fate.<sup>155</sup> Moreover, these two communications were deeply intertwined: by confronting Matthew's family, Westboro sought to gain widespread publicity for its views, while the condemnation of the Snyders was partly based on their connections to institutions such as the United States military and the Roman Catholic Church. Signs like "Thank God for Dead Soldiers" contained general statements, but Westboro intended those statements to apply to Matthew in particular, and his family understood them in the same way. Under these circumstances, it is fruitless to ask whether the speech is essentially a contribution to public discourse or essentially a personal attack: both things are true at the same time.

This point reveals the limitations of the Court's approach, with its sharp distinction between public-concern and private-concern speech. Of course, some First Amendment cases involve expression that clearly falls into the public category (such as the criticism of public officials in *New York Times Co. v. Sullivan*<sup>156</sup>) or into the private category (such as the credit-reporting service in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>157</sup>). But cases like *Snyder* involve speech that straddles this divide. In such cases, the use of these abstract categories is simply too crude a tool to allow for a thoughtful consideration of the values at stake.

In *Snyder*, Chief Justice Roberts sometimes phrases the question as whether the speech related to "purely private matters."<sup>158</sup> Thus, he might respond that even if Westboro's speech did constitute a personal attack, it still should be protected so long as it also related to matters of public

---

<sup>152</sup> *Id.* at 1217.

<sup>153</sup> *Id.* at 1217–19.

<sup>154</sup> *Id.* at 1226–27 (Alito, J., dissenting).

<sup>155</sup> *Epic*, *supra* note 96, at 3791; *see supra* Part III.B.

<sup>156</sup> 376 U.S. 254, 256 (1964).

<sup>157</sup> 472 U.S. 749, 751 (1985).

<sup>158</sup> *Snyder*, 131 S. Ct. at 1215 (emphasis added).

concern. This leads to the next problem I want to raise—that the Court’s approach unduly sacrifices other values to the protection of free speech.

## 2. *Protecting Free Speech at the Expense of Other Fundamental Values*

In *Snyder*, the jury determined that Westboro had “maliciously” violated the plaintiff’s rights by intentionally or recklessly inflicting severe emotional distress through “extreme and outrageous” conduct, and by invading his privacy in a way that was “highly offensive to a reasonable person.”<sup>159</sup> On appeal, Westboro did not dispute these findings, and the Supreme Court accepted them for purposes of the decision.<sup>160</sup> Indeed, the Chief Justice recognized that Westboro’s conduct “inflict[ed] great pain” and “anguish” in a way that “added to Mr. Snyder’s already incalculable grief.”<sup>161</sup> At the same time, Chief Justice Roberts conceded that the “contribution [of Westboro’s funeral picketing] to public discourse may be negligible.”<sup>162</sup> Nevertheless, he concluded that the speech was entitled to First Amendment protection. Such a position can only be described as tragic, for it holds that we can be faithful to one of our most cherished principles—freedom of expression—only by denying protection to individual personality, a value that (as I shall argue in Part V) is just as worthy of respect.

## 3. *Undermining the Normative and Practical Conditions of Public Discourse*

A defender of the Court’s approach might reply that while the state should be allowed to protect individuals from some forms of abusive speech in the private realm, it may not do so in the public realm, for that would undermine the paramount value of democratic self-government. This argument is unpersuasive for two reasons. First, in the American tradition, there is a deep connection between the idea of democracy and the idea of individual rights. Democracy is the way in which free and equal individuals govern themselves on matters of common concern. At the same time, one of the primary functions of democratic government is to protect individual rights. It follows that individual rights should not be sacrificed to the value of democratic self-government except when there is a clear need to do so.

Second, as I shall argue in the next Part, public discourse itself depends on mutual recognition and respect among citizens. On one level, this is a practical requirement: many individuals will feel alienated from

---

<sup>159</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570, 580–81, 589 (D. Md. 2008).

<sup>160</sup> *Snyder*, 131 S. Ct. at 1214 n.2.

<sup>161</sup> *Id.* at 1218, 1220.

<sup>162</sup> *Id.* at 1220.

and reluctant to participate in public discourse if it is not conducted in a way that affords them at least minimal respect as persons. And mutual recognition is also a normative requirement because the outcome of public debate can be regarded as legitimate and binding only if it is conducted on this basis.

These points are dramatically illustrated by the *Snyder* case. The majority takes the position that the state may not protect individual personality in the public realm because “speech concerning public affairs . . . is the essence of self-government,” and because of the threat that regulation would pose to “a meaningful dialogue of ideas.”<sup>163</sup> But what sort of “meaningful dialogue” could exist between the Westboro protesters and the mourners at a funeral? To begin with, that is not the goal of funeral picketing. As Westboro has stated:

We are not really interested in a dialogue with you demon-possessed [sic] perverts. We are not out to change your minds, win your soul to Jesus, agree to disagree, find common ground upon which to build a meaningful long-term relationship, or any other of your euphemisms for compromising in our stance on the Word of God.<sup>164</sup>

As for the mourners themselves, their focus is on remembering the person they have lost. Under these circumstances, Westboro’s picketing, with its condemnation of the mourners and the deceased, and its celebration of his death, cannot be experienced as anything other than a brutal attack and a gross intrusion into their emotional and spiritual lives.

It is true that the protesters are also trying to attract the attention of the community at large. But they are deliberately doing so by means of an attack on the deceased and the mourners. As I shall argue, at its deepest level, the community is founded on respect for the personality of all of its members. It follows that community members are bound to experience Westboro’s picketing not as a legitimate contribution to public debate, but as an assault on their fellow citizens as well as on the community itself.

Under these conditions, no “meaningful dialogue” is possible. Indeed, the majority seemed to acknowledge this fact when it remarked that Westboro’s funeral picketing makes little or no “contribution to public discourse.”<sup>165</sup> This statement can hardly rest on a wholesale assessment of Westboro’s religious and ideological views, such as the claim that America is violating God’s law and incurring divine wrath. Whatever one thinks of such views, it is hard to deny that they are provocative and that they do

---

<sup>163</sup> *Id.* at 1215 (internal quotation marks omitted).

<sup>164</sup> Barrett-Fox, *supra* note 70, at 23 (quoting Westboro Baptist Church, *Contact Us*, GODHATESTHEWORLD.COM, <http://www.godhatesamerica.com/contact.html>).

<sup>165</sup> *Snyder*, 131 S. Ct. at 1220.

make some contribution to public debate. Thus, the majority's statement seems to reflect the view that the church is expressing its beliefs in a manner that contravenes the most basic conditions of public discussion, and that this prevents the expression from being received as part of a meaningful exchange.

In these ways, the Court's current approach to public discourse is internally contradictory and self-defeating. For both practical and normative reasons, public discourse depends on mutual respect among citizens. When the Court insists on granting constitutional protection to speech that violates this principle, it not only sacrifices the value of individual personality but also undermines the conditions for democratic deliberation itself.

#### V. A LIBERAL HUMANIST THEORY OF THE FIRST AMENDMENT

The root problem with the Supreme Court's approach is that it fails to recognize that all of the values of a democratic society are ultimately founded on respect for the freedom and dignity of human beings. What we need is a theory of the First Amendment that places those values at its center. In this Part, I outline such a theory, which I call the liberal humanist approach.<sup>166</sup> This view is rooted in the Lockean natural rights tradition, which deeply influenced the adoption of the Bill of Rights and the Fourteenth Amendment.<sup>167</sup> At the same time, this view draws on our contemporary understandings of human personality, community, and rights.

In Section A, I explore the phenomenology of free speech. I argue that for communication to take place, the participants must recognize one another as persons, and that this is true in both the private and the public realms. In Section B, I explore the concept of personality in greater depth, and show that it not only justifies the freedom of speech but also gives rise to other important rights which impose some limits on that freedom. Section C discusses how we should deal with substantial conflicts between free speech and other rights. In Section D, I discuss the implications of this theory for the doctrine of content neutrality, which is central to the Supreme Court's current jurisprudence. Section E considers some objections to the liberal humanist approach, and especially the objection that the right to be free from dignitary and emotional injury is too subjective to support restrictions on speech. Finally, Section F contrasts the liberal humanist approach with other theories of public discourse.

---

<sup>166</sup> For a fuller exposition and defense of this theory, see STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* (2008) [hereinafter HEYMAN, *FREE SPEECH*].

<sup>167</sup> See discussion *infra* Part V.A.2.

### A. *The Phenomenology of Free Speech*

At the core of the liberal humanist theory is a conception of personality. Persons are capable of forming and expressing their own thoughts and feelings and of directing their own actions. This capacity for self-determination is the basis of human dignity and autonomy. As a person, I demand recognition and respect from others. But I can expect to receive this recognition and respect only if I am willing to accord the same treatment to others. All human interaction depends on mutual recognition, which is a form of thought and expression that affirms the freedom and dignity of the individuals concerned and, at the same time, establishes a relationship of community between them.<sup>168</sup>

#### 1. *Private Speech*

In addition to being one of the most important forms of communication in its own right, mutual recognition is inherent in all other sorts of human communication. To see this point, consider the most basic kind of communication: a conversation between two individuals.<sup>169</sup> On one level, a conversation involves an exchange of information, attitudes, beliefs, requests, and so on. On a deeper level, however, it involves a *relationship between persons*.<sup>170</sup> This relationship is based on mutual recognition. To communicate with another individual, I must recognize her as an intelligent being who is capable of understanding language or other forms of symbolic expression. Likewise, if she is to regard the sounds or gestures that I make not as gibberish but as intelligible expression, she must regard me as an intelligent being who is capable of using language or other symbols to express meaning.

In this way, every conversation involves a relationship in which the participants recognize one another as persons. Of course, these relationships vary greatly, from the most significant and long-lasting to the most transient and inconsequential, such as two strangers conversing about the weather. In the conversation, each person seeks not only to promote her own views and interests, but also to reach a common understanding and to promote an interest that she shares with her interlocutor. Thus, as contemporary communications scholars have argued, conversations do not

---

<sup>168</sup> The concept of recognition is most fully developed in the philosophy of G.W.F. Hegel. See, e.g., 3 G.W.F. HEGEL, *PHILOSOPHY OF SUBJECTIVE SPIRIT* §§ 430–39 (M.J. Petry ed. & trans., D. Reidel 1978) (1830, 1845). For a comprehensive account of Hegel's view, see ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* (1997). Other important works on recognition include AXEL HONNETH, *DISRESPECT* (2007); AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION* (Joel Anderson trans., 1995); and PAUL RICOEUR, *THE COURSE OF RECOGNITION* (David Pellauer trans., 2005).

<sup>169</sup> For a good overview of contemporary communications theory and research on conversations, see STEPHEN W. LITTLEJOHN & KAREN A. FOSS, *THEORIES OF HUMAN COMMUNICATION* ch. 6 (10th ed. 2011).

<sup>170</sup> See *id.* at 229–32, 245–49, 255–57.

simply involve the transmission of meanings from one individual to another, but instead involve shared work and a joint production of meaning.<sup>171</sup>

To be clear, I do not wish to suggest that all conversations are—or should be—amicable in nature. On the contrary, some involve strong disagreements or expressions of anger. Even in those situations, however, an exchange of sounds and gestures can be regarded as an instance of communication only when the participants view one another as intelligent persons who are capable of understanding and expressing meaning. In fact, when people argue with one another, they can be seen as appealing to standards that they share—or could come to share—as persons. For example, if a woman accuses her husband of disregarding her feelings by flirting with another woman at a party, she is implicitly relying on a general notion about the respect that individuals owe one another, as well as on a more specific notion about the obligations that spouses have to each other.

Yet some acts of speech are simply inconsistent with the duty to recognize the personality of others. A dramatic example may be found in the 1982 Kansas case of *Gomez v. Hug*.<sup>172</sup> In that case, it was alleged that a county commissioner named Hug had ordered Gomez, one of his subordinates, to walk over to him and had then shouted, “You are a fucking spic. . . . A fucking Mexican greaser like you, that is all you are. You are nothing but a fucking Mexican greaser, nothing but a pile of shit”—a torrent of epithets that he repeated over and over again.<sup>173</sup> This act of expression reflected a deep contradiction. On one hand, Hug clearly recognized that Gomez was a person who was capable of understanding the content of his tirade. But on the other hand, the content itself was so degrading and humiliating that it was utterly incompatible with the respect that Hug owed Gomez as a person. In a situation like this, it becomes clear that mutual recognition is not merely a descriptive concept, which points to a condition that is necessary for communication to occur at all, but also a normative principle, which establishes the ground rules for legitimate communication. In this case, Hug’s speech violated those rules in the most flagrant manner.

This discussion suggests two further points. First, in legitimate communication, each participant recognizes the other as an intelligent being who is capable of using and understanding language. It follows that, in principle, communication is dialogical, not monological: each participant must be free to express his own views and to respond to those

---

<sup>171</sup> See *id.* at 54, 199–200, 205, 219–20.

<sup>172</sup> 645 P.2d 916 (Kan. Ct. App. 1982).

<sup>173</sup> *Id.* at 918 (internal quotation marks omitted).

expressed by the other.<sup>174</sup> Thus, Hug violated the ground rules of communication not only by treating Gomez as subhuman, but also by using his own power as a supervisor to deny Gomez an opportunity to speak up for himself.

Second, the duty to recognize others as persons entails a duty to respect the rights that flow from this status. These rights include both positive rights to act in particular ways and negative rights to be free from particular forms of injury and abuse. In the Kansas case, for example, the court held that Hug's speech may have violated Gomez's rights to equality in the workplace and to freedom from intentional infliction of emotional distress.<sup>175</sup> When speech violates important rights of this sort, it not only contravenes the ground rules of communication, but also causes serious injury to individuals.

## 2. Public Speech

In *Snyder*, the Supreme Court acknowledged that, under the First Amendment, the state sometimes may restrict private speech in order to protect individuals from dignitary or emotional injury.<sup>176</sup> But the Court insisted that public discourse is essentially different and is largely immune from regulation on these grounds.<sup>177</sup>

Of course, it is true that private and public discourse differ in important ways, including the nature of the audiences and the issues that they address. On the most fundamental level, however, the two forms of speech should be regarded as similar, for public discourse also presupposes mutual recognition.

The roots of this idea may be found in the natural rights tradition. According to John Locke, all human beings are naturally free and equal and belong to a single community.<sup>178</sup> This "great and natural Community" is bound together by reason, which teaches that all individuals have a duty to recognize the humanity and inherent rights of others.<sup>179</sup> In addition to life, liberty, and property, these rights include freedom of thought and belief.<sup>180</sup> To secure these rights, individuals enter into a social contract—

---

<sup>174</sup> Cf. Douglas Ehninger, *Argument as Method: Its Nature, Its Limitations and Its Uses*, 37 SPEECH MONOGRAPHS 101, 102–03 (1970) (characterizing reasoned argument in this way).

<sup>175</sup> *Gomez*, 645 P.2d at 922.

<sup>176</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011).

<sup>177</sup> *See id.* at 1219.

<sup>178</sup> *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 4, 128 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690) [hereinafter LOCKE, GOVERNMENT].

<sup>179</sup> *Id.* §§ 6, 128.

<sup>180</sup> *See id.* § 123; JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXVIII, at 353–54 (Peter H. Nidditch ed., Clarendon Press 1975) (1700) (discussing freedom of thought); JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 2d ed. 1690), in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 13 (Mark Goldie ed., Liberty Fund 2010) (discussing freedom of belief).

an agreement that is necessarily premised on mutual recognition.<sup>181</sup> Through this contract, individuals form a particular political community with the power to make and enforce laws and adjudicate disputes.<sup>182</sup> In this way, controversies over rights come to be determined not by the private judgment of individuals but by the public judgment of the community.<sup>183</sup> Of course, this judgment can be formed only through public discussion.

Initially, all political power is vested in the people as a whole.<sup>184</sup> The people commonly delegate their power to a government, which is required to use that power to protect individual rights and to promote the public good.<sup>185</sup> At the same time, the people always retain the right to determine whether the government is discharging its responsibilities in a faithful and effective manner.<sup>186</sup>

The implications of this view for freedom of speech were developed by two radical Whig disciples of Locke: John Trenchard and Thomas Gordon. In a series of essays called *Cato's Letters*, they argued that because rulers were merely "the trustees of the people," the people were entitled to oversee their conduct to ensure that they did not abuse their trust.<sup>187</sup> Thus, freedom of speech was not only an inalienable right of individuals but was also "inseparable from publick Liberty."<sup>188</sup> In this way, Trenchard and Gordon synthesized Lockean natural rights theory with the civic republican tradition, which stressed the need for public-spirited individuals to actively participate in political life to promote the public good.<sup>189</sup> Like the works of Locke, *Cato's Letters* was widely read in eighteenth-century America and had a deep influence on the new nation's conception of free speech and republican liberty.<sup>190</sup>

Thus, eighteenth-century Americans inherited a rich body of political thought which associated freedom of speech with the ideal of a free society that was based on mutual recognition and respect. This ideal played an important role in the founding of the nation and the adoption of the Bill of Rights.<sup>191</sup>

---

<sup>181</sup> LOCKE, GOVERNMENT, *supra* note 178, bk. II, §§ 87–89, 95.

<sup>182</sup> *Id.* § 87.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* §§ 95, 132.

<sup>185</sup> *Id.* §§ 131, 134.

<sup>186</sup> *Id.* §§ 149, 240.

<sup>187</sup> 1 JOHN TRENCHARD & THOMAS GORDON, *No. 15 Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, in CATO'S LETTERS 110, 111 (Ronald Hamowy ed., Liberty Fund 1995).

<sup>188</sup> *Id.* at 110.

<sup>189</sup> HEYMAN, FREE SPEECH, *supra* note 166, at 9, 11.

<sup>190</sup> LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 109–14 (1985).

<sup>191</sup> For example, in his account of James Madison's speech introducing the Bill of Rights in the First Congress, the historian Lance Banning writes that, as "a *revolutionary* statesman," Madison was

A similar ideal may be found in the writings of Alexander Meiklejohn, which constitute one of the most influential modern defenses of political free speech.<sup>192</sup> Drawing on the language of social contract theory, Meiklejohn maintains that Americans have entered into a “compact or agreement” to form a democratic society.<sup>193</sup> This society is bound together by an “attitude of mutual regard” among individuals who see themselves as “a group of free and equal men” who are “cooperating in a common enterprise.”<sup>194</sup> Under this “form of government,” Meiklejohn writes, “every citizen has, and has a right to have, dignity—the dignity of men who govern themselves.”<sup>195</sup>

These ideas play a central role in Meiklejohn’s account of the First Amendment. He develops this account by reference to “the traditional American town meeting,” in which members of the community gather to debate and decide matters of public concern.<sup>196</sup> In this setting, citizens “meet as political equals.”<sup>197</sup> Political discussion is an open and reciprocal exchange in which each person has “a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others.”<sup>198</sup> The principle of free speech means that citizens “may not be barred [from speaking] because their views are thought to be false or dangerous,” or because they take “one side of the issue rather than another.”<sup>199</sup> At the same time, the very nature of the town meeting requires certain limits on expression: “If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared ‘out of order.’”<sup>200</sup>

Like the interpersonal conversation which I discussed in the previous section, Meiklejohn’s town meeting offers a valuable paradigm for exploring the nature of communication. In both cases, communication can be understood on two different levels: on one level, it involves an

---

genuinely dedicated to a special concept of how decisions should be made in a republic. He believed that a republic ultimately rests on mutual respect among its citizens and on a recognition on the part of all that they are the constituents of a community of mutually regarding equals, participators in a polity that asks them to be conscious that they are, at once, the rulers and the ruled.

LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 287 (1995).

<sup>192</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

<sup>193</sup> *Id.* at 14.

<sup>194</sup> *Id.* at 25, 69.

<sup>195</sup> *Id.* at 68.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 27.

<sup>200</sup> *Id.* at 24–25.

exchange of information and ideas, while on another level, it involves a relationship between persons. Of course, the nature of the relationship differs greatly in these two situations. In its simplest form, a conversation involves a bilateral relationship between two persons. By contrast, the political community that is assembled in the town meeting involves a more complex relationship, in which the individual relates to the community as a whole as well as to her fellow citizens. But this complex relationship is also founded on mutual recognition and respect. Speech that accords with these principles makes a contribution to what Meiklejohn calls “the thinking process of the community” by offering information and opinions that bear on the common good.<sup>201</sup> By contrast, speech that is “abusive”<sup>202</sup> toward other members can be regarded as wrongful in several ways. First, it can cause emotional and dignity injuries to the target(s) in a way that is comparable to the injuries that result from insults in a private conversation.<sup>203</sup> Second, it tends to degrade and humiliate the target(s) in the eyes of the community as a whole. And finally, it injures the community itself by violating the ground rules for debate—rules that serve not only to protect the “dignity” of its members but also to protect the functioning of the meeting itself.<sup>204</sup>

Although Meiklejohn’s image of the town meeting is an illuminating one, it obviously does not fully capture the nature of political discourse in a large, diverse modern society. Unlike speech in the town meeting, that discourse does not take place within a single, unitary forum that is held at a specific time and place. Nor does public discourse have a set agenda that determines what issues shall be discussed and for what period of time. Instead, it consists of many different forms of expression that occur in a wide variety of forums throughout the society and over the course of time, including individual conversations, social media, political rallies, candidate debates, newspapers, cable news talk shows, and the Internet, to mention only a few.<sup>205</sup>

In this situation, many of Meiklejohn’s “rules of order”<sup>206</sup> are clearly irrelevant. It would be absurd to restrict an individual’s speech at a political rally on the ground that she had “wander[ed] from the point at issue,” or that she had merely repeated what others had already said.<sup>207</sup> Likewise, many expressions that would be ruled out of order as “abusive”

---

<sup>201</sup> *Id.* at 27 (emphasis omitted).

<sup>202</sup> *Id.* at 25.

<sup>203</sup> See *supra* text accompanying notes 172–75 (discussing *Gomez v. Hug*).

<sup>204</sup> MEIKLEJOHN, *supra* note 192, at 24–25, 68.

<sup>205</sup> Cf. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 408 (William Rehg trans., 1996) (discussing the communications that nourish governance in a modern democratic society).

<sup>206</sup> MEIKLEJOHN, *supra* note 192, at 24.

<sup>207</sup> *Id.* at 24–26.

in a town meeting<sup>208</sup> or a legislative debate<sup>209</sup> would barely raise an eyebrow if they appeared in the comments section of a political blog.

In my view, however, none of this undermines Meiklejohn's more basic claim that public discourse depends on an "attitude of mutual regard" among citizens.<sup>210</sup> No matter how complex public discourse may be, at bottom it involves communication between persons. As such, it necessarily presupposes mutual recognition.

To elaborate this point, suppose that a hate group calls for the deportation or extermination of a small and vulnerable ethnic group within the society. This speech might be addressed to members of the ethnic group itself or to other members of the society. To the extent that it is directed to the former, the speech suffers from the same contradiction that we saw in connection with *Gomez v. Hug*: in addressing the target group members, the speaker implicitly assumes that they are intelligent beings who are capable of understanding and using language—that is, that they are persons—yet at the same time, the speech denies that their status and rights as persons.<sup>211</sup> In this way, the content of the speech directly conflicts with the formal conditions that make the speech comprehensible and legitimate.

Suppose, however, that we regard the hate group's speech as addressed not to the target group but to other members of the society. In this situation, the contradiction that we noticed in connection with *Gomez* does not exist. But another, equally serious one does: while the speakers regard the audience members as intelligent persons, they deny the humanity of others (the target-group members) who have an equal claim to that status and who are also members of the society. In this situation, the audience members cannot understand and accept the hate group's speech without betraying their fellow citizens as well as their own humanity. This too is a fatal contradiction which undermines the legitimacy of the speech.

From a liberal humanist perspective, then, public discourse consists of discussion among individuals who recognize one another as persons and members of the community. Once again, this does not mean that speech must always be polite or nonconfrontational. In a free society, competing interests and ideological commitments will often lead to profound social and political conflict. Public debate provides a forum in which such conflicts can be fought out. But if it is to perform this function, and if such conflicts are not to degenerate into all-out warfare, there must be some

---

<sup>208</sup> *Id.* at 25.

<sup>209</sup> See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, Rule XVII ¶ 1(b) (112th Cong.), available at <http://www.rules.house.gov/singlepages.aspx?NewsID=138&rsbd=165> (banning personal attacks on other Members).

<sup>210</sup> MEIKLEJOHN, *supra* note 192, at 69.

<sup>211</sup> See *supra* text following note 173.

common ground on which citizens can stand to discuss their differences. At the deepest level, this common ground arises from mutual recognition.

### B. *The Justifications for Free Speech and Other Rights*

In the previous section, I argued that the concept of mutual recognition is central to all forms of human interaction, especially communication. Individuals can communicate only when they recognize one another as persons. Because persons have rights, this duty of recognition extends to their rights as well. Thus, the right to free speech carries with it a duty to respect the fundamental rights of others.

What are these rights, and how can we identify them? To answer these questions we must further explore the concepts of freedom and dignity that are inherent in personality. In this section, I discuss what those concepts mean in the various areas of human life: (1) the external world; (2) the internal domain of thought and feeling; (3) the social, political, and cultural sphere; and (4) the intellectual and spiritual realm. These four areas correspond to the leading justifications for freedom of expression: that it is an aspect of external freedom; that it is essential for individual self-fulfillment; that it is necessary for democratic self-government; and that it is vital for the search for truth. As I shall show, however, these same aspects of human freedom and dignity also give rise to other fundamental rights. Speakers should have a duty to respect these rights, except in cases where the value of the speech outweighs the value of the other rights. In this way, we can develop a rich and complex account that embraces both freedom of speech and other rights and that enables us to determine the appropriate boundaries between them.

#### 1. *External Freedom*

On the first and most basic level, individual freedom and dignity support a right to control one's own mind and body, free from unjustified interference by others. This is a right that the Anglo-American legal tradition calls *personal security*.<sup>212</sup> This right provides a basis for the liberties protected by the First Amendment, for the ability to control your own mind and body includes the freedom to think as you like and to speak as you think.<sup>213</sup> At the same time, personal security includes the right to be free from violence and the fear of violence. Speech invades this right when it amounts to an assault, a threat, or an incitement to imminent violence. These forms of speech also constitute a wrong against the

---

<sup>212</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*129–34 (St. George Tucker ed., Philadelphia, Birch & Small 1803).

<sup>213</sup> See, e.g., St. George Tucker, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, in *id.*, app., note G, at 3–4, 11 (discussing the rights of personal opinion, speech, and writing).

community as a whole, which has both a right and a duty to preserve the public peace and to protect its citizens against violence.<sup>214</sup> This right of the community is also violated by “fighting words,” or those that tend to provoke an immediate breach of the peace.

## 2. *Internal Freedom*

Personal security may be described as a form of *external freedom*—the freedom of a person as an embodied being who exists in the world. In turn, external freedom is rooted in the capacity for *internal autonomy or self-determination*. This is the second level on which we can understand the liberties protected by the First Amendment. Internal autonomy includes the ability to determine one’s own thoughts, beliefs, and emotions without unwarranted interference or compulsion, as well as to express them outwardly through speech. By protecting these forms of autonomy, the First Amendment seeks “to assure self-fulfillment for each individual”<sup>215</sup> and to promote the values of “individual dignity and choice” upon which our constitutional order is based.<sup>216</sup>

On this level, First Amendment liberties protect what Justice Louis D. Brandeis called the right to “an inviolate personality.”<sup>217</sup> In addition to freedom of speech and thought, this concept embraces a number of other rights. First, just as individuals have a right to bodily integrity, they also have a right to psychological integrity<sup>218</sup>—a right that is violated by extreme and unwarranted attacks on their mental or emotional well-being.<sup>219</sup> Second, the right to an inviolate personality is infringed by speech or conduct that is profoundly insulting or degrading. Third, it is violated by acts that invade one’s privacy, which serves to protect the boundary between the self and the outside world. Finally, the right is violated by unjustified attacks on one’s reputation, which constitutes the social dimension of personality, or the self as it relates to others. These rights to psychological integrity, personal dignity, privacy, and reputation may be just as important for individual self-fulfillment as is free speech itself.<sup>220</sup>

<sup>214</sup> On this duty, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509–10 (1991). For a defense of the claim that, in the liberal tradition, communities as well as individuals can possess rights, see HEYMAN, FREE SPEECH, *supra* note 166, at 40–42.

<sup>215</sup> *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

<sup>216</sup> *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>217</sup> Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

<sup>218</sup> See JOHN RAWLS, *JUSTICE AS FAIRNESS* 113 (Erin Kelly ed., 2001) (discussing the rights to physical and psychological integrity).

<sup>219</sup> See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 45 (Tentative Draft No. 5, 2005) (discussing liability for outrageous conduct causing severe emotional disturbance).

<sup>220</sup> For a fuller exploration of these rights, see HEYMAN, FREE SPEECH, *supra* note 166, at 54–59, 144–46, 149–63.

### 3. *Social, Political, and Cultural Freedom*

While the first two forms of liberty regard individuals as separate and independent, the third focuses on their relationships with one another. Individuals use speech to interact with family members, friends, co-workers, and others in private life. Individuals also have a right to free speech in the public or political realm. Negatively, this includes a right to critically evaluate the conduct of the government, of public officials, and of others who play a prominent role in our common life. And positively, political freedom of speech allows citizens to discuss public policy and other matters of common concern. Individuals also use speech to contribute to the broader culture of the society.

In protecting these forms of speech, the First Amendment affirms the freedom and dignity of individuals as social beings. At the same time, the social nature of communication has important implications for our understanding of free speech. When an individual speaks with others, she is engaging not in a purely individual, self-regarding activity, but in a form of interaction with others. This is true not only in private conversations but also in the public realm, where citizens deliberate with one another on public issues.<sup>221</sup> Thus the right to communicate is what may be called a *relational right*—a right to interact with others in a particular way or to take part in a common activity. By their nature, relational rights must be exercised in a way that respects the personality and rights of those with whom one interacts. On this view, the freedom to engage in public discourse does not give one a license to invade the rights of other people.

### 4. *Intellectual and Spiritual Freedom*

For the liberal tradition, our freedom and dignity are ultimately grounded in our nature as intelligent beings. This points to a fourth kind of liberty: the ability to engage in intellectual and spiritual activity in an effort to gain a deeper understanding of ourselves and the world we live in, as well as to express our sense of the meaning and value of existence. To the extent that this is a purely individual activity, it should be protected so long as it does not violate other rights. In many cases, however, intellectual or spiritual activity is conducted together with other people. In those cases, it presupposes mutual recognition and respect in the same way as other forms of communication.

### 5. *Free Speech and Equality*

The concept of equality is also central to the liberal tradition. Although individuals differ in many ways, they all have an equal claim to

---

<sup>221</sup> See *supra* Part V.A.

freedom and dignity. This is the positive meaning of equality.<sup>222</sup> In negative terms, equality means the right to be free from unwarranted subordination and discrimination.<sup>223</sup>

The concept of equality plays an important role in contemporary First Amendment jurisprudence. Because all individuals have an equal right to free speech, the government is generally barred from favoring some speakers or ideas over others.<sup>224</sup> At the same time, speech can be restricted when it amounts to a form of unlawful discrimination against others, as in *Gomez v. Hug*<sup>225</sup> and other cases arising under federal and state laws that are designed to secure workplace equality.<sup>226</sup>

### C. Conflicts of Rights

In the previous section, I showed that the same principles that justify freedom of speech also give rise to other rights. Speech that unjustifiably infringes these rights should not receive protection under the First Amendment. In some cases, however, there is a substantial conflict between free speech and other rights. In such cases, the law should determine which of the rights, under the circumstances, is most important from the standpoint of human freedom and dignity, the values that lie at the foundation of all rights.

For an illustration of this point, we can look to the law of defamation. The common law afforded strong protection to reputation by imposing a kind of strict liability for false statements that damaged an individual's standing in the community.<sup>227</sup> In *New York Times Co. v. Sullivan*,<sup>228</sup> the police commissioner of Montgomery, Alabama relied on this traditional doctrine to obtain a huge damages award against the *Times* for publishing a political advertisement that allegedly accused him of harassing civil rights activists in the South.<sup>229</sup> The Supreme Court overturned the award on First Amendment grounds. Writing for the majority, Justice Brennan declared that the right to criticize the official conduct of public officials is so vital to democratic self-government that it should prevail over the official's right to reputation, except in cases where the statements at issue are knowingly or recklessly false.<sup>230</sup> At the same time, the majority rejected the position that accusations against public officials are entitled to absolute protection

---

<sup>222</sup> See LOCKE, GOVERNMENT, *supra* note 178, bk. II, § 54.

<sup>223</sup> See *id.*

<sup>224</sup> See *infra* Part V.D (discussing the doctrine of content neutrality).

<sup>225</sup> 645 P.2d 916, 927–28 (Kan. Ct. App. 1982), discussed *supra* at notes 172–73.

<sup>226</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (indicating that Title VII's ban on employment discrimination may constitutionally be applied to harassing speech).

<sup>227</sup> W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 804 (5th ed. 1984).

<sup>228</sup> 376 U.S. 254 (1964).

<sup>229</sup> *Id.* at 256–59.

<sup>230</sup> *Id.* at 269–83.

under the First Amendment—a position that was taken by Justices Hugo L. Black, William O. Douglas, and Arthur J. Goldberg.<sup>231</sup> As Justice Brennan later explained, “[t]he use of calculated falsehood” could be restrained because it not only caused social harm but also was “at odds with the premises of democratic government.”<sup>232</sup>

In subsequent cases, the Justices extended the *New York Times* rule to suits by political candidates,<sup>233</sup> as well as to suits by “public figures” who play an influential role in the life of the community.<sup>234</sup> However, in *Gertz v. Robert Welch, Inc.*,<sup>235</sup> the Court concluded that applying the *New York Times* rule to private-figure plaintiffs would unduly sacrifice the right to reputation, a right that flows from “our basic concept of the essential dignity and worth of every human being.”<sup>236</sup> Under *Gertz*, states may allow private figures who are defamed on matters of public concern to recover for statements that are made without reasonable care.<sup>237</sup> Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>238</sup> the Justices indicated that a lower level of First Amendment protection applies to cases in which a private figure is defamed on a matter of private concern.<sup>239</sup> In this series of cases, the Court has sought to achieve a sensitive accommodation between the competing rights at stake.

#### D. *The First Amendment and Content Neutrality*

In addition to illuminating the boundaries between free speech and other values, this discussion allows us to reassess the doctrine of content neutrality. Writing for the Court in *Police Department of Chicago v. Mosley*,<sup>240</sup> Justice Thurgood Marshall declared that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>241</sup> As Chief Justice Warren E. Burger pointed out in a brief concurrence, this was an obvious overstatement, for the Court has continued to hold that some categories of speech, such as defamation, fighting words, and obscenity, are not protected.<sup>242</sup> Over the past four decades, however, the doctrine of content neutrality has come to dominate

---

<sup>231</sup> *Id.* at 293 (Black, J., dissenting); *id.* at 298–99 (Goldberg, J., dissenting).

<sup>232</sup> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>233</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 270–73 (1971).

<sup>234</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 162–65 (1967) (Warren, C.J., concurring).

<sup>235</sup> 418 U.S. 323 (1974).

<sup>236</sup> *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

<sup>237</sup> *Id.* at 347.

<sup>238</sup> 472 U.S. 749 (1985).

<sup>239</sup> *See id.* at 760–61 (plurality opinion).

<sup>240</sup> 408 U.S. 92 (1972).

<sup>241</sup> *Id.* at 95.

<sup>242</sup> *Id.* at 102–03 (Burger, C.J., concurring).

First Amendment jurisprudence. In *Snyder* and many other cases, the courts have resorted to this doctrine to grant First Amendment protection without making any serious inquiry into the value of the speech at issue or the harm that it causes to other values.<sup>243</sup>

From a liberal humanist perspective, we can see not only the appeal of the content neutrality doctrine but also its limits. Individuals are autonomous beings who must be free to determine the content of their own thought and expression. As members of the political community, they also have a right to engage in collective self-determination. The government violates the autonomy of individuals or the community when it unjustifiably interferes with the content of thought or expression. As we have seen, however, the autonomy of individuals is limited by the rights of others.<sup>244</sup> In a liberal constitutional order, the community also is bound to respect the rights of individuals. When the government regulates speech in a way that is necessary to protect other rights, it does not violate the autonomy of individuals or the community; instead, it simply fulfills its fundamental duty to protect rights. It follows that, in cases where free speech appears to conflict with other important rights, the courts should engage in a careful consideration of the values on both sides, and should not short-circuit this inquiry by invoking the content neutrality doctrine as has been done in cases like *Snyder*.<sup>245</sup>

#### E. *A Response to Some Objections*

In this Part, I have argued that communication depends on mutual recognition, and that this is true not only in the private but also in the public sphere. It follows that individuals who participate in public discourse have a duty to respect the personality and rights of others. Speech that infringes those rights is wrongful and subject to regulation by law, except in cases where the speech should be privileged because of its overriding value for First Amendment purposes.

In point of fact, even contemporary First Amendment jurisprudence recognizes some limits on public discourse—limits that serve at least in part to protect the rights of other individuals and the community itself. For example, the Supreme Court has held that even speech that relates to

---

<sup>243</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80, 391 (1992) (using the doctrine to strike down a ban on cross-burning); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324, 332–34 (7th Cir. 1985) (using the doctrine to invalidate a feminist anti-pornography ordinance), *aff'd mem.*, 475 U.S. 1001 (1986).

<sup>244</sup> See *supra* Part V.B.

<sup>245</sup> For a fuller critique of the Court's approach to content neutrality, see Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002).

matters of public concern may be restricted if it falls into the categories of threats, incitement, or fighting words.<sup>246</sup>

In response, it might be said that these three doctrines protect only against violence, not against injuries to personality. But that is not entirely true. Consider the fighting words doctrine. In the classic formulation of *Chaplinsky v. New Hampshire*,<sup>247</sup> that doctrine holds that words are unprotected not only if they “tend to incite to an immediate breach of the peace,” but also if they “inflict injury” “by their very utterance.”<sup>248</sup> Although the Justices have sometimes overlooked the second branch of the definition,<sup>249</sup> they have never overruled it.<sup>250</sup> In any event, even if the doctrine were confined to the first branch, it would still function in an indirect way to deny First Amendment protection to insulting speech, since that is one of the kinds of speech that most commonly leads to a breach of the peace.

Moreover, there is another doctrine that clearly serves to protect personality, and that is the law of defamation. As discussed above, even when speech addresses matters of public concern, it is unprotected if it intentionally or recklessly defames a public official or figure or if it negligently defames a private figure.<sup>251</sup> As the Court observed in *Gertz*, these limits on public discourse are necessary to protect the right to reputation, which is an essential aspect of individual “dignity and worth.”<sup>252</sup>

A critic of the liberal humanist view might respond that, to recover for defamation, a plaintiff must show more than simply an affront to his dignity: he must prove that the defendant made false statements of fact, and that she did so with the requisite state of mind. In this way, the tort of defamation has a basis in objective fact. By contrast, other claims of emotional or dignity injury are merely subjective and exist in the eye of the beholder. Whether a person is upset or offended by the speech or conduct of others is largely within his own control. Moreover, as the old adage about “sticks and stones” suggests, emotional and dignitary injuries are not real in the way that physical harm is. For the same reasons, those injuries are incapable of objective proof. In short, with the exception of

---

<sup>246</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343, 363 (2003) (threats); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–74 (1942) (fighting words).

<sup>247</sup> 315 U.S. 568 (1942).

<sup>248</sup> *Id.* at 572.

<sup>249</sup> See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 518–19, 527–28 (1972).

<sup>250</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (assuming for purposes of decision that the *Chaplinsky* definition remains good law).

<sup>251</sup> See *supra* text accompanying notes 227–37.

<sup>252</sup> 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

defamation, emotional and dignitary injuries are too arbitrary, subjective, insubstantial, and unverifiable to provide a principled basis for restricting the freedom of speech.

However convincing this argument may seem in the abstract, it runs directly contrary to common sense and experience. Consider *Wilkinson v. Downton*,<sup>253</sup> the seminal case that led to the development of the tort of IIED. In that case, a woman suffered intense emotional distress after a man falsely told her that her husband had been gravely injured in an accident.<sup>254</sup> In a situation like this, it cannot plausibly be argued that the distress was within the woman's own control, or that it did not constitute a real and substantial injury, or that a jury would have any serious difficulty determining whether it had occurred or not.

This example suggests that we need to develop a conception of the person that is richer, deeper, and more consonant with experience than the one that figures in the Supreme Court's current approach. Although this is not the place to develop such a conception in depth, it is possible to sketch some of its main elements and to show how they justify legal protection against emotional and dignitary harm.

As we have seen, human personality can be understood on several different levels. To begin with, a person is an embodied being who exists in the external world.<sup>255</sup> As a matter of instinct as well as reason, she has a deep concern with protecting her own life and bodily integrity. When confronted with actual or threatened violence, she naturally experiences fear or apprehension. At the same time, she may feel anger at being treated as an inferior being who can be abused and dominated by others. These are emotional and dignitary injuries, but no one doubts that the law may and should protect individuals against them, even when they are caused by speech.

On a second level, personality can be identified with the inner self. A person has an internal life of thought, feeling, and experience. He has the capacity to determine his own values and beliefs, to pursue them in his personal life, to express himself to others, and to form personal relationships. Thus, just as a person is concerned with protecting his own bodily integrity, he is also concerned with protecting the integrity of his inner self, of his personal life, of his self-expression, and of his relationships with others. Speech or conduct that violates this integrity naturally causes emotional and dignitary injury. As the *Wilkinson* case

---

<sup>253</sup> [1897] 2 Q.B. 57 (Eng.).

<sup>254</sup> *Id.* at 57.

<sup>255</sup> See *supra* text accompanying notes 212–16 (discussing external and internal freedom). The law uses *person* in this sense when it describes crimes like homicide, assault, and rape as “offenses involving danger to the person.” See AMERICAN LAW INSTITUTE, MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 117 (1985).

shows, there is nothing that is necessarily arbitrary, insubstantial, or unprovable about such injuries.<sup>256</sup> On the contrary, when a person is told that someone that she deeply loves is gravely injured or dead, and when she believes the statement to be true, it would be highly abnormal *not* to experience intense grief and distress. Just as the capacity to love is part of our conception of a person, so are the emotions that result from the loss of a loved one. In this way, it is possible to give a reasoned account of emotional reactions such as fear and grief and to show that they have a solid basis in a conception of human personality.

In response, it might be said that however true this may be of emotional reactions, it is not true of a sense of personal dignity, which is a purely subjective notion that depends on the particular values that are held by individuals or on the conventional standards that are accepted by a certain community.<sup>257</sup> But this is not the case. At the root of personal dignity is a sense of one's inherent value as a human being, which is integral to the concept of personality. Thus, it is normal and appropriate for individuals to have a sense of dignity and self-respect. When they are subjected to speech or conduct that violates this sense—such as a barrage of racial insults and abuse—they suffer a real and substantial injury.<sup>258</sup>

On a third level, a person is a member of the community and feels a sense of belonging and attachment to it. Once again, speech or conduct that denies this aspect of personality—such as a cross-burning that is meant to drive a family out of the neighborhood—can cause serious injury. And the same is true of speech or conduct that attacks a person's status as an intellectual and spiritual being—an injury that can be caused by religious persecution or other oppression based on thought, conscience, or belief.<sup>259</sup>

In short, human personality has a number of dimensions. A person's identity resides in his embodied self, in his inner self, in his private life, in his social relationships, in his community membership, and in his intellectual and spiritual life. When he suffers injury in any of these capacities, it constitutes a wrong to his personality. In this way, we can give a rational explanation of the nature of emotional and dignitary harm.

---

<sup>256</sup> See *Wilkinson*, [1897] 2 Q.B. at 57 (“The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences . . .”).

<sup>257</sup> See ROBERT C. POST, CONSTITUTIONAL DOMAINS 139 (1995) [hereinafter POST, CONSTITUTIONAL DOMAINS] (asserting that dignitary standards such as those used by the IIED tort “can have meaning only within the commonly accepted norms of a particular community”).

<sup>258</sup> See *supra* text accompanying notes 172–75 (discussing *Gomez v. Hug*).

<sup>259</sup> See, e.g., LAURI LEBOWITZ, THE DEVIL IN DOVER 213–14 (2008) (describing threats and hate mail directed against family who brought a lawsuit challenging teaching of “intelligent design” in public schools).

I have suggested that the Supreme Court's current approach to the First Amendment is flawed because it lacks this sort of rich and complex account of human personality. At times, however, the Court does appeal to such an account. When the Justices discuss the values that underlie the constitutional protection of freedom of speech, they speak in terms of individual self-fulfillment,<sup>260</sup> personal dignity,<sup>261</sup> the political and cultural life of the community,<sup>262</sup> and intellectual and spiritual liberty.<sup>263</sup> Of course, these are the same values that I have discussed.<sup>264</sup> From this point of view, then, the problem with the Court's approach is not that it lacks a rich theory of personality, but that it applies that theory in a one-sided way by using it only to explain why free speech should be protected, while failing to recognize the ways in which the theory also supports other rights such as privacy, dignity, and emotional well-being—rights which also deserve protection under the law and which justify some limits on speech.

#### F. *Other Theories of Public Discourse*

Finally, it may be useful to contrast the liberal humanist approach with two leading accounts of public discourse: Robert C. Post's theory of free speech and democracy and Justice Oliver Wendell Holmes's metaphor of the marketplace of ideas.

##### 1. *Robert C. Post's Theory of Free Speech and Democracy*

The approach that Post takes is deeply informed by social theory. Post maintains that constitutional principles like free speech apply differently in different areas of social life.<sup>265</sup> In particular, he distinguishes between two domains that he calls *community* and *democracy*. For Post, a community is "a social formation that inculcates norms into the very identities of its members."<sup>266</sup> These norms, or "civility rules," prescribe the respect that individuals owe one another.<sup>267</sup> Traditionally, the law has enforced these norms by regulating communication as well as conduct, for example through "such communicative torts as defamation, invasion of privacy, and intentional infliction of emotional distress."<sup>268</sup> "Through these torts," Post explains, "the common law not only protects the integrity of the personality of individual community members, but also serves

---

<sup>260</sup> See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>261</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>262</sup> See, e.g., *Mosley*, 408 U.S. at 95–96; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

<sup>263</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>264</sup> See *supra* Part V.B.

<sup>265</sup> See POST, *CONSTITUTIONAL DOMAINS*, *supra* note 257, at 12.

<sup>266</sup> *Id.* at 300.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

authoritatively to articulate a community's norms and hence to define a community's identity."<sup>269</sup>

The domain of democracy embodies a very different conception of individuals: instead of being formed by social norms, they are viewed as autonomous beings who are capable of "choos[ing] the forms of their communal life" through public discussion and democratic self-governance.<sup>270</sup> It follows that, while it is appropriate for the law to enforce civility rules in the ordinary life of the community, the enforcement of those rules must be "suspended" within the sphere of democracy in order to "open the space of public discourse" and thereby make individuals as free as possible to engage in "collective self-constitution."<sup>271</sup>

In this way, Post offers a highly sophisticated defense of contemporary First Amendment jurisprudence, which holds that the law generally may not regulate public discourse to protect individual dignity and personality. There are two difficulties with Post's view, however. First, it does not provide a fully adequate account of the preconditions of public discourse. As I have argued, in addition to the exchange of information, ideas, and so on, communication involves an underlying relationship between the participants—a relationship that is ultimately founded on mutual recognition.<sup>272</sup> And this is true not only of personal conversations but also of democratic deliberation.<sup>273</sup> People can engage in collective self-determination only if they view themselves as a group with a shared identity, and this is possible only when they recognize one another as persons and members of the group.

It follows that democratic deliberation depends on mutual recognition. Some statements that Post makes seem to reflect this idea. For example, he follows Jean Piaget in holding that democracy is founded on "the mutual respect of autonomous wills."<sup>274</sup> It is unclear, however, how this idea can be squared with Post's position that the law's protections for individual dignity and personality must be suspended within the realm of public discourse.

---

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 120, 144, 149, 301, 330. In his recently published Rosenthal Lectures, Post succinctly summarizes his position as follows: "Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than to protect the targets of speech; outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets of speech." ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 24 (2012).

<sup>272</sup> See *supra* Part V.A.

<sup>273</sup> *Id.*

<sup>274</sup> POST, *CONSTITUTIONAL DOMAINS*, *supra* note 257, at 187–88, 299 (quoting JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 366 (Marjorie Gabain trans., 1932)).

The second problem with Post's view is that it draws too sharp a distinction between the public and private aspects of personality.<sup>275</sup> For Post, the democratic sphere is based on respect for individuals as autonomous beings who are capable of engaging in self-government, not on respect for individuals in their private capacities. But the self cannot reasonably be divided up in this way. The person who actively participates in the political realm is the same person who has a claim to respect for her bodily integrity, her personal dignity, her private life, her reputation, her personal and family relationships, and her intellectual and spiritual life. It would hardly be logical for one to claim to respect another individual as a self-governing citizen but to deny her respect in every other way. Thus, there is no good reason to hold that the First Amendment should protect public speech no matter how seriously it violates other rights such as privacy, reputation, dignity, and emotional well-being.

Of course, this does not mean that the law should be allowed to restrict speech whenever it conflicts with or criticizes the particular beliefs, values, or sense of identity held by an individual or group. For the liberal tradition, individuals have no right to be shielded from ideas with which they disagree. Instead, they should be open to the views of other people and willing to critically examine and reassess their own beliefs.<sup>276</sup> But it does not follow that speakers should have carte blanche to invade the personality rights of others. As we have seen, those rights are not merely arbitrary or conventional; instead, at their core, they reflect our conception of the dignity that inheres in every person.

It is also true, as Post argues, that the particular legal rights that individuals have are determined through democratic debate and self-governance. Thus, citizens must be free to argue that the laws that define individual rights should be reformed.<sup>277</sup> However, it is one thing to argue for a change in (say) the law of privacy, and another thing to engage in speech that violates the rights of a particular individual as recognized by existing law. Our commitment to democratic self-governance does not require us to grant blanket protection to speech of that sort.<sup>278</sup>

---

<sup>275</sup> In this respect, his position resembles that of Meiklejohn, who insists that every person has two "radically different" capacities—his capacity as a citizen who has "a part to play in the governing of the nation," and his capacity "as an individual or as a member of some private group," who "is rightly pursuing his own advantage." MEIKLEJOHN, *supra* note 192, at 80.

<sup>276</sup> See generally JOHN STUART MILL, ON LIBERTY (Curran V. Shields ed., 1956) (1859) (discussing the liberty of thought and discussion).

<sup>277</sup> POST, CONSTITUTIONAL DOMAINS, *supra* note 257, at 120, 151.

<sup>278</sup> At first glance, Post's theory clearly seems to support the result in *Snyder*. The issue is more complex than it appears, however. While Post holds that the legal enforcement of civility rules must be suspended in public discourse, he also observes that there are situations in which our commitment to democratic deliberation may be superseded by "other competing commitments, such as those entailed in the dignity of the socially situated self, in the importance of group identity, or in the necessary exercise of community authority." POST, CONSTITUTIONAL DOMAINS, *supra* note 257, at 174 (citations

## 2. Justice Holmes and the Marketplace of Ideas

In this Part, I have argued that personality should play a central role in First Amendment jurisprudence. While Post unduly narrows that role, Justice Holmes sought to do away with it altogether. In his writings both on and off the bench, Justice Holmes rejected the ideas of natural rights and human dignity which had provided the traditional American justification for freedom of speech.<sup>279</sup> Initially, he took the view that free speech should receive no more protection from legislative majorities than any other form of liberty.<sup>280</sup> As he struggled to decide a series of cases arising from political persecution during the First World War, he came to change his mind, but he made no effort to return to the traditional rationale. Instead, in his powerful dissent in *Abrams v. United States*,<sup>281</sup> Justice Holmes argued that while “persecution” is a “perfectly logical” way for people to pursue their goals, “the ultimate good” that they desire “is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”<sup>282</sup>

---

omitted). In such cases, the courts must determine where the boundary should be drawn between the domain of public discourse and the domain of community. *Id.* at 174–77. Post also recognizes that, paradoxically, “our conception of rational reflection and deliberation itself depends upon the observance of civility rules.” *Id.* at 146. Speech that violates these rules “is likely to be experienced as violent and coercive” as well as “irrational or valueless.” *Id.* at 146. Thus, in extreme cases, the law may need to enforce civility rules for the sake of public discourse itself. *Id.* at 301.

In these ways, Post’s theory is rich and complex enough to allow for differing positions on the issue of funeral picketing. Although one can argue that this is a classic situation in which the legal protections for personality must be suspended to promote democratic deliberation, one can also argue that funeral picketing goes beyond the appropriate bounds of public discourse and thus may be regulated to protect the community’s norms of privacy, dignity, and civility.

However, while Post’s theory does not foreclose arguments of the latter kind, it regards them as problematic because they seek to restrict public discourse on the basis of the values held by particular communities. *Id.* at 177. For this reason, Post seems to recognize a presumption against allowing “ideological regulation” in such cases. *Id.* Courts that follow this view are likely to reject particular limits on expression, as the Supreme Court did in *Snyder*. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011) (observing that the holding in *Snyder* is “explicitly base[d]” on the notion that the protesters’ speech “should . . . be regarded as part of the formation of democratic public opinion”). It follows that Post’s theory is subject to the same objections discussed in Part IV.B: it tends to unduly sacrifice the values of individual dignity and personality as well as to undermine the conditions for legitimate public debate. For a fuller critique of Post’s view, see HEYMAN, *FREE SPEECH*, *supra* note 166, at 174–77, 276 n.56.

<sup>279</sup> Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 674 (2011) [hereinafter Heyman, *Dark Side*].

<sup>280</sup> See *id.* at 675–79.

<sup>281</sup> 250 U.S. 616 (1919).

<sup>282</sup> *Id.* at 630 (Holmes, J., dissenting).

This passage suggests that the protection of free speech will promote the common good. As Justice Holmes's other writings make clear, however, he did not believe that there is such a thing as the common good. Instead, he held that the community is made up of different groups (such as employers and workers), each of which has its own interests and beliefs.<sup>283</sup> Social life is a Darwinian "struggle for life" in which each group seeks to promote its own good at the expense of other groups.<sup>284</sup> In this way, human life is governed by force in the same way as all other phenomena.<sup>285</sup>

Against this background, Justice Holmes's defense of free speech appears in a rather different light. What he calls "the power of the thought to get itself accepted in the competition of the market"<sup>286</sup> is a function not only of the intrinsic merit of an idea, but also, and above all, of its capacity to embody the views of the most powerful group within the society.<sup>287</sup> As he put the point in *Gitlow v. New York*,<sup>288</sup> the function or "meaning of free speech" is to determine which beliefs are destined "in the long run . . . to be accepted by the dominant forces of the community."<sup>289</sup>

Thus, Justice Holmes understood freedom of speech in terms of power. Speech is one of the most important ways in which groups seek to attain a dominant position within the society, a position that allows them to promote their own interests and beliefs and to impose them on other groups. Of course, this understanding of free speech is far removed from notions of respect for the personality and rights of others. In addition to rejecting the idea of human dignity, Justice Holmes held that the interests of individuals may and should be sacrificed whenever necessary to promote the larger interests of the society—in this case, the interests that are served by the marketplace of ideas.<sup>290</sup>

A strong echo of this Holmesian view can be heard in the *Snyder* case. At the end of his opinion, Chief Justice Roberts writes:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen

---

<sup>283</sup> See OLIVER WENDELL HOLMES, *The Gas-Stokers' Strike*, in 1 THE COLLECTED WORKS OF JUSTICE HOLMES 323, 324–25 (Sheldon M. Novick ed., 1995) (arguing that an "identity of interest between the different parts of a community" does not exist).

<sup>284</sup> *Id.* at 325.

<sup>285</sup> See Heyman, *Dark Side*, *supra* note 279, at 692.

<sup>286</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>287</sup> See Heyman, *Dark Side*, *supra* note 279, at 690–95.

<sup>288</sup> 268 U.S. 652 (1925).

<sup>289</sup> *Id.* at 673 (Holmes, J., dissenting).

<sup>290</sup> See Heyman, *Dark Side*, *supra* note 279, at 674, 706–08.

a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>291</sup>

In this way, Chief Justice Roberts, like Justice Holmes, understands speech in terms of “power[.]”<sup>292</sup> A serious problem with this approach is that it allows people to use speech to abuse and dominate others. Arguably, that is what Westboro does when it pickets funerals. At bottom, funeral picketing is a form of bullying directed against the grieving families.<sup>293</sup> In the next Part, I consider whether this behavior should receive protection under the First Amendment.

#### VI. APPLYING THE LIBERAL HUMANIST APPROACH TO FUNERAL PICKETING IN ITS PARADIGMATIC FORM

How would the liberal humanist approach apply to Westboro’s funeral picketing? The best way to address this question is to begin with a paradigmatic case of funeral picketing, that is, a case in which the protesters are able to stand close enough to communicate directly with the family and mourners. A striking example may be found in the funeral of Army Spc. Edward Myers, who was killed in Iraq and buried after a service held at Grace Evangelical Church in St. Joseph, Missouri, in August 2005.<sup>294</sup> Westboro’s members stood along the highway directly across from the church, holding bright neon-colored signs bearing many of the same slogans as in *Snyder*.<sup>295</sup> As the soldier’s mother, Charlotte Myers-Dicks, recently recalled, “The combat vets . . . were on one side of the road . . . , the Westboro Baptist Church was on the other side of the road, and we drove right in between them.”<sup>296</sup> She continued: “I’ve heard every word they said at my son’s funeral. I read every sign. They were specifically targeting my son. Those are memories you just don’t forget.”<sup>297</sup>

In this Part, I argue that when funeral picketing has this kind of direct impact on the family and mourners, it violates their rights to emotional well-being, dignity, privacy, and religious liberty, as well as the community’s right to protect the dignity of human life and death. To this end, I first explore the nature of the grief caused by the death itself, as well

---

<sup>291</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

<sup>292</sup> *Id.*

<sup>293</sup> See Sacks, *supra* note 16, at 200–03.

<sup>294</sup> *Phelps’ Group Protests at Soldier’s Funeral*, KMBC.COM (Aug. 5, 2005, 6:54 AM), <http://www.kmbc.com/Phelps-Group-Protests-At-Soldier-s-Funeral/-/11664900/12246900/-/50vy75z/-/index.html>.

<sup>295</sup> *Grieving Mom Saddened by Westboro Ruling*, KMBC.COM (Mar. 2, 2011), <http://news.yahoo.com/video/politics-15749652/grieving-mom-saddened-by-westboro-ruling-24391485.html> (video).

<sup>296</sup> *Id.* at 0:53–1:01.

<sup>297</sup> *Id.* at 1:09–18.

as how the funeral and other forms of consolation respond to this grief. I then address the ways in which Westboro's funeral picketing increases this grief and interferes with the process of mourning. Finally, I consider whether the picketing nevertheless should be protected because of its value as political or religious expression. After discussing the paradigmatic case of funeral picketing in this Part, we shall be in a position to consider the particular facts of *Snyder* in Part VII.

#### A. *The Grief Caused by the Death Itself*

As Chief Justice Roberts observed in *Snyder*, the legal term “emotional distress” does not fully capture what family members suffer in a situation like this.<sup>298</sup> We need to unpack this term to have a sense of the grief caused by the death itself and of the ways in which it can be exacerbated by the Westboro picketing.

Of course, the response that one has to the death of a loved one is deeply personal and to some extent unique. Nevertheless, we can identify some of the most basic reactions that are commonly experienced by the mourners or survivors—terms that I shall use to refer to the parents, children, spouse or partner, and other close relatives and friends of the deceased.

Perhaps the most basic response mourners have is grief for the deceased herself—for the pain or fear that she may have suffered, for the fact that she has lost her life, and for all the things that she will never be able to do in the future. Of course, these reactions will be especially strong if the deceased was relatively young and was cut down before her time. The manner of her death may also cause grief and shock to those she has left behind, particularly if it was sudden or unexpected or involved violence. When parents lose a child, they may also experience a sense of guilt that they have failed to protect her.

In addition to the sorrow they feel for the deceased, the mourners feel sorrow for themselves. The relationship that you have with a parent or a child, a spouse or a partner or a close friend, becomes part of your own identity. When that person dies, you lose a part of yourself as well. At the same time, you are forced to confront the reality of death and of your own mortality.

In these ways, the loss of a loved one may have an existential impact on those who are left behind. The experience may undermine their sense of the meaning and value of life. As an Iraq war widow named Kelly Franz put it, when she learned that her husband Lucas had died “all the

---

<sup>298</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1217–18 (2011).

color drained out of the world.”<sup>299</sup> The death can also challenge the survivors’ religious faith and their sense that there is a loving God who cares about them.

Funerals and other forms of mourning are intended to respond to these various and ramified sorts of grief. These rituals are meant to remember the deceased, to express love and respect for him, and to recognize the significance of his life. They are also meant to console the mourners by showing affection, support, and solidarity. At the same time, these rituals reaffirm the meaning and value of life in the face of death.<sup>300</sup>

## B. *The Impact of Westboro’s Funeral Picketing*

### 1. *Freedom from Severe Emotional Distress*

Should Westboro’s funeral picketing, in its paradigmatic form, be protected under a liberal humanist approach to the First Amendment? At the outset, it is critical to recognize that Westboro specifically intends its conduct to increase the mourners’ grief and to counteract the consolation that they receive from the funeral. In its picketing, Westboro celebrates the death and, in the case of soldiers and murder victims, the violence that brought it about.<sup>301</sup> In addition, while the mourners seek to affirm the value of their loved one and his life, the protesters repudiate that value. Instead, they declare that God has killed him and condemned him to hell in order to punish him, his family, or the community for their sinfulness.<sup>302</sup> In the funeral and other expressions of support, members of the community show their love and concern for the family; by contrast, the protest often seeks to hold the deceased and his family up to the contempt of the community.<sup>303</sup> The funeral asserts the value of life in the midst of death; the protesters proclaim that all human beings deserve to suffer death and damnation—and that, apart from a tiny remnant of the elect, they all will.<sup>304</sup>

---

<sup>299</sup> FALL FROM GRACE (Docurama Films 2007). A powerful lament on the death of a friend by the poet W.H. Auden ends:

The stars are not wanted now: put out every one;  
Pack up the moon and dismantle the sun;  
Pour away the ocean and sweep up the wood.  
For nothing now can ever come to any good.

W.H. AUDEN, *Funeral Blues*, in ANOTHER TIME: POEMS BY W.H. AUDEN 78 (1940).

<sup>300</sup> For a good discussion of mourning rituals and the ways that Westboro’s picketing interferes with them, see Mathis Rutledge, *supra* note 16, at 304–11.

<sup>301</sup> See *supra* text accompanying notes 91–95.

<sup>302</sup> See *supra* text accompanying notes 91–112.

<sup>303</sup> See *supra* text accompanying notes 93–94.

<sup>304</sup> See *supra* text accompanying note 75.

As we have seen, these messages are not merely intended for the public at large. Instead, when Westboro pickets a funeral, one of its primary goals is to communicate these messages to the mourners themselves, and, in the paradigmatic case, the protesters stand close enough to do so. It seems clear that speech of this kind, when directed toward people who have just lost a loved one, is capable of causing severe emotional distress.<sup>305</sup> Moreover, that is exactly what Westboro intends to do. As Rebekah Phelps-Davis explained at the *Snyder* trial, Westboro's signs contain "hard-hitting language" that is "designed to strike the heart of anyone who reads it."<sup>306</sup> As the jury found, this conduct easily meets the requirements for IIED. In the terms I have used, the picketing violates the mourners' right to psychological integrity, or the right to be free from severe and unwarranted invasions of their emotional well-being.<sup>307</sup>

## 2. Privacy

When people go to a funeral, especially when they were close to the deceased, they are intensely focused on remembering and expressing their love for her. When Westboro appears at the funeral and, in the paradigmatic case, forces the mourners to view signs that condemn the deceased and celebrate her death, they are bound to experience this conduct as a gross intrusion into their personal lives. In this way, the conduct infringes their right to privacy.

In response, it may be said that individuals can protect themselves from unwanted expression simply by "averting [their] eyes."<sup>308</sup> However true this may be in other situations, Westboro seeks to confront others in a way that is impossible to ignore. As Timothy Phelps has explained, "Nobody looks at our signs or hears our words without *immediately* having to take a position—*immediately*."<sup>309</sup>

It may also be said that a funeral is not a purely private affair.<sup>310</sup> The time and place of the event may be published in the newspaper; many people may attend; there may be a procession through the streets of the community; and, when the death has resulted from a war or some other well-known catastrophe, there may even be a degree of media coverage.

---

<sup>305</sup> For a moving account of the impact that family members suffer when they are confronted by the Westboro protesters standing nearby, see FALL FROM GRACE, *supra* note 299, at 1:00:16 (interview with Kelly Franz).

<sup>306</sup> Record, *supra* note 59, at 1951 (opening statement of Rebekah Phelps-Davis).

<sup>307</sup> See *supra* text accompanying notes 218–19.

<sup>308</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 (1975)) (internal quotation marks omitted).

<sup>309</sup> FALL FROM GRACE, *supra* note 299, at 17:25 (remarks of Timothy Phelps).

<sup>310</sup> See, e.g., Brief for Respondents at 2–6, 37–38, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751) [hereinafter Westboro Brief].

I grant that many funerals have a public dimension, and that this is true of most of the funerals that Westboro chooses to picket. But I would make three points in response. First, the terms *private* and *public* do not refer to clear and distinct categories but rather are situated on a continuum. While the funeral of a major public figure may be a highly public event, the funeral of an ordinary person lies much closer to the private end of the spectrum.

Second, the concept of privacy is a qualitative one, which is used to mark the boundary around an area of life that is reserved to a particular person or group of people. An outsider who unjustifiably intrudes into this realm may be said to invade the privacy of the people within, regardless of whether they are a small group such as a family or a larger one such as a political organization. For example, in *NAACP v. Alabama ex rel. Patterson*,<sup>311</sup> the Supreme Court held that the State of Alabama had no power to compel a civil rights organization to turn over its membership lists because that would violate a right to associational privacy.<sup>312</sup> Although the internal life of the group may be public for its members, outsiders infringe the group's privacy when they intrude into that life.

The third and most important point has to do with how one conceives of funerals. It may be that there are societies in which an individual is regarded as having value not so much for her own sake as for her role in the community. In such societies, the funeral may focus on the community itself and the contributions that the deceased made to it. But that is not the way that funerals are ordinarily understood in our society. With the possible exception of those held for major public figures, the focus of a funeral is on the life and the value of the deceased herself. In this sense, the funeral is a deeply personal event. At the center of that event is the person who has died, then her family and close friends, and then other friends and members of the community. Thus, even when many members of the community attend the funeral of a private person, it would be a mistake to view it as essentially a public event that should be treated in the same manner as, say, a political rally. At the heart of the event is the expression of love and respect for the deceased. When someone who has no personal connection with or concern for the deceased approaches the funeral and seeks to inject a broader religious or political message into it—and still more when the message is one that condemns the mourners and the deceased herself—this constitutes a blatant intrusion into the mourners' personal lives and thus invades their right to privacy.<sup>313</sup>

---

<sup>311</sup> 357 U.S. 449 (1958).

<sup>312</sup> *Id.* at 462.

<sup>313</sup> At times, Westboro has engaged in expression that is even more profoundly intrusive and hurtful. For example, in March 1993, two days after a young musician named Kevin Oldham died of complications from AIDS, his parents received an envelope in the mail from the church. Believing it to

### 3. *Personal Dignity*

Funeral picketing also has an impact on personal dignity. Most clearly, this is the dignity of the deceased himself. Some philosophers, such as Immanuel Kant, hold that the right to dignity is one that survives a person's death,<sup>314</sup> and some contemporary legal systems take the same view.<sup>315</sup> Although American law does not do so, it does recognize a number of dignitary rights on the part of the family of the deceased. In cases where his corpse has been mistreated, his family may be able to recover for the torts of intentional or negligent infliction of emotional distress.<sup>316</sup> In other situations, the family may be able to assert a right to privacy. For example, in *National Archives and Records Administration v. Favish*,<sup>317</sup> the Supreme Court held that photographs of a suicide victim's body were exempt from disclosure under the Freedom of Information Act because that would "constitute an unwarranted invasion of personal privacy."<sup>318</sup> As Justice Anthony M. Kennedy wrote, "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."<sup>319</sup>

Justice Kennedy's statement applies just as forcefully to Westboro's funeral picketing in cases where protestors succeed in communicating directly with grieving family members. This conduct violates the mourners' right to protect the dignity of the deceased. Moreover, because the community is founded on respect for human life, the picketing may also be regarded as a wrong against the community itself.

### 4. *Religious or Spiritual Freedom*

In addition to being a deeply personal event, a funeral is often a deeply religious or spiritual one. At the funeral, the mourners seek consolation for their loss and reaffirm their faith in the midst of tragedy and death.

---

be an expression of sympathy, they opened it and were shocked to find a flier denouncing their son as "a filthy dead sodomite." *Grieving Family Forced to Deal with Phelps*, THE TOPEKA CAPITOL-JOURNAL (Aug. 3, 1994), [http://cjonline.com/indepth/phelps/stories/080394\\_phelps06.shtml](http://cjonline.com/indepth/phelps/stories/080394_phelps06.shtml).

<sup>314</sup> See IMMANUEL KANT, THE METAPHYSICS OF MORALS \*295 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

<sup>315</sup> See, e.g., EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 98–99, 117–18 & nn. 100, 102 (2002) (discussing German law, which protects a person's reputation even after his death).

<sup>316</sup> See KEETON ET AL., *supra* note 227, at 63, 362; Alan Brownstein & Vikram David Amar, *Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?*, 2010 CARDOZO L. REV. DE NOVO 368, 377–79 (discussing cases where emotional distress results from the mishandling of dead bodies).

<sup>317</sup> 541 U.S. 157 (2004).

<sup>318</sup> *Id.* at 168; 5 U.S.C. § 552(b)(7)(C) (2006).

<sup>319</sup> *Favish*, 541 U.S. at 168.

Westboro invades their right to religious or spiritual freedom when it attempts to seize their attention in order to deepen their grief and condemn their beliefs.

### C. *The Value of Funeral Picketing*

Thus, in its paradigmatic form, Westboro's funeral picketing infringes the mourners' rights by inflicting severe emotional and dignitary injury, invading their privacy, and interfering with their religious or spiritual freedom. Yet this is only the first part of the analysis. Under the liberal humanist approach, we must go on and ask whether, from a First Amendment perspective, the value of the speech is so great that it should be regarded as privileged despite the injury that it causes.<sup>320</sup> In considering this question, we must remember that Westboro's picketing is directed to two different audiences: the mourners themselves and the public at large.<sup>321</sup> Thus, we should ask: (1) whether the First Amendment gives Westboro a right to communicate its message to the mourners at a funeral; and (2) whether the amendment gives Westboro a right to communicate with the public by standing so close to a funeral that the group's message is also effectively communicated to the mourners.

#### 1. *Should Westboro Have a First Amendment Right to Communicate with the Mourners?*

Although the liberal humanist approach holds that speakers generally must respect the rights of others, it recognizes that some First Amendment cases involve substantial conflicts between free speech and other rights. In such cases, a court should determine which of the competing rights is more important under the circumstances. To make this determination, the court should look to the values that provide the justification both for free speech and for other rights. In other words, the court should ask which of the rights, under the circumstances, is most important for external freedom, for individual autonomy and self-realization, for participation in the social, political, and cultural life of the community, and for the pursuit of intellectual and spiritual truth. The ultimate question is which of the competing rights has the greatest value from the standpoint of human freedom and dignity, the principles which lie at the basis of all rights.<sup>322</sup>

At the same time, this balancing of rights comes with an important caveat: an asserted right can derive no value from its negation of another right. For example, if making false and defamatory statements about a person is wrongful because it invades his right to reputation, the speaker

---

<sup>320</sup> See *supra* Part V.C.

<sup>321</sup> See *supra* Part III.B.

<sup>322</sup> See *supra* text following note 226.

cannot contend that the speech should be privileged simply because she derives self-fulfillment from degrading the other person in this way.

With this background, we are now in a position to determine whether the Westboro protesters should have a right to communicate their message to the mourners at a funeral. The first task is to identify the nature and value of Westboro's speech. In *Snyder*, the majority suggested that this speech is basically political in nature.<sup>323</sup> That is certainly not how Westboro's members conceive of it, however. Instead, they regard themselves as preaching a religious message of divine wrath.<sup>324</sup> At the same time, of course, this message also bears on political issues such as the nation's stance on homosexuality.

As a general matter, people should have a right to proclaim their religious and political views to the world. But the question we are considering here is whether outsiders have a right to proclaim those views to the mourners at a funeral. The answer clearly is no. The mourners are already engaged in the activity of remembering and grieving over a loved one, an activity that is deeply personal and spiritual. In this situation, no one should have a right to intrude into their lives by forcing them to listen to someone else's religious or political message. And that is even more true when the message consists of a condemnation of the mourners themselves and the person whom they have lost.

In response, Westboro would insist that its preaching is a "loving act," and that it seeks to communicate with the mourners for their own good.<sup>325</sup> This assertion is difficult to credit. After all, Westboro's members believe that almost everyone they speak to has already been condemned to hell, and that is the message that they communicate.<sup>326</sup> In any event, if the law is to respect the autonomy of the mourners, it must allow them to decide for themselves whether their well-being will be promoted by listening to Westboro's message. To be sure, granting the church members the right to picket would promote their own autonomy and self-fulfillment.<sup>327</sup> But individuals have no right to pursue those values when they are defined in such a way as to deny the autonomy and self-fulfillment of others. That is clearly the case in this situation.

---

<sup>323</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011); *supra* text accompanying note 23.

<sup>324</sup> As Westboro wrote in 2005:

[W]e're the prophets of God. We don't care who's in office; we don't care about your politics; we don't care about your policies on the war. . . . All of that is irrelevant to us. The simple fact of the matter is . . . [that this war] is the means by which God is punishing America, and nothing is going to change that fact.

Westboro, *Message to Lawmakers*, *supra* note 90, at 3.

<sup>325</sup> Barrett-Fox, *supra* note 70, at 231–33.

<sup>326</sup> See *supra* text accompanying notes 73–83.

<sup>327</sup> See Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 43 n.245 (2011).

2. *Should Westboro Have a First Amendment Right to Communicate with the Public in a Way That Also Directly Impacts the Mourners?*

For these reasons, we should not say that the First Amendment gives Westboro a right to communicate with the mourners at a funeral themselves. But Westboro also preaches to the public at large. Does that provide a good reason for holding that the picketing is protected by the First Amendment?

Of course, if the picketing were directed solely to the public, there would be a much stronger case for constitutional protection.<sup>328</sup> But the question under discussion is a different one: whether the picketers' First Amendment right to communicate with the public should give them a right *to stand so close to a funeral that they are also communicating directly with the mourners*. When the question is posed in this way, the answer is clear. What draws so much public attention to this form of picketing is the fact that Westboro is confronting the mourners and telling them that they and their loved one are going to hell. In this way, the publicity and attention that is generated by the picketing derives from the very thing that makes it wrongful in the first place—the emotional and dignity injury that it inflicts on the mourners.

---

<sup>328</sup> Even in this situation, signs like “Thank God for Dead Soldiers” and “Thank God for IEDs” might be quite hurtful to the families of those killed in the wars. However, if those messages were addressed only to the public—and if they did not attack specific individuals—the impact on the families would not seem serious enough to speak of a violation of their rights. And even if one did, the effect on those rights would be outweighed by the value of the speech as a form of participation in public discussion.

One could also argue that Westboro's picketing should be held unprotected as a form of hate speech. Elsewhere, I have argued that, under the liberal humanist approach, some forms of hate speech should be denied constitutional protection on the ground that they violate their targets' rights to personality, citizenship, and equality, as well as the most fundamental right of all—the right to be recognized and treated as a human being and a member of the community. See HEYMAN, *FREE SPEECH*, *supra* note 166, ch. 10. Of course, a great deal of Westboro's speech expresses a virulent form of hatred toward gay and lesbian people. The group dehumanizes them by routinely equating them with animals. See Barrett-Fox, *supra* note 70, at 235 n.685 (recounting rhetoric used by Westboro members against gay men and women such as “beasts” and “brutes”). It displays signs that proclaim that “Fags are Worthy of Death,” and holds that they should suffer the death penalty. See FALL FROM GRACE, *supra* note 299, at 11:41; Westboro Baptist Church, *All Nations Must Immediately Outlaw Sodomy (Homosexuality) & Impose the Death Penalty!*, GODHATESFAGS (Dec. 3, 2002), [http://www.godhatesfags.com/fliers/archive/20021203\\_outlaw-sodomy.pdf](http://www.godhatesfags.com/fliers/archive/20021203_outlaw-sodomy.pdf) (last visited July 30, 2012). It is hardly surprising that organizations like the Southern Poverty Law Center classify Westboro as a hate group. See *Westboro Baptist Church*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/groups/westboro-baptist-church> (last visited July 30, 2012) (describing Westboro as “arguably the most obnoxious and rabid hate group in America”).

I believe that, in some situations, it would be perfectly reasonable to hold Westboro's expression unprotected as a form of hate speech. In this Article, however, I shall not pursue the question of whether, and under what circumstances, hate speech should be excluded from First Amendment protection.

To put it another way, when rights conflict, the liberal humanist approach seeks to protect both of them as much as possible. In this situation, that means that while Westboro should be allowed to communicate its message to the public, it should not be allowed to do so in a way that unnecessarily inflicts serious injury to the mourners, a group with whom Westboro should not have a constitutional right to communicate.

#### D. Conclusion

In this Part, I have argued that the First Amendment should not protect the paradigmatic form of funeral picketing, in which the protesters stand so close to the funeral that they are able to communicate their message directly to the mourners as well as to the public in general. In *Snyder*, the Justices did not discuss whether this form of picketing is entitled to constitutional protection. Instead, they carefully avoided the issue and stressed that their decision was a “narrow” one “limited by the particular facts” of the case.<sup>329</sup> It is reasonable to suppose that they did so because they recognized that this form of funeral picketing would present a very different case, and that it might not be entitled to constitutional protection. Yet the Court said very little to explain why this case would be different. By contrast, the liberal humanist approach offers a language and a framework that show why the First Amendment’s protection should not extend to this form of expression: it violates the mourners’ rights to emotional well-being, privacy, dignity, and religious liberty, and while the protesters do have a First Amendment right to communicate with the public in general, they can do so in a way that does not cause such serious injury to the mourners themselves.

### VII. APPLYING THE LIBERAL HUMANIST APPROACH TO THE FACTS OF *SNYDER*

#### A. Was Westboro’s Picketing Entitled to First Amendment Protection?

Now that we have considered the paradigmatic case of funeral picketing, let us return to the facts of *Snyder v. Phelps* itself. Chief Justice Roberts stressed that “Westboro stayed well away from the memorial service”; that Albert Snyder could not read the signs as he was driven to the funeral; that the signs were predominantly directed to addressing public issues, not to attacking the Snyder family; and that “there is no indication that the picketing in any way interfered with the funeral service itself.”<sup>330</sup>

---

<sup>329</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

<sup>330</sup> *Id.* at 1216–17, 1220.

If one views the facts in this way, then *Snyder* is a fairly easy case for First Amendment protection even under the liberal humanist approach. However, if one also takes account of other facts disclosed by the record, this conclusion is more debatable. In its news release, Westboro announced that it would “picket [the] funeral of Lance Cpl. Matthew A. Snyder . . . at St. John’s Catholic” church<sup>331</sup>—not, as the Court would have it, that Westboro merely planned to hold a demonstration that would “coincide with Matthew Snyder’s funeral.”<sup>332</sup> The protesters were allowed to stand exactly where they had requested, at the main entrance to the church campus.<sup>333</sup> Thus, as Justice Alito observed, the protesters “approached [the church] as closely as they could without trespassing.”<sup>334</sup> The funeral procession passed within 200 to 300 feet of the demonstrators, and Albert Snyder saw the tops of the picket signs, although he could not read what was written on them.<sup>335</sup>

As Westboro’s members explained before, during, and after the protest, the signs they displayed—such as “America is Doomed,” “God Hates Fags,” “Fag Troops,” “Thank God for Dead Soldiers,” “God Hates You,” and “You’re Going to Hell”<sup>336</sup>—were intended to condemn not only the nation as a whole but also Matthew Snyder and his family in particular. Those signs were meant to assert that Matthew was a “fag” in the sense that he had voluntarily chosen “to fight for the United States of Sodom,”<sup>337</sup> that God had killed him to punish him and his parents for their “evil, wicked, and sinful manner of life,”<sup>338</sup> that “[h]e died in shame, not honor, for a fag nation cursed by God,”<sup>339</sup> and that he was “[n]ow in Hell.”<sup>340</sup> Albert Snyder could not read the signs at the time of funeral itself, but he did see them an hour or two later, during the wake, when someone turned on the television, and again the next morning, when the protest was splashed across the front page of newspaper.<sup>341</sup> The jury found that Westboro’s picketing, together with its subsequent attack on the family on the Internet, invaded his privacy and caused him to suffer severe emotional distress—findings that Westboro did not dispute on appeal.<sup>342</sup>

When all of the facts are taken into account, it becomes clear that, in contrast to the paradigmatic case of funeral picketing, *Snyder* is a very

---

<sup>331</sup> Westboro, News Release, *supra* note 95.

<sup>332</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>333</sup> See *supra* text accompanying notes 57–61.

<sup>334</sup> *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

<sup>335</sup> *Id.* at 1213 (majority opinion).

<sup>336</sup> *Id.* at 1216–17.

<sup>337</sup> *Epic*, *supra* note 96, at 3791; see *Snyder*, 131 S. Ct. at 1216–17 (describing the signs).

<sup>338</sup> *Epic*, *supra* note 96, at 3791.

<sup>339</sup> Westboro, News Release, *supra* note 95.

<sup>340</sup> *Id.*

<sup>341</sup> See Record, *supra* note 59, at 2072, 2075, 2078, 2085, 2088 (testimony of Albert Snyder).

<sup>342</sup> See *supra* text accompanying notes 159–60.

difficult, borderline case. On one hand, Westboro should have a First Amendment right to communicate its message on public issues to the community at large. On the other hand, Westboro should not be permitted to communicate a hateful message to the family at this time, for that would violate the family's own rights to privacy, dignity, emotional well-being, and religious liberty. The question is where we should draw the line between these two sets of rights.

When the issue is posed in this way, it is tempting to focus on whether Westboro was communicating with the family directly. On this view, the protesters should not have a right to stand so close to the mourners that they are forced to see or hear the group's message. As long as the protesters stand further away, however, the First Amendment should protect Westboro's right to communicate with the public.

The difficulty with this position is that it disregards both the intent and the effect of Westboro's picketing, as well as the realities of modern communication. As Pastor Phelps testified, he and his followers believe that they have a duty to preach their message of God's wrath "to every creature," including the mourners at funerals.<sup>343</sup> Presumably, Westboro's members set up their picket at the main entrance to the church campus in hopes of being able to convey their message directly to the family. They were unable to do so only because the clergy decided to reroute the procession through a different entrance and because the service was held at a sanctuary that happened to be on the opposite side of the campus.<sup>344</sup> And even though Matthew's father did not see or hear the message at the time, he did see and hear it within a matter of hours.<sup>345</sup>

Thus, Westboro *intended* to convey its message to the family, and it *succeeded* in conveying that message. Under these circumstances, it hardly seems decisive that the message was communicated not in a direct way but rather by means of coverage on television and in the newspaper—media that, as Westboro surely knew, were substantially certain to bring the message home to the family.<sup>346</sup>

---

<sup>343</sup> Record, *supra* note 59, at 2215, 2226 (testimony of Fred Phelps Sr.).

<sup>344</sup> See *supra* text accompanying notes 61–63.

<sup>345</sup> See *supra* text accompanying notes 120–25.

<sup>346</sup> In this connection, it is instructive to compare some other instances of unprotected speech. For example, in *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062–63 (9th Cir. 2002) (en banc), cert. denied, 539 U.S. 2637 (2003), members of a radical anti-abortion group held a news conference at which they unveiled "Wanted" posters that amounted to death threats against thirteen physicians who performed abortions. The physicians were also featured on a threatening website maintained by the group. The activists were convicted of making unlawful threats in violation of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(a)(1), and their convictions were upheld by the court of appeals, which ruled that the speech was unprotected under the First Amendment "true threats" doctrine. *Id.* at 1063. As this case illustrates, threatening speech can cause serious injury and fall outside the First Amendment's protection even when the speakers do not communicate directly

### B. *The Vagueness of the Tort Doctrines Employed in Snyder*

For these reasons, I am inclined to disagree with the majority's holding that the picketing in *Snyder* was entitled to substantive protection under the First Amendment. On another critical issue, however, I believe the majority is on solid ground.

To recover for the common law tort of IIED, Albert Snyder had to prove "that the defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused [him] to suffer severe emotional distress."<sup>347</sup> If a state enacted a statute in those terms, it surely would be held invalid as applied to public-concern speech under the vagueness doctrine, which is meant to constrain the discretion of judges, juries, and prosecutors, as well as to ensure that those who are subject to the law have adequate notice about what it allows or forbids.<sup>348</sup> The IIED tort presents a similar problem.<sup>349</sup> As Chief Justice Roberts observed, "'Outrageousness' . . . is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'"<sup>350</sup> This concern is well-founded, and it is reinforced by one of the instructions that was given to the jury in *Snyder*. That instruction failed to make sufficiently clear that Westboro could not be held liable on the ground that its *views* were extreme and outrageous, but only on the ground that its *conduct in interfering with the funeral* was.<sup>351</sup>

The invasion-of-privacy claim in *Snyder* suffered from a similar problem. To recover, the plaintiff was required to show that the defendants had intentionally intruded on his private affairs or concerns in a way that

---

with their targets. Of course, the same is true of defamatory and privacy-invading speech. I believe that we should take the same position on the funeral picketing at issue in *Snyder*.

<sup>347</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 580 (D. Md. 2008) (citation omitted) (internal quotation marks omitted).

<sup>348</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.2, at 970–72 (4th ed. 2011) (outlining the parameters of the "void-for-vagueness" doctrine).

<sup>349</sup> For some good discussions, see Brownstein & Amar, *supra* note 316, at 385–87; Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, CARDOZO L. REV. DE NOVO 300, 300–03 (2010). But see Zipursky, *supra* note 16 (forcefully arguing that the tort should not be considered unconstitutionally vague in the context of funeral picketing).

<sup>350</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Hustler Mag. v. Falwell*, 485 U.S. 46, 55 (1988)) (internal quotation marks omitted by Court).

<sup>351</sup> The full text of the instruction is reproduced in the Fourth Circuit's opinion. *Snyder v. Phelps*, 580 F.3d 206, 214–15 (4th Cir. 2009). A close reading of the instruction suggests that the district judge attempted to draw this distinction but that he did not do so in a way that was clear enough to ensure that the jury would understand. The instruction also was defective because it asked the jury itself to determine whether the speech was entitled to constitutional protection—an issue that is generally regarded as one for the court. This last point was one ground on which the appellate court relied in reversing the judgment the plaintiff had won at trial. *Id.* at 221.

“‘‘would be highly offensive to a reasonable person.’’<sup>352</sup> One can imagine funeral protests that would clearly meet this standard—for example, if Westboro’s members were to use amplification equipment to make themselves heard by those inside the church where a funeral was taking place. In a case like that, no serious problem of vagueness would arise. In *Snyder* itself, however, it was hardly clear that the impact on the family’s privacy should be considered ‘‘highly offensive’’ in view of the fact that the protesters believed they were exercising rights protected by the First Amendment. Once again, therefore, the tort was unduly vague as applied to Westboro’s speech. On these grounds, while I disagree with the broader reasoning in the Court’s opinion, I believe that it was correct to hold the damages judgment inconsistent with the First Amendment.

### VIII. BUFFER-ZONE LAWS

Although Westboro prevailed in *Snyder*, that victory may prove to be a Pyrrhic one. Few, if any, other tort cases have been brought against Westboro for its picketing of funerals. Instead, the most common legal response has been the adoption of laws that restrict picketing within a specified distance of a funeral.<sup>353</sup> From a practical perspective, the most important question after *Snyder* is whether these buffer-zone laws are constitutional. The federal courts of appeals have been divided on this issue. In *Phelps-Roper v. Strickland*,<sup>354</sup> the Sixth Circuit ruled that such laws may be justified by the need to protect the dignity of funerals and the privacy and emotional well-being of mourners.<sup>355</sup> The Fourth Circuit expressed a similar view in *Snyder* itself.<sup>356</sup> By contrast, in *Phelps-Roper v. Nixon*,<sup>357</sup> the Eighth Circuit asserted that these interests cannot justify a restriction on the protesters’ freedom of expression.<sup>358</sup>

In *Snyder*, Chief Justice Roberts observes that, although public-issue speech in a public forum is entitled to strong protection:

Even protected speech is not equally permissible in all places and at all times. Westboro’s choice of where and when to conduct its picketing is not beyond the

---

<sup>352</sup> *Snyder v. Phelps*, 2006 U.S. Dist. LEXIS 79020, at \*30 (D. Md. Oct. 30, 2006) (quoting RESTATEMENT (SECOND), *supra* note 19, at § 652B).

<sup>353</sup> See *infra* text accompanying note 359.

<sup>354</sup> 539 F.3d 356 (6th Cir. 2008).

<sup>355</sup> *Id.* at 362–66.

<sup>356</sup> *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

<sup>357</sup> 545 F.3d 685 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2865 (2009).

<sup>358</sup> *Id.* at 692. In the wake of *Snyder*, the Eighth Circuit voted to reconsider the issue en banc in *Phelps-Roper v. City of Manchester*. Ryan Koopmans, *Eighth Circuit Grants Rehearing En Banc in Funeral Protest Case*, ON BRIEF: IOWA’S APPELLATE BLOG (Dec. 13, 2011, 4:36 PM), <http://iowaappeals.com/eighth-circuit-grants-rehearing-en-banc-in-funeral-protest-case>.

Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions that are consistent with the standards announced in this Court's precedents. Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case.<sup>359</sup>

Although Chief Justice Roberts makes clear that the Court is not passing on the constitutionality of these laws,<sup>360</sup> this passage does suggest that the government has some power to protect mourners through the enactment of buffer-zone laws. If that turns out to be true, then although Westboro won the battle over common-law tort liability in *Snyder*, it may lose the larger war over the regulation of funeral picketing.

In this Part, I explore the use of time, place, and manner regulations in the funeral context. I begin with the question of whether buffer-zone laws are in fact “consistent with the standards announced in [the Supreme] Court's precedents.”<sup>361</sup> Next, I discuss how broad a buffer zone may be. Finally, I consider the sanctions that may be imposed for violations.

#### A. *The Constitutionality of Buffer-Zone Laws*

When Chief Justice Roberts referred to the standards set forth in earlier decisions, he cited the Court's 1984 opinion in *Clark v. Community for Creative Non-Violence*.<sup>362</sup> That case indicates that time, place, and manner regulations “are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.”<sup>363</sup>

Buffer-zone laws regulate the times and places at which funeral picketing may occur. A good example is the Ohio statute at issue in *Phelps-Roper*.<sup>364</sup> That law bans picketing within 300 feet of a place where a funeral is being held, from one hour before to one hour after the funeral.<sup>365</sup> For the purpose of discussion, I shall focus on this statute,

---

<sup>359</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (alteration in original) (citations omitted) (internal quotation marks omitted).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>363</sup> *Clark*, 468 U.S. at 293.

<sup>364</sup> 539 F.3d 356 (6th Cir. 2008).

<sup>365</sup> OHIO REV. CODE ANN. § 3767.30 (West 2006). The statute provided that:

[N]o person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or

which is typical of the laws that have been passed in a number of jurisdictions.<sup>366</sup>

Although the courts have been divided over the constitutionality of such laws, they agree that the laws satisfy the first *Clark* requirement—that of content neutrality. In determining whether a statute is content neutral, the courts look to both its text and its purpose. The language of the Ohio statute makes no reference to the content of the protesters' speech. Instead, the statute applies to all demonstrations without regard to whether they support or oppose gay rights, or the Catholic Church, or the policies of the United States military. There is no doubt, then, that the law is content neutral on its face. As for purpose, the government can make a strong argument that it sought to regulate funeral picketing not "because of disagreement with the message" that it conveys,<sup>367</sup> but because of the importance of protecting the mourners attending funerals.

Of course, the great majority of funeral picketing laws have been passed in response to Westboro's activities.<sup>368</sup> On this ground, the group might argue that the laws violate the First Amendment doctrine that forbids discrimination on the basis of viewpoint. As the Supreme Court has made clear, however, a statute should not be found to violate this doctrine "simply because its enactment was motivated by the conduct of the partisans on one side of a debate."<sup>369</sup> Instead, when a law aims to protect an important interest such as privacy, and when the law applies evenhandedly to all speech that seriously injures that interest, the law does not amount to forbidden viewpoint discrimination.<sup>370</sup>

Westboro might also argue that buffer-zone laws are viewpoint-discriminatory because they restrict its own speech but not the speech of those who desire to express more favorable messages toward the family. In *Snyder*, for example, the route of the procession leaving the church was lined by children from the Catholic school that Matthew had attended, as well as by police and firefighters who saluted the procession as it went

---

other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place.

*Id.* The statute defined "other protest activities" to mean "any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service." *Id.*

<sup>366</sup> The local ordinance that is now before the Eighth Circuit en banc in *Phelps-Roper v. City of Manchester* imposes similar restrictions. See Koopmans, *supra* note 358.

<sup>367</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (citing *Clark*, 468 U.S. at 295)).

<sup>368</sup> Interestingly, Ohio passed its first regulation of funeral picketing in 1957, long before Westboro began to protest at funerals. See *Strickland*, 539 F.3d at 358. In 2006, the legislature made several changes to the law, *id.*, changes which no doubt were prompted by Westboro's conduct.

<sup>369</sup> *Hill v. Colorado*, 530 U.S. 703, 724 (2000).

<sup>370</sup> See *id.* at 723–24 (upholding a law which sought to protect individuals from harassment when entering health care facilities).

by.<sup>371</sup> Also present outside the funeral were motorcyclists from the Patriot Guard Riders, a veterans group that offers to attend to support the family and to shield them from the Westboro protesters.<sup>372</sup>

Westboro might contend that the state cannot constitutionally discriminate between these demonstrations and the ones that the church engages in. This contention would be convincing if the other groups were allowed to demonstrate in favor of certain ideological positions while Westboro was forbidden to express its own opposing views. But that is not an accurate description of what takes place in a situation like *Snyder*. Instead, the school children, the public safety officers, and the Patriot Guard Riders essentially act as participants in the funeral procession itself. Thus, if a buffer-zone law were to permit their actions but not Westboro's, the law would not be discriminating on the basis of viewpoint, but would simply be distinguishing between participants who were present to express their support for the family and to pay their last respects to the deceased, on one hand, and outsiders who sought to intrude into the observance to express a particular ideological message to the mourners and the public, on the other hand.

Finally, Westboro might argue that buffer-zone laws are content-based because they seek to protect individuals against offensive speech. Of course, it is a central tenet of contemporary First Amendment jurisprudence that the law may not restrict speech on this ground.<sup>373</sup> But the Court has recognized an exception to this principle in situations where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.”<sup>374</sup> “The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings, but can also be protected in confrontational settings” such as protests outside a medical facility.<sup>375</sup> In such situations, the Court has observed that “[i]t may not be the content of the speech, as much as the deliberate ‘verbal [or visual] assault,’ that justifies proscription.”<sup>376</sup>

This use of the captive audience doctrine fits the problem of funeral picketing to a T. As the Sixth Circuit has recognized, mourners are compelled to attend funerals not merely by the need for emotional support but also by “deep tradition and social obligation.”<sup>377</sup> Once there, they cannot easily avoid exposure to disruptive picketing. Nor can they protect

---

<sup>371</sup> Record, *supra* note 59, at 2082 (testimony of Albert Snyder).

<sup>372</sup> Westboro Brief, *supra* note 310, at 6.

<sup>373</sup> See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (“[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”).

<sup>374</sup> *Id.* at 209.

<sup>375</sup> *Hill*, 530 U.S. at 717 (citations omitted).

<sup>376</sup> *Erznoznik*, 422 U.S. at 210 n.6.

<sup>377</sup> *Phelps-Roper v. Strickland*, 539 F.3d 356, 366 (6th Cir. 2008).

themselves by simply “avert[ing] their eyes” from the messages on the signs, for, in a situation like this, the “mere presence” of intrusive protesters “is sufficient to inflict the harm,”<sup>378</sup> and Westboro does everything it can to make its protests impossible to ignore.<sup>379</sup> For these reasons, I believe that funeral picketing is one of the rare situations in which the government should be allowed to protect individuals against unwelcome speech on the ground “that substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>380</sup>

Thus, buffer-zone laws should be found to satisfy the first element of the Court’s test for time, place, and manner regulations. For the reasons discussed in Part V, the laws should also be found to advance “significant government interest[s]”<sup>381</sup> by protecting the privacy, emotional well-being, and religious freedom of mourners, as well as the dignity and solemnity of funerals. It also is difficult to deny that the laws “leave open ample alternative channels for communication of the information.”<sup>382</sup> As Justice Alito explained in his *Snyder* dissent, the First Amendment ensures that Westboro’s members “have almost limitless opportunities to express their views”:

They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails.<sup>383</sup>

Moreover, a buffer-zone law would even allow them to picket as long as they did so outside the specified zone or time period.

It follows that a buffer-zone law should be upheld under the *Clark* test if it is “narrowly tailored.”<sup>384</sup> One of the key issues that arise under this heading is how large the zone can be.

---

<sup>378</sup> *Id.* (citations omitted) (internal quotation marks omitted).

<sup>379</sup> See *supra* text accompanying note 306.

<sup>380</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971). In *Snyder*, the majority found that this standard was not met on the facts of the case. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). But this conclusion rested in large part on the fact that Westboro had “stayed well away from the memorial service.” *Id.* Of course, this conclusion does not conflict with the view that the state may require protesters to “stay[] well away” in order to protect mourners from being forced to see or hear their message. *Id.*

<sup>381</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>382</sup> *Id.*

<sup>383</sup> *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

<sup>384</sup> *Clark*, 468 U.S. at 293.

### B. *The Size of the Buffer Zone*

In *Snyder*, the Court offered two examples of situations in which it had approved restrictions on “the location of targeted picketing.”<sup>385</sup> In *Frisby v. Schultz*,<sup>386</sup> the Court “upheld a ban on such picketing ‘before or about’ a particular residence.”<sup>387</sup> In *Madsen v. Women’s Health Center, Inc.*,<sup>388</sup> the Court upheld a provision of an injunction that banned picketing within thirty-six feet of the property line of a clinic that performed abortions, but struck down another provision that banned picketing within 300 feet of the residence of an employee or owner of the clinic.<sup>389</sup> Westboro would argue that a funeral picketing law should not be upheld if it establishes a buffer zone substantially larger than those upheld in *Frisby* and *Madsen*.

This argument is unpersuasive, however. As the Court indicated in *Madsen*, courts “must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.”<sup>390</sup> In other words, what constitutes an appropriate buffer zone depends on the particular context.<sup>391</sup>

The critical issue here is whether Westboro has a right to communicate with the mourners at all. As I argued in Part VI, the answer is no because this would inflict serious and unwarranted injury on them. If this view is correct, then the First Amendment should allow the government to establish a buffer zone that is large enough to keep the protesters out of the sight and hearing of the mourners.

This conclusion does not conflict with the Court’s opinion in *Snyder*. Chief Justice Roberts stressed that the demonstration in that case took place “some 1,000 feet from the church, out of sight of those at the church.”<sup>392</sup> In this situation, he treated the speech as addressed to the public at large, rather than to those attending the funeral.<sup>393</sup> *Snyder* holds that Westboro has a constitutional right to communicate with the public and to do so in a way that uses the funeral “to increase publicity for its views,” even if this causes emotional injury to the family.<sup>394</sup> But the decision does *not* hold that Westboro has a First Amendment right to communicate directly with the mourners themselves. Unless the Court is prepared to hold that there is such a right, it would seem perfectly reasonable for states to establish buffer zones that keep the protesters “well

---

<sup>385</sup> *Snyder*, 131 S. Ct. at 1212.

<sup>386</sup> 487 U.S. 474 (1988).

<sup>387</sup> *Snyder*, 131 S. Ct. at 1218 (quoting *Frisby*, 487 U.S. at 477).

<sup>388</sup> 512 U.S. 753 (1994).

<sup>389</sup> *Id.* at 768–71, 774–75.

<sup>390</sup> *Id.* at 772.

<sup>391</sup> See *Phelps-Roper v. Strickland*, 539 F.3d 356, 368 (6th Cir. 2008).

<sup>392</sup> *Snyder*, 131 S. Ct. at 1218.

<sup>393</sup> See *supra* text accompanying note 69.

<sup>394</sup> *Snyder*, 131 S. Ct. at 1217–18.

away” from the funeral,<sup>395</sup> while permitting them to stand close enough to use it as a backdrop for their expression. On this view, state laws that establish buffer zones of several hundred feet should not be held to violate the First Amendment.

The same reasoning supports the constitutionality of the central provisions of section 601 of the Honoring America’s Veterans Act (“HAVA”), which was passed by Congress in the summer of 2012.<sup>396</sup> Section 601(a) sets forth the constitutional authority for the Act—Congress’s powers in relation to the military—as well as the Act’s purpose: to promote the recruitment and retention of members of the Armed Forces “by protecting the dignity of [their] service” as well as “the privacy of their immediate family members and other attendees during funeral services for such members.”<sup>397</sup> Section 601(b) adopts time, place, and manner regulations for funerals at cemeteries that are not controlled by the federal government.<sup>398</sup> These regulations are codified at 18 U.S.C. § 1388.<sup>399</sup> Finally, section 601(c) imposes similar regulations (which are codified at 38 U.S.C. § 2413) with respect to Arlington National Cemetery and other sites that are under federal control.<sup>400</sup>

For purposes of simplicity, I shall focus on 18 U.S.C. § 1388. The statute sets forth three prohibitions. First, subsection (a)(1) makes it unlawful, within 300 feet of a military funeral, to willfully make “any noise or diversion . . . that disturbs or tends to disturb the peace or good order of such funeral, . . . with the intent of disturbing the peace or good order of such funeral.”<sup>401</sup> As I have explained, a provision like this should be upheld as a reasonable effort to protect the dignity of funerals and the privacy of mourners.<sup>402</sup> Second, subsection (a)(2) makes it unlawful, within 500 feet of a funeral, to willfully impede access to or egress from the location where it is being held<sup>403</sup>—conduct that clearly is not protected

---

<sup>395</sup> *Id.* at 1220.

<sup>396</sup> Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, P.L. 112-154, § 601, 126 Stat. 1165, slip law at 1, 31–35 (codified at 18 U.S.C. § 1388 and 38 U.S.C. § 2413). An explanation and constitutional defense of the Act may be found in S. REP. NO. 112–88, at 39–45 (2011).

<sup>397</sup> § 601(a), slip law at 31.

<sup>398</sup> § 601(b), slip law at 32–33.

<sup>399</sup> *Id.*

<sup>400</sup> § 601(c), slip law at 34–35.

<sup>401</sup> 18 U.S.C. § 1388(a)(1) (2012). Congress’s first effort to regulate funeral protests at nonfederal cemeteries was the Respect for the Funerals of Fallen Heroes Act, Pub. L. 109-464, § 1, 120 Stat. 3480, 3480-81 (2006) (codified at 18 U.S.C. § 1388 (prior to 2012 amendment)). Under that law, the distance was 150 feet. 18 U.S.C. § 1388(a)(2) (prior to 2012 amendment).

<sup>402</sup> See *supra* text accompanying notes 390–95.

<sup>403</sup> 18 U.S.C. § 1388(a)(2). Under the 2006 law, the distance was 300 feet. See 18 U.S.C. § 1388(a)(2) (prior to 2012 amendment).

by the First Amendment.<sup>404</sup> Finally, subsection (a)(3) makes it unlawful to stand near the home of a family member of the deceased and to willfully create any noise or diversion that intentionally disturbs the peace of that person.<sup>405</sup> This provision protects residential privacy in the same way that the Court approved in *Frisby v. Schultz*,<sup>406</sup> and it does so in a situation where the privacy interest is far more compelling.

Under the Act, these restrictions apply from two hours before to two hours after a funeral.<sup>407</sup> Westboro might argue that this time period is too long and that it does not strike a reasonable balance between the competing interests of the protesters and the mourners. It is not clear, however, that this provision falls outside the bounds of reasonable legislative judgment. Moreover, it is important to remember that subsection (a)(1) applies only to acts that intentionally disturb the peace or good order of the funeral.<sup>408</sup> There is no reason that such acts should receive constitutional protection simply because they take place more than, say, an hour before or after the funeral. And this point is even clearer with respect to section (a)(2)'s prohibition on intentionally interfering with access or egress and section (a)(3)'s ban on intentionally disturbing the peace of mourners. Accordingly, these provisions should be upheld under the Court's time, place, and manner doctrine.<sup>409</sup>

---

<sup>404</sup> See, e.g., *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (upholding a statute that was designed to protect "the right of 'passage without obstruction'" when entering or leaving an abortion clinic); *id.* at 747 (Scalia, J., dissenting) (recognizing that the state may proscribe conduct that "impede[s] . . . or block[s] access to a health care facility"); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380–82 (1997) (upholding an injunction establishing a buffer zone as a reasonable way to prevent interference with access to or egress from an abortion clinic).

<sup>405</sup> 18 U.S.C. § 1388(a)(3).

<sup>406</sup> 487 U.S. 474 (1988); see also S. REP. NO. 112–88, at 41 (2011) (relying on *Frisby* in support of this provision).

<sup>407</sup> 18 U.S.C. § 1388(a).

<sup>408</sup> 18 U.S.C. § 1388(a)(1)(B)(2).

<sup>409</sup> Some of the Act's other provisions are more problematic. For example, § 1388(e) provides:

It shall be a rebuttable presumption that the violation was committed willfully for purposes of determining relief under this section if the violator, or a person acting in concert with the violator, did not have reasonable grounds to believe, either from the attention or publicity sought by the violator or other circumstance, that the conduct of such violator or person would not disturb or tend to disturb the peace or good order of such funeral, impede or tend to impede the access to or egress from such funeral, or disturb or tend to disturb the peace of any surviving member of the deceased person's immediate family who may be found on or near the residence, home, or domicile of the deceased person's immediate family on the date of the service or ceremony.

18 U.S.C. § 1388(e). 38 U.S.C. § 2413(e) contains similar language. These somewhat opaque provisions raise complex issues of statutory and constitutional interpretation which I shall not explore here. See *infra* note 414 (discussing the Act's provisions for "statutory damages").

### C. Sanctions for Violation

In *Snyder*, the Court overturned a judgment that required Westboro to pay tort damages for IIED and invasion of privacy. It may seem, then, that while *Snyder* leaves the door open for the adoption of buffer-zone laws, it holds that funeral protesters cannot be subjected to damages liability. For two reasons, however, the decision should not be read that broadly. First, as Chief Justice Roberts made clear, the opinion “is limited by the particular facts” of the case.<sup>410</sup> That does not mean the opinion contains no broader holdings. As I read it, for example, it does indicate that the standards for IIED are inherently so subjective that they cannot constitutionally be applied to any instance of otherwise protected speech on matters of public concern, at least when the speech takes place within a public forum.<sup>411</sup> However, the Court makes no broad pronouncements about the tort of intrusion upon seclusion.<sup>412</sup> To return to an earlier hypothetical, if Westboro were to use amplification equipment to be heard within the church itself, it seems unlikely that the Court would hold that the First Amendment precluded the award of damages for invasion of privacy.

Second, and more importantly, *Snyder*’s rejection of IIED liability was based largely on the ground that the liability was a reaction to the content of Westboro’s speech, as well as on the ground that the tort was unconstitutionally vague as applied to public-issue speech.<sup>413</sup> But these two objections would not necessarily apply to other kinds of laws that imposed civil liability. For example, a legislature might enact a law establishing a specific buffer zone around funerals and providing that violators should be subject not only to criminal penalties but also to civil liability for any injuries caused to other individuals by the violation. Such a law would not be content-based, nor would it be vague. In this way, the legislature could grant families a remedy for the harms caused by intrusive funeral protests without raising the concerns that led the Court to overturn the damages award in *Snyder*.<sup>414</sup>

---

<sup>410</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

<sup>411</sup> *See id.* at 1219.

<sup>412</sup> *See id.* at 1219–20 (holding only that “the captive audience doctrine” should not be “expand[ed]” to apply “to the circumstances presented here”).

<sup>413</sup> *See id.* at 1219 (“In a case such as this, a jury is unlikely to be neutral with respect to the content of [the] speech, posing a real danger of becoming an instrument for the suppression of . . . vehement caustic, and sometimes unpleasan[t] expression.” (alterations in original) (internal quotation marks omitted)).

<sup>414</sup> Congress has now provided such a remedy in cases governed by federal law. The HAVA provides that “[a]ny person, including a surviving member of the deceased person’s immediate family, who suffers injury as a result of conduct that violates” the Act may sue the violator for damages. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, § 601(b), (c), 126 Stat. 1165, slip law at 1, 31, 32–33, 34 (codified at 18 U.S.C. § 1388(c)(3) and 38

## IX. CONCLUSION

*Snyder v. Phelps* appears to strike an important blow for the First Amendment freedom of speech by making clear that it encompasses even the most unpopular and offensive kinds of expression. As I have tried to show, however, the decision is deeply problematic for several reasons. To begin with, the Court fundamentally misunderstands the nature of Westboro's expression. The majority maintains that "Westboro's choice to conduct its picketing [near Matthew Snyder's funeral] did not alter the nature of its speech," which was primarily intended to communicate with the public on matters of public concern.<sup>415</sup> But Westboro's members did not regard themselves as merely holding a demonstration that was "planned to coincide" with the funeral.<sup>416</sup> Instead, they announced that they would "picket [the] funeral" in order to proclaim that Matthew was "[n]ow in Hell" and to convey a message of God's hatred not only to the public in general but also to his family, friends, and religious community.<sup>417</sup> And as the record shows, Matthew's father received this message loud and clear.

In this way, the Court fails to recognize the human meaning of Westboro's picketing—the meaning that it had for those who engaged in it as well as for those who were targeted by it. The Court also fails to appreciate the human impact of the speech. Although the majority acknowledges that the picketing caused great distress, it attributes that distress to offense at Westboro's ideology, rather than to the profound personal attack that the group leveled against Matthew Snyder and his family.

The deepest problem with *Snyder* is that it reinforces a theme that has become increasingly prevalent in our jurisprudence—the notion that the First Amendment requires us to protect public speech regardless of how insulting, abusive, or degrading it may be. According to the Court, we must take this position in order to avoid any "potential interference with a

---

U.S.C. § 2413(c)(3)). The injured party may opt to recover either (1) actual damages or (2) "statutory damages" in an amount between \$25,000 and \$50,000 for each violation. 18 U.S.C. § 1388(d); 38 U.S.C. § 2413(d). Although actual damages should be deemed constitutional for the reasons I have given, statutory damages are more problematic. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that presumed damages may not be awarded in defamation actions for statements on matters of public concern unless the statements meet the *New York Times* standard of knowing or reckless falsity. *See id.* at 349–50. A court that reviewed the HAVA's constitutionality would have to determine whether a similar doctrine should apply to its provisions on statutory damages, and if so, whether the doctrine was satisfied by the mens rea requirements set forth in §§ 1388(a) and 2413(a), see *supra* text accompanying notes 401–05, as qualified by the rebuttable presumption discussed in *supra* note 409.

<sup>415</sup> *Snyder*, 131 S. Ct. at 1217, 1220.

<sup>416</sup> *Id.* at 1220.

<sup>417</sup> Westboro, News Release, *supra* note 95.

meaningful dialogue of ideas.”<sup>418</sup> As the case of funeral picketing makes clear, however, this view is ultimately self-defeating, for a meaningful dialogue is possible only when the participants show one another at least a minimal level of respect. In this way, the Court’s approach not only negates the law’s protections for individual personality, but also undermines the practical and normative conditions for public discourse itself.

This Article has offered an alternative theory of the First Amendment. That theory holds that the same values that support freedom of speech also give rise to other fundamental rights, including privacy, dignity, emotional well-being, and other facets of what Justice Brandeis called the right to “an inviolate personality.”<sup>419</sup> Westboro’s funeral picketing invades those rights in the most blatant manner by intentionally interfering with the mourners’ ability to bury a loved one in peace. Although *Snyder* largely precludes the use of tort law to protect these rights, it does suggest that buffer-zone laws may be enacted for this purpose. Imposing reasonable restrictions on funeral picketing would not undermine our constitutional commitment to freedom of expression, but instead would reaffirm the values of human freedom and dignity on which it is based.

---

<sup>418</sup> *Snyder*, 131 S. Ct. at 1215 (internal quotation marks omitted).

<sup>419</sup> Warren & Brandeis, *supra* note 217, at 205.

## APPENDIX

**Westboro Baptist Church**  
(WBC Chronicles – Since 1955)  
3701 SW 12<sup>th</sup> St. Topeka, Ks. 66604 785-273-0325 www.godhatesfags.com  
**Religious Opinion & Bible Commentary on Current Events**

Wednesday, March 8, 2006



**NEWS RELEASE**

(Supplemental info: background, photos, audio sermons & hymns, and video footage – available free at: www.godhatesfags.com, godhatesamerica.com, smellthebrimstone.com, and hatemongers.com, and, our latest offering: www.thesignsofthetimes.net)

**Thank God for IEDs**  
(Improvised Explosive Devices)


God Himself Has Now Become America's Terrorist, Killing Americans in Strange Lands for "Brokeback Mountain" Fag Sins.

**WBC to picket funeral of Lance Cpl. Matthew A. Snyder – at 10:15 a.m., Friday, Mar. 10, at St. John's Catholic dog kennel, 43 Monroe St., Westminster, Maryland. Killed by IED – like the IED America bombed WBC with in a terroristic effort to silence our anti-gay Gospel preaching by violence.**

America bombed our church with an IED made by fag students at Washburn U. in Topeka. In his retaliatory wrath, God is killing Americans with Muslim IEDs: "Saying, Touch not mine anointed, and do my prophets no harm." 1 Chron. 16:22. "For it is written, Vengeance is mine; I will repay, saith the Lord." Rom. 12:19. God Almighty killed Lance Cpl. Snyder. He died in shame, not honor – for a fag nation cursed by God: "Buried with the burial of an ass." Jer. 22:19. Now in Hell – sine die.

**They turned America  
Over to fags;  
They're coming home  
In body bags.**



The Dover Factor. They come night & day, steel-gray cargo planes, bringing IED dead. America became WBC's terrorist. Now God Himself is America's Terrorist.

**"And I myself will fight against you with an outstretched hand and with a strong arm, even in anger, and in fury, and in great wrath." Jer. 21:5.**

When the barbaric Babylonians were at the gate, King Zedekiah sent messengers to Jeremiah seeking help from God. Too late. Israel had sinned away her day of grace. Jeremiah brought God's answer: "Not only will I no longer help you – I will fight against you. I will help the Babylonians. I am now your Enemy. I will not spare you, neither have pity, nor mercy." Jer. 21:1-7. Even so, America. You bombed our church and instituted a 15-year reign of terror against us – for warning you about fag sins. You are now in God's eternal crosshairs.

