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# Can Dead Soldiers Revive A "Dead" Doctrine? An Argument For The Revitalization Of "Fighting Words" To Protect Grieving Families Post-Snyder V. Phelps

Kevin P. Donoughe

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**CAN DEAD SOLDIERS REVIVE A “DEAD”  
DOCTRINE? AN ARGUMENT FOR THE  
REVITALIZATION OF “FIGHTING WORDS” TO  
PROTECT GRIEVING FAMILIES POST-*SNYDER V.  
PHELPS***

KEVIN P. DONOUGHE\*

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## I. INTRODUCTION

The language on the picket signs is notorious: “God Hates Fags;” “Thank God for Dead Soldiers;” “Semper Fi, Semper Fags, Coming Home in Body Bags;” “Thank God for 9/11;” “God Hates the USA.” These are among the cruelest phrases imaginable, but they are phrases routinely utilized by the fire-and-brimstone fundamentalists of the Westboro Baptist Church during their picketing activities. Their practice of picketing the funerals of fallen United States soldiers, seamen, airmen, and marines is well known throughout America. Westboro members claim their purpose for this picketing is to “draw attention to God’s alleged hatred of homosexuality” and “His punishment of American citizens and servicemen for their tolerance of homosexuality.” Westboro protests of this nature are as prolific as the litigation they generate.

Imagine now that you are a grieving father. Only a week ago, you lost your twenty-year-old son to a tragic accident in the Iraq War. Your only wish is to bury your son in peace; to give a fine Marine a hero’s rest. Yet on the way to the funeral service, you are confronted with the abhorrent signage of the Westboro Baptist Church: thanking God for your dead son; calling him a “fag;” telling you he is “going to hell.” Several weeks later, you find reprehensible commentary about your son on the Internet, disparaging his name even further, on a website called “godhatesfags.com.”

Such was the plight of Albert Snyder, father of fallen Marine Lance Corporal Matthew Snyder, who was killed in the line of duty in March 2006. After the Westboro Baptist Church picketed his slain son’s funeral, Snyder filed a lawsuit against Westboro alleging, *inter alia*, defamation, invasion of privacy by intrusion upon seclusion, and intentional infliction of emotional distress. Upon appeal to the United States Supreme Court, in *Snyder v. Phelps*,<sup>1</sup> the Court held that the speech of the Westboro members was protected under the First Amendment, which shielded Westboro from tort liability for its picketing in this case. In the wake of *Snyder*, it appears that bereaved parents and families of fallen American servicemen, as well as the grieving families of victims of violent tragedies, have no method under the law to redress their grievances against Westboro.

*Snyder* left a major problem in its wake: how can grieving families—private citizens—in a time already full of the utmost emotional pain, be shielded from these destructive words and attacks?

In response to the sharp rise in military funeral protests conducted by Westboro, and in response to Albert Snyder’s plight specifically, the federal government, over 30 states, and numerous municipalities have enacted legislation proscribing the picketing of funerals in some manner—usually with content-neutral restrictions on the time, place, and manner of picketing. These statutes have only emboldened the scions

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<sup>1</sup> 131 S. Ct. 1207 (2011).

of Westboro leader, Fred Phelps, Sr. Westboro members have vowed to continue with their demonstrations, as well as with their lawsuits to fight statutes that they deem to be unfairly or unreasonably restrictive of their First Amendment rights. Generally, these statutes impose time restrictions keyed to the start and end of funeral services, as well as no-demonstration buffer zones around funerals or processions (ranging anywhere from 100 feet to over 1,000 feet).

While enacted to protect grieving families of fallen soldiers in their time of greatest grief, these statutes do very little to assuage the anger of these families, nor to protect the honor of the individuals being laid to rest, nor to shield mourner’s eyes from the hateful—and, typically, individually targeted—messages of Westboro’s signs and chants. When picketing funerals, Westboro members are often merely a few hundred feet away from funeral services—not nearly enough distance for families to be fully guarded from the Westboro messages.

Westboro pickets have spawned numerous responses, which in many instances involve peaceful counter-protests; however, their activities have also incited violent acts from onlookers and other breaches of the peace. Police are generally on-scene at these protests—there to protect Westboro members from the violence that would ensue as a result of their speech in the absence of law enforcement.

The Supreme Court has recognized that “fighting words” constitute a category of speech that does not enjoy protection under the First Amendment. Originally defined in *Chaplinsky v. New Hampshire*,<sup>2</sup> “fighting words” are “those statements which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>3</sup> *Chaplinsky* represents the first and last decision in which the Supreme Court has ever affirmed a conviction under the “fighting words” doctrine.<sup>4</sup> The Court has refused to “breathe new life into the doctrine” in a number of cases since 1942.<sup>5</sup>

This Note avers that speech of the Westboro Baptist Church, in the context of funeral pickets, can be construed as targeted personal attacks on grieving families which have the potential to incite—and indeed have incited—immediate breaches of the peace and violent rebuttals. In light of *Snyder*, and the inadequacy of time, place, and manner statutes as a protection for grieving families, this Note argues for the revitalization of the “fighting words” doctrine to encompass targeted, *ad hominem* attacks from organizations like the Westboro Baptist Church, thereby leaving this speech unprotected by the First Amendment and exposing the speakers to tort liability.

Part II.A of this Note explores the development of categories of speech deemed unprotected by the First Amendment, and the Roberts Court’s refusal to add new categories of unprotected speech. Part II.B.1 introduces the “fighting words doctrine” as one of these categories of unprotected speech, and Part II.B.2 discusses the Supreme Court’s subsequent narrowing of the doctrine. Part III.A offers a background on the beliefs and funeral protest activities of the Westboro Baptist Church. Part III.B discusses the development of *Snyder v. Phelps*, tracing from the protest that gave rise to the initial litigation through the Supreme Court’s decision. In Part IV, the argument in favor of revitalizing “fighting words” to curb targeted speech at funeral protests is

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<sup>2</sup> 315 U.S. 568 (1942).

<sup>3</sup> *Id.* at 572.

<sup>4</sup> See Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 256 (2000).

<sup>5</sup> See *id.* at 257.

set forth, beginning with the contention that tort liability is a redress for private wrongs that would not necessarily have a stifling effect on free speech. Part IV.A contradicts scholarly arguments that the fighting words doctrine is dead or virtually nonexistent in current jurisprudence. Offered in Part IV.B is a brief overview of the premise that the state has traditionally recognized the dignitary rights of the deceased and their families. Justice Alito's dissent in *Snyder* is discussed in Part IV.C, laying the groundwork for the argument that Westboro's funeral protests constitute targeted speech that can be construed as fighting words. Part IV.D.1 addresses the premise that some of Westboro's funeral protest speech constitutes targeted messages and *ad hominem* attacks that could fall within the "fighting words" category. Part IV.D.2 addresses specific instances of violence against Westboro members as a result of their speech at funeral protests, which reinforces the argument set forth in Part IV.D.1. Part IV.D.3 suggests a revitalization of fighting words by refocusing inquiries on the "by their very utterance inflict injury" prong of the doctrine. Part IV.E addresses potential counterpoints. Part V offers in conclusion that the targeted opprobrious speech employed by Westboro at funeral protests constitutes fighting words, and should enjoy no First Amendment protection, so that grieving families have a method of redress in tort for the severe mental distress that can be caused by this hateful speech at a time of great emotional vulnerability.

## II. BACKGROUND: THE FIRST AMENDMENT AND THE FIGHTING WORDS DOCTRINE

### A. *The First Amendment and Categories of Unprotected Speech*

The First Amendment states "Congress shall make no law . . . respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble."<sup>6</sup> It is a fundamental principle of the First Amendment that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>7</sup> However, people need not hear or tolerate every message regardless of where it is dispatched.<sup>8</sup> The Supreme Court has long recognized that "not all speech is of equal First Amendment importance."<sup>9</sup> The First Amendment does not provide a "special privilege to invade the rights and liberties of others."<sup>10</sup> As once noted by the Court in *Cantwell v. Connecticut*,<sup>11</sup> "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the

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<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>8</sup> See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (holding prohibition on picketing was valid as it protected individuals who were "presumptively unwilling to receive it").

<sup>9</sup> See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, 763 (1985) (holding that a private citizen could recover damages for common law defamation claim where subject of lawsuit was a matter of private concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that First Amendment interest in protecting speech must be balanced against state's interest in protecting its citizens from tortious injury).

<sup>10</sup> *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972).

<sup>11</sup> 310 U.S. 296 (1940).

Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>12</sup>

The Supreme Court has carved out several exceptions to the First Amendment’s protection of speech.<sup>13</sup> Categories of speech which the Court has deemed unprotected include: speech which presents a clear and present danger to the public,<sup>14</sup> speech which advocates imminent lawless action,<sup>15</sup> obscenity,<sup>16</sup> false statements,<sup>17</sup> and fighting words.<sup>18</sup> These categories of speech are denied full First Amendment protection

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<sup>12</sup> *Id.* at 309-10.

<sup>13</sup> *See generally* O’Neill, *supra* note 4, at 251-65 (discussing the Supreme Court’s “categorical approach” to direct regulation of speech content).

<sup>14</sup> *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (recognizing there is no concept of a total freedom of speech if speech presents a “clear and present danger” to others). Justice Holmes employed the infamous illustration that one yelling “fire” in a crowded theatre would pose a clear and present danger to others and therefore is not within the purview of First Amendment protection. *Id.*

<sup>15</sup> *See* Brandenburg v. Ohio, 395 U.S. 444, 485 (1969) (reversing conviction for advocating violence against blacks and Jews after finding Ohio statute violated First Amendment, and holding that government cannot punish inflammatory speech unless that speech is directed to inciting, and is likely to incite, imminent lawless action).

<sup>16</sup> *See* Roth v. United States, 354 U.S. 476 (1957) (upholding defendant’s conviction for mailing obscene circulars and advertisements in violation of the federal obscenity law). The Court noted that any speech “having even the slightest redeeming social importance” will receive full constitutional protection, but obscene speech is implicitly rejected by the history of the First Amendment as being “utterly without redeeming social importance.” *Id.* at 484; *see also* Miller v. California, 413 U.S. 15, 24 (1973) (holding that expression will be deemed obscene, and hence utterly unprotected by the First Amendment, if it satisfies the following elements: (1) “the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest”; (2) the work “depicts or describes, in a patently offensive way” sexual conduct specifically defined by the applicable state law; and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”).

<sup>17</sup> *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (“The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”). The Court concluded that “constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered,’” and established the onerous “actual malice” standard for public officials seeking to recover in a libel suit. *Id.* at 271, 279-80.

<sup>18</sup> *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 574 (1942) (upholding, against First Amendment challenge, a state statute that, saved by a narrowing construction, punished a spectrum of derisive statements no broader than “fighting words,” where the defendant called a city marshal “a God damned racketeer” and “a damned Fascist”); *see also* discussion *infra* Parts II.B.1, II.B.2. The Court acknowledged an exception to First Amendment protection for “fighting words,” speech which inflicts injury or tends to “incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572. The Court concluded that this type of speech is of such slight social value that any benefit derived from it is outweighed by the interests of order and morality. *Id.* Because New Hampshire’s statute did no more than proscribe face-to-face words likely to cause a breach of peace, the Court upheld the statute. *Id.* at 573.

because “such utterances are no essential part of any exposition of ideas,” and are of only “slight social value as a step to truth.”<sup>19</sup>

Recently, under Chief Justice Roberts, the Court has shown a “genuine willingness to be guided by early American history when interpreting the Constitution.”<sup>20</sup> The Court refuses to recognize new categories of unprotected speech, unless there exists a longstanding historical tradition of treating the speech as unprotected.<sup>21</sup> In *United States v. Stevens*,<sup>22</sup> the Court stressed that it was disinclined to recognize new categories of free speech.<sup>23</sup> Chief Justice Roberts, writing for the Court, stated that “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”<sup>24</sup> Roberts suggested that “speech will be deemed categorically unprotected only if it has so been treated by longstanding historical tradition.”<sup>25</sup> The Court reasserted its reluctance to recognize new categories of unprotected speech in *Brown v. Entertainment Merchants Association*.<sup>26</sup> This reluctance, if not an outright refusal, to create new categories of unprotected speech essentially means that speech must fall within the already-existing categories discussed above to be deemed unprotected by the First Amendment.

### B. The Fighting Words Doctrine

#### 1. *Chaplinsky v. New Hampshire* and the Advent of “Fighting Words”

The “fighting words” doctrine stems from the Supreme Court’s 1942 decision in *Chaplinsky v. New Hampshire*,<sup>27</sup> in which the Court defined “fighting words” as “those [statements] which by their very utterance inflict injury or tend to incite an

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<sup>19</sup> *Id.* at 571-72; see also O’Neill, *supra* note 4, at 251.

<sup>20</sup> Patrick J. Charles & Kevin F. O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1766-67 (2012).

<sup>21</sup> *Id.* at 1766.

<sup>22</sup> 559 U.S. 460, 482 (2010) (striking down, as substantially overbroad, a federal statute criminalizing depictions of animal cruelty). The Court rejected the government’s invitation to hold that depictions of animal cruelty are categorically unprotected by the First Amendment. *Id.* at 472. The government’s proposal involved a test to recognize new categories of unprotected speech, enumerated as “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of speech against its societal costs.” *Id.* at 470.

<sup>23</sup> See *id.* at 471.

<sup>24</sup> *Id.* at 470.

<sup>25</sup> Charles & O’Neill, *supra* note 20, at 1767.

<sup>26</sup> 131 S. Ct. 2729, 2732, 2734 (2011) (striking down state law that banned sale and rental of “violent video games” to minors). The Court expressed that it would be unwilling to recognize any new categories of unprotected speech “without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.” *Id.* at 2734.

<sup>27</sup> 315 U.S. 568 (1942).

immediate breach of the peace.”<sup>28</sup> *Chaplinsky* represents the first and last decision in which the Supreme Court has ever affirmed a “fighting words” conviction.<sup>29</sup>

Walter Chaplinsky, a Jehovah’s Witness, was preaching and distributing literature on a street in Rochester, New Hampshire, and local citizens complained to the city marshal that Chaplinsky was “denouncing all religion as a ‘racket.’”<sup>30</sup> The city marshal informed Chaplinsky that he was well within his rights.<sup>31</sup> A disturbance broke out, and the outraged crowd “treated Chaplinsky with some violence.”<sup>32</sup> An officer escorted Chaplinsky toward the police station for his own protection, at which point Chaplinsky encountered the city marshal who originally spoke to him.<sup>33</sup> Chaplinsky shouted at the marshal, “[y]ou are a God damned racketeer” and called him “a damned Fascist,” going on to state that “the whole government of Rochester are Fascists or agents of Fascists.”<sup>34</sup> For saying these words, the city marshal arrested Chaplinsky for violating a New Hampshire statute that provided “[n]o person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . .”<sup>35</sup> The New Hampshire Supreme Court upheld the conviction, finding that the statute forbade only those words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”<sup>36</sup> This court described the test for tendency to cause violence as “what men of common intelligence would understand would be words likely to cause an average addressee to fight.”<sup>37</sup>

The United States Supreme Court affirmed the New Hampshire Supreme Court unanimously.<sup>38</sup> Justice Murphy, writing for the Court, declared Chaplinsky’s words to be outside the purview of First Amendment protection:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to

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<sup>28</sup> *Id.* at 572.

<sup>29</sup> See O’Neill, *supra* note 4, at 256.

<sup>30</sup> *Chaplinsky*, 315 U.S. at 569-70.

<sup>31</sup> *Id.*

<sup>32</sup> *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941). One member of the crowd allegedly tried to impale Chaplinsky on a flagpole; see Brief for Appellant at 3, *Chaplinsky*, 315 U.S. at 568.

<sup>33</sup> *Chaplinsky*, 315 U.S. at 569.

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

<sup>35</sup> *Id.*; 1926 N.H. Laws, ch. 378, § 2.

<sup>36</sup> *Chaplinsky*, 18 A.2d at 758.

<sup>37</sup> *Id.* at 762.

<sup>38</sup> *Chaplinsky*, 315 U.S. at 568.



truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>39</sup>

The Court concluded that Chaplinsky's speech fell into the "narrowly limited class[] of speech" called "fighting words," and upheld Chaplinsky's conviction.<sup>40</sup>

## 2. Post-*Chaplinsky*: Narrowing Fighting Words

For nearly thirty years the Supreme Court continued to uphold the fighting words doctrine, yet declined to extend or apply it in every case in which it was addressed.<sup>41</sup> The Court began to steadily narrow the grounds on which "fighting words" are held to apply, beginning in 1969 with *Street v. New York*.<sup>42</sup> Decided in 1971, *Cohen v. California*<sup>43</sup> further narrowed the doctrine to apply to speech "directed to the person of the hearer"<sup>44</sup> and which could be "reasonably . . . regarded [as] . . . direct personal

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<sup>39</sup> *Id.* at 571-72 (citations omitted). This passage has been employed to place other entire categories of speech outside the protection of the First Amendment. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 753, 754 (1982) (child pornography category); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 255-57 (1952) (group libel).

<sup>40</sup> *Chaplinsky*, 315 U.S. at 571-72, 574.

<sup>41</sup> *See* O'Neill, *supra* note 4, at 256-57; *see also* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 402 (2005) (recognizing that the Supreme Court has "not affirmed a single fighting words conviction since *Chaplinsky*, but the Court has repeatedly affirmed the doctrine's continued vitality").

<sup>42</sup> 394 U.S. 576, 581 (1969) (vacating defendant's conviction under New York flag desecration statute where defendant publicly burned flag in response to murder of civil rights leader). The Court found the statute was unconstitutionally applied as it permitted the punishment of merely speaking defiant words about the American flag. *Id.* at 578-80. The Court found that the defendant's "remarks were [not] so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" *Id.* at 592 (quoting *Chaplinsky*, 315 U.S. at 574).

<sup>43</sup> 403 U.S. 15 (1971) (overturning defendant's breach-of-the-peace conviction for walking through courthouse wearing jacket with "Fuck the Draft" written on back). The Court noted that for speech to be constitutionally criminalized under the fighting words doctrine, the speech must clearly address a particular listener as opposed to the general public. *Id.* at 20. The Court noted that fighting words are "personally abusive epithets . . . likely to provoke violent reaction," and rejected incitement, vulgarity, and offense to bystanders as rationales for upholding defendant's conviction. *Id.*

<sup>44</sup> *Id.* Michael J. Mannheimer notes that "[a]lthough the 'directed to the person of the hearer' requirement was spelled out explicitly for the first time in *Cohen*, the Court was actually restating a thought developed in *Cantwell*. This requirement went unmentioned two years later in *Chaplinsky* . . . [and] is crucial to differentiate the fighting words cases from those, like *Cohen*, in which a word is addressed to no one in particular or the world in general, and also from the 'hostile audience' cases . . . in which speech that arguably otherwise constitutes fighting words is addressed to a large group." Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1534 n.74 (1993).

insult[s].”<sup>45</sup> Fighting words are thus more akin to conduct than the communication of ideas.<sup>46</sup>

The Court further enumerated this restriction of the doctrine in *Gooding v. Wilson*,<sup>47</sup> in which the majority limited the doctrine to those words “having a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”<sup>48</sup> Invoking *Gooding*, the Court furthered this limitation in *Rosenfeld v. New Jersey*,<sup>49</sup> *Lewis v. New Orleans*,<sup>50</sup> and *Brown v. Oklahoma*.<sup>51</sup> The Court again declined to revitalize “fighting words” in *Texas v. Johnson*,<sup>52</sup> wherein the Court rejected the notion that flag burning “falls within that small class of ‘fighting words’ that are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace’” or that it constituted an “invitation to exchange fisticuffs.”<sup>53</sup>

Advocates for hate speech regulations failed to revitalize the fighting words doctrine in the early 1990s, with the decision in *R.A.V. v. City of St. Paul*.<sup>54</sup> Striking down a municipal ordinance that criminalized hate speech, the Court held that the ordinance was flawed because it singled out a particularized list of hateful statements.<sup>55</sup> According to the Court, the existence of this particularized list in the ordinance went “even beyond mere content discrimination, to actual viewpoint

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<sup>45</sup> *Cohen*, 403 U.S. at 20.

<sup>46</sup> See *Cohen*, 403 U.S. at 22 (examining whether “California can excise, as ‘offensive conduct,’ one particular scurrilous epithet from the public discourse” (emphasis added)); *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring); see also discussion *infra* note 140 and accompanying text.

<sup>47</sup> 405 U.S. 518 (1972) (striking down a Georgia statute, which criminalized use of “opprobrious words or abusive language, tending to cause a breach of the peace,” in the context of an anti-war demonstration outside an army facility). Defendant exclaimed, *inter alia*, “[y]ou son of a bitch, I’ll choke you to death” and “[w]hite son of a bitch, I’ll kill you,” when being moved away from the protest by police officers. *Id.* at 519 n.1. The majority further limited the scope of “fighting words” by confining it to words “hav[ing] a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” *Id.* at 524.

<sup>48</sup> *Id.* at 524.

<sup>49</sup> 408 U.S. 901, 904-05 (1972) (invoking *Gooding* to vacate conviction for using “mother-fucker” during public school board meeting, to describe teachers, the school board, the town, and county).

<sup>50</sup> 408 U.S. 913 (1972) (invoking *Gooding* to vacate mother’s conviction for calling officers “God damn mother fuckers” during son’s arrest).

<sup>51</sup> 408 U.S. 914 (1972) (invoking *Gooding* to vacate conviction of Black Panthers member for use of the word “motherfucker” at a political meeting).

<sup>52</sup> 491 U.S. 397, 414 (1989) (holding that a flag burning at protest of President Ronald Reagan was expressive conduct under the First Amendment, and striking down a Texas flag desecration statute).

<sup>53</sup> *Id.* at 408-09.

<sup>54</sup> 505 U.S. 377 (1992) (striking down a St. Paul ordinance that criminalized “bias-motivated disorderly conduct” because it singled out the public display of symbols that “arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”).

<sup>55</sup> See *id.* at 394.

discrimination,<sup>56</sup> and it was therefore held unconstitutional.<sup>57</sup> The Court in *Virginia v. Black*<sup>58</sup> further affirmed that fighting words still exists as a category of unprotected speech by observing that the Court's holding in *R.A.V.* had not banned all low-value speech categories such as threats or fighting words.<sup>59</sup>

To summarize the current state of the "fighting words" category, it is essentially now limited to statements constituting direct personal insults or affronts,<sup>60</sup> or invitations to exchange fisticuffs,<sup>61</sup> which are individually directed at a particular target.<sup>62</sup>

### III. BACKGROUND: THE WESTBORO BAPTIST CHURCH AND *SNYDER V. PHELPS*

#### A. *The Westboro Baptist Church and Its Protest Activities*

Founded in Topeka, Kansas by disbarred attorney Fred W. Phelps, Sr. in 1955, the Westboro Baptist Church [Westboro] believes, among other things, that God is punishing America for tolerating the "sin" of homosexuality by killing Americans.<sup>63</sup> Indeed, the church's predominant message is one of virulent anti-homosexuality. The church consists primarily, if not exclusively, of members of Phelps' extended family.<sup>64</sup>

According to its website, the church's members engage in "daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth" and "display large, colorful signs containing Bible words and sentiments, including: GOD HATES FAGS, FAGS HATE GOD, AIDS CURES FAGS, THANK GOD FOR AIDS, FAGS BURN IN HELL, GOD IS NOT MOCKED, FAGS ARE NATURE FREAKS, GOD GAVE FAGS UP, NO SPECIAL LAWS FOR FAGS, FAGS DOOM NATIONS, THANK GOD FOR DEAD SOLDIERS, FAG TROOPS, GOD BLEW UP THE TROOPS, GOD HATES AMERICA, AMERICA IS DOOMED, THE WORLD IS DOOMED, etc."<sup>65</sup> The church protesters often sing or chant songs, often well-known popular music with the church's own "lyrics," with or without the use of amplification devices.<sup>66</sup>

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<sup>56</sup> *Id.* at 391.

<sup>57</sup> *Id.* at 377-78.

<sup>58</sup> 538 U.S. 343 (2003).

<sup>59</sup> *See id.* at 361-62.

<sup>60</sup> *See Johnson*, 491 U.S. at 409; *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>61</sup> *See Johnson*, 491 U.S. at 409.

<sup>62</sup> *See Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

<sup>63</sup> *See* Westboro Baptist Church, *About Westboro Baptist Church*, GODHATESFAGS.COM, <http://godhatesfags.com/wbcinfo/aboutwbc.html> (Oct. 1, 2013).

<sup>64</sup> Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 578 (2007).

<sup>65</sup> *About Westboro Baptist Church*, *supra* note 63.

<sup>66</sup> McAllister, *supra* note 64, at 578.

Westboro claims to have engaged in more than 51,000 anti-gay protests since 1991.<sup>67</sup> These protests and pickets have included over 600 military funerals, which Westboro claims were of “troops whom God has killed in Iraq/Afghanistan in righteous judgment against an evil nation.”<sup>68</sup> Westboro has also protested at funerals of “police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes.”<sup>69</sup> Westboro has protested funerals of victims of tornadoes in Joplin, Missouri, victims of Hurricane Katrina, and even the funerals of the innocent children killed in the Sandy Hook, Connecticut elementary school shooting.<sup>70</sup> The church has also agreed to accept free media airtime in lieu of protesting certain funerals; notably, the funeral of a nine-year-old victim of the Tucson shooting spree that rendered U.S. Representative Gabrielle Giffords permanently disabled,<sup>71</sup> and the funeral of five Amish girls murdered in their schoolhouse by a gunman.<sup>72</sup> Westboro gained much notoriety for its protest of the funeral of Matthew Shepard, a homosexual man who was beaten to death in Wyoming because of his sexuality.<sup>73</sup> The church maintains a cruel and virulently homophobic “perpetual memorial” to Matthew’s death on its website.<sup>74</sup> Of note most recently, Westboro announced plans to picket the funerals of victims of the 2013 Boston Marathon bombings, thanking God for their deaths, which led to a petition on the White House website asking for the banning of such demonstrations by the church.<sup>75</sup>

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<sup>67</sup> *About Westboro Baptist Church*, *supra* note 63.

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

<sup>69</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1224 (2011) (Alito, J., dissenting).

<sup>70</sup> See Westboro Baptist Church, *Archive*, GODHATESFAGS.COM, <http://www.godhatesfags.com/archive/index.html> (last visited Nov. 20, 2013); *As Newtown Plans Burials For Shooting Victims, Westboro Baptist Church Prepares To Picket*, CBS NEW YORK (Dec. 16, 2012), <http://newyork.cbslocal.com/2012/12/16/reports-as-newtown-plans-burials-for-shooting-victims-westboro-baptist-church-prepares-to-picket>.

<sup>71</sup> See Lourdes Medrano, *How Tucson Kept Westboro Baptist Church Protests Out of Town*, CHRISTIAN SCI. MONITOR (Jan. 14, 2011), <http://www.csmonitor.com/USA/2011/0114/How-Tucson-kept-Westboro-Baptist-Church-protests-out-of-town>. The church proclaimed that the young victim was “better off dead.” *Snyder*, 131 S. Ct. at 1224 (Alito, J., dissenting).

<sup>72</sup> See Jacques Steinberg, *Air Time Instead of Funeral Protest*, N.Y. TIMES (Oct. 6, 2006), [www.nytimes.com/2006/10/06/us/06radio.html?r=0](http://www.nytimes.com/2006/10/06/us/06radio.html?r=0). Shirley Phelps-Roper stated it was “appropriate [God] sent a pervert in to shoot those children” and that the Amish “were laid to an open shame because they are a false religion.” *Id.*

<sup>73</sup> See Westboro Baptist Church, *Perpetual Gospel Memorial to Matthew Shepard*, GODHATESFAGS.COM, <http://www.godhatesfags.com/memorials/matthewshepardmemorial.html> (last visited Nov. 20, 2013).

<sup>74</sup> *See id.*

<sup>75</sup> See Steven Nelson, *Westboro Baptist Church Plans to Picket Boston Funerals*, U.S. NEWS & WORLD REP. (Apr. 16, 2013), <http://www.usnews.com/news/newsgram/articles/2013/04/16/boston-bombing-funerals-will-be-picketed-westboro-baptist-church-says>. The church stated that the death of eight-year-old victim Martin Richard was God’s punishment, and that his “blood was on [society’s] hands.” *Id.* The announced funeral protest never came to fruition.

The Westboro Baptist Church or its members are frequently parties to litigation, and several of its members are trained as attorneys.<sup>76</sup> Indeed, some of them are currently licensed to practice law.<sup>77</sup> The church members go to great lengths to ensure that they will not be arrested when they engage in protest.<sup>78</sup> In an effort to appear averse to civil disobedience, the members generally comply with law enforcement instructions, such as those regarding location of protest or the use of loudspeakers.<sup>79</sup> The church members, however, are far from apprehensive about bringing lawsuits to challenge restrictions placed on their protest activities, and they are quite adept at defending their First Amendment rights.<sup>80</sup>

*B. Background and Case History of Snyder v. Phelps*

1. The Westboro Protest of Lance Corporal Matthew Snyder's Funeral

In Iraq on March 3, 2006, Marine Lance Corporal Matthew Snyder was killed in the line of duty.<sup>81</sup> His father, Albert Snyder, selected St. John's Catholic Church in Westminster, Maryland as the site for Matthew's funeral service.<sup>82</sup> Mr. Snyder posted obituary notices in local newspapers, providing notice of the location and March 10, 2006 date of the funeral.<sup>83</sup> Members of the Westboro Baptist Church learned of Snyder's funeral and issued a news release on March 8, 2006 which announced their intention to travel to Maryland to picket at the funeral.<sup>84</sup> They arrived in Westminster and engaged in picketing activities on March 10, 2006, outside of St. John's Catholic Church.<sup>85</sup>

Westboro's testimony at trial established that its picketing efforts "gained increased attention when its members began to picket funerals of soldiers killed in recent years."<sup>86</sup> Westboro picketed Snyder's funeral in order to "publicize their message of God's hatred of America for its tolerance of homosexuality."<sup>87</sup> At trial, Westboro pastor Fred Phelps, Sr. testified that it was Westboro's "duty" to deliver the

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<sup>76</sup> McAllister, *supra* note 64, at 578.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 578-79.

<sup>80</sup> *Id.* at 579.

<sup>81</sup> Snyder v. Phelps, 580 F.3d 206, 211 (4th Cir. 2009) (quoting Snyder v. Phelps, 533 F. Supp. 2d 567, 571-72 (D. Md. 2008)).

<sup>82</sup> *Id.*

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 211-12.

<sup>86</sup> *Id.* at 211.

<sup>87</sup> *Id.* at 212.

message “whether they want to hear it or not.”<sup>88</sup> For Albert Snyder, however, this picketing made his son’s funeral into a “media circus for [Westboro’s] benefit.”<sup>89</sup>

Westboro notified local police in advance of its arrival in Westminster, and at trial it was undisputed that Westboro had complied with all local ordinances and police directions with respect to maintaining a certain distance from the front of the church.<sup>90</sup> At trial, it was established that Westboro members had carried a mix of signage, ranging from general messages<sup>91</sup> to those which could be construed as specific<sup>92</sup> to Snyder’s funeral. One large sign displayed a graphic photograph of two men engaged in anal intercourse.<sup>93</sup>

Westboro members staged their protest directly in front of St. John’s Catholic Church, and Mr. Snyder re-routed Matthew’s funeral procession to an alternate entrance.<sup>94</sup> After the route was readjusted, the Snyders were still only a mere 200-300 feet from the Phelps and Westboro members during the procession.<sup>95</sup> On the way to the funeral, “as Mr. Snyder was trying to focus on the memory of his son, he looked at his daughters and saw the Phelps’ signs behind them.”<sup>96</sup> It was later established through testimony that Mr. Snyder, while he saw parts of the signs on the way to Matthew’s funeral, did not see the entirety of their message until that evening while he watched a news broadcast that covered the protest.<sup>97</sup>

Westboro posted a message on its website in the weeks following the funeral which contained religiously oriented denunciations of the Snyders, which gave rise to Albert Snyder’s defamation claim.<sup>98</sup> The website “epic,” as the Snyders dubbed it, was entitled “The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of the

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also Brief for Petitioner at 4, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497 (“Unsurprisingly, the Phelps’ presence turned Matthew Snyder’s funeral into a circus. Even according to *the Phelps’ expert*, they were a ‘petty irritant.’”).

<sup>90</sup> *Snyder*, 580 F.3d at 212.

<sup>91</sup> *Id.* Signs expressing generalized messages included “God Hates the USA,” “America is Doomed,” “Pope in Hell,” and “Fag troops.” *Id.*

<sup>92</sup> *Id.* “Specific” messages contained on Westboro signage included “You’re Going to Hell,” “God Hates You,” “Semper Fi Fags,” and “Thank God for Dead Soldiers.” *Id.*

<sup>93</sup> Reply Brief for Petitioner, *Snyder v. Phelps*, 131 S. Ct. 1207 (No. 09-751), 2010 WL 3167312, at \*15.

<sup>94</sup> Brief for Petitioner at 4, *Snyder*, 131 S. Ct. 1207. The protest was staged directly in front of St. John’s Catholic elementary school, and across the street from a public school. *Id.* “To mitigate the harm the Phelps’ presence and activities would have on the school children, the school mandated that all blinds be closed, covered doors and windows facing the Phelps with paper, and offered ‘excused absences’ to children whose parents chose to keep them out that day.” *Id.* at \*4-5.

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

<sup>96</sup> *Id.*

<sup>97</sup> *Snyder*, 131 S. Ct. at 1213-14.

<sup>98</sup> *Id.* at 1214 n.1.

Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!”<sup>99</sup> As discussed in Part III.B.3 below, the Supreme Court did not visit the website “epic” in deciding *Snyder*.

## 2. Procedural History of *Snyder v. Phelps*

In June 2006, Albert Snyder filed a diversity action in the United States District Court for the District of Maryland, against Fred Phelps, Sr., his daughters, and the Westboro Baptist Church.<sup>100</sup> Snyder asserted five tort claims—invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, defamation, publicity given to private life, and civil conspiracy.<sup>101</sup> Contending that the First Amendment insulated its speech from tort liability, Westboro moved for summary judgment, which the district court granted as to the claims for defamation and publicity given to private life.<sup>102</sup> A trial was held as to the remaining claims, and a jury awarded Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages, the latter of which the District Court remitted to \$2.1 million while leaving “the jury verdict otherwise intact.”<sup>103</sup>

On appeal to the United States Court of Appeals for the Fourth Circuit, Westboro again contended that the speech of its members was fully protected by the First Amendment, and that it was entitled to summary judgment as a matter of law.<sup>104</sup> The Fourth Circuit agreed, reversing the District Court, and concluding that the statements on Westboro’s signage involved matters of public concern, “were not provably false, and were expressed solely through hyperbolic rhetoric.”<sup>105</sup> The United States Supreme Court granted certiorari in March 2010.<sup>106</sup>

## 3. United States Supreme Court Opinion

Affirming the Fourth Circuit in an 8-1 decision, with Justice Breyer concurring and Justice Alito dissenting, the Court held that the speech of the Westboro Baptist Church was protected under the First Amendment, and that Westboro was therefore shielded from liability in tort.<sup>107</sup>

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<sup>99</sup> *Id.* at 1226 (Alito, J., dissenting) (“[T]he epic addressed the Snyder family directly: . . . ‘you raised [Matthew] for the devil . . . taught Matthew to defy his Creator, to divorce, and to commit adultery . . . how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity . . . taught Matthew to be an idolater.’”).

<sup>100</sup> *Id.* at 1214.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* Westboro contended that the speech being challenged constituted “expressions of opinion, which are not actionable.” *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009). Westboro asserted that their words were “clearly rhetorical, hypothetical, religious, and laced with opinion” and that it would be “impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions.” *Id.* at 212-13.

<sup>103</sup> *Snyder*, 131 S. Ct. at 1214.

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

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

<sup>106</sup> *Snyder v. Phelps*, 559 U.S. 990 (2010).

<sup>107</sup> *Snyder*, 131 S. Ct. at 1210, 1212.

Chief Justice Roberts, writing for the Court, held that *Hustler Magazine, Inc. v. Falwell*<sup>108</sup> allowed the First Amendment to be used as a defense in state tort suits, including those for intentional infliction of emotional distress.<sup>109</sup> The Court had to hold that Westboro’s speech was on matters of public concern in order for the First Amendment to prohibit holding Westboro liable in tort.<sup>110</sup> In determining whether Westboro’s speech was of public or private concern, the Court examined the “content, form, and context” of the speech “as revealed by the whole record.”<sup>111</sup> The Court determined that the “‘content’ of Westboro’s signs plainly relat[ed] to broad issues of interest to society at large, rather than matters of ‘purely private concern.’”<sup>112</sup> The Court reached this conclusion by finding that the issues highlighted by Westboro<sup>113</sup> were matters of public import, and that the Westboro signage was designed to reach as broad a public audience as possible.<sup>114</sup> The Court found the fact that some of Westboro’s signs were viewed as being directed specifically at the Snyders was inconsequential to the “public versus private concern” inquiry, stating that the “overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”<sup>115</sup> The Court also held that the context of the Westboro picket, though designed to desecrate the private funeral of a fallen Marine, could not remove First Amendment protection.<sup>116</sup>

It bears mentioning that the fact that Albert Snyder had proven the rigorous standard of the intentional infliction of emotional distress tort<sup>117</sup> was not contested at

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<sup>108</sup> 485 U.S. 46 (1988).

<sup>109</sup> *Snyder*, 131 S. Ct. at 1215. It is worth noting that neither *Snyder* nor *Hustler* held that the First Amendment *per se* trumps a private citizen’s claim for intentional infliction of emotional distress. *See id.*; *see also Hustler*, 485 U.S. at 46.

<sup>110</sup> *See Snyder*, 131 S. Ct. at 1215 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)) (“[S]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”). Where matters of purely private significance are at issue, First Amendment protections are less rigorous. *Id.* (citing *Dun & Bradstreet*, 472 U.S. at 758) (finding that where speech on private matters is restricted, “there is no potential interference with a meaningful dialogue of ideas” and the “threat of liability” does not pose the risk of a “reaction of self-censorship on matters of public import”).

<sup>111</sup> *Id.* at 1216 (citing *Dun & Bradstreet*, 472 U.S. at 761). The Court examines “what was said, where it was said, and how it was said.” *Id.*

<sup>112</sup> *Id.* (citing *Dun & Bradstreet*, 472 U.S. at 759).

<sup>113</sup> “[T]he 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.” *Id.* at 1217.

<sup>114</sup> *Id.* at 1217.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (noting that Westboro’s signs were “displayed on public land next to a public street” and that this reflected the fact that Westboro “finds much to condemn in modern society,” such that the funeral setting did not alter the conclusion that the speech was on matters of public concern).

<sup>117</sup> The defendant(s) must, intentionally or recklessly, engage in extreme and outrageous conduct that causes the plaintiff to suffer severe emotional distress. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 580 (D. Md. 2008) (citing *Miller v. Bristol-Myers Squibb Co.*, 121 F. Supp. 2d 831, 839 (D. Md. 2000)). The jury at trial had “sufficient evidence before it to conclude that



the Supreme Court level.<sup>118</sup> Westboro “abandoned any effort to show” that the elements of the emotional distress tort were not met, choosing not to contest the sufficiency of the evidence found at trial.<sup>119</sup>

It is also important to note that the Supreme Court did not consider the website “epic”<sup>120</sup> when reviewing Snyder’s claims.<sup>121</sup> The Court found that, although the epic was properly submitted to the jury and discussed in the courts below, Snyder had never mentioned the website epic in his petition for certiorari, and therefore the epic was not properly before the Court and could not factor into its analysis.<sup>122</sup>

#### IV. ANALYSIS

When the First Amendment was conceived, its drafters drew upon notions of liberty and responsibility—rather than upon license<sup>123</sup>—and so the First Amendment should not immunize an “intentional[] . . . attack”<sup>124</sup> on a private person where a jury finds liability under state tort law. Tort law was designed to compensate for injuries brought about by private wrongs that the Constitution gives a defendant no privilege to commit.<sup>125</sup> Thus, tort suits are not vehicles of public outrage; rather, tort law serves as a tool for the redress of private individual wrongs that damage unwilling victims.<sup>126</sup> The public discourse under the First Amendment “should not be understood as a realm in which all standards of civility and respect have been suspended.”<sup>127</sup> The right to

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[Albert Snyder] had suffered ‘severe and specific’ injuries” as a result of Westboro’s speech at Matthew Snyder’s funeral and its website epic. *See id.* at 180-81. The author notes that Albert Snyder proved the elements of the tort despite having the added burden of showing that his severe emotional distress was not simply attributable to his son’s death alone; that is, he had to show that he suffered *additional* severe emotional distress because of Westboro’s conduct.

<sup>118</sup> *See Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting).

<sup>119</sup> *Id.*

<sup>120</sup> *See supra* notes 98-99 and accompanying text.

<sup>121</sup> *Snyder*, 131 S. Ct. at 1214 n.1.

<sup>122</sup> *Id.* (“The epic is not properly before us and does not factor into our analysis.”).

<sup>123</sup> *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288-89 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (“[T]hough this be a State of Liberty, yet it is not a State of License; though Man in that State have an unconroleable [sic] Liberty to dispose of his Person or Possessions, yet he has not Liberty to destroy himself . . . that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (recognizing the “basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty”); Michael I. Krauss, *A Marine’s Honor: The Supreme Court from Snyder to Alvarez*, 20 GEO. MASON L. REV. 1, 15 (2012); *see also infra* note 127 and accompanying text.

<sup>124</sup> *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting).

<sup>125</sup> *See, e.g., Dun & Bradstreet*, 472 U.S. at 761 (holding that private citizen could recover damages for common law defamation claim where subject of lawsuit was a matter of private concern); *see also* Krauss, *supra* note 123, at 15.

<sup>126</sup> *See* Krauss, *supra* note 123, at 1.

<sup>127</sup> Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 CONN. L. REV. 101, 107 (2012). Professor Heyman contends that the

commit a wrong against a private person in order to make a political or religious statement should be no more permissible under the First Amendment than would be the right to shoot someone to make a statement about the Second Amendment right to bear arms.<sup>128</sup>

Time, place, and manner statutes restrictive of funeral protests<sup>129</sup> have perhaps mitigated the effects of Westboro’s distasteful signage on grieving families, but these statutes arguably do nothing to remedy the injuries inflicted upon these families by Westboro’s speech.<sup>130</sup> Indeed, Westboro has vowed to continue its protests despite these new legal restrictions.<sup>131</sup> In light of these facts, the Supreme Court’s reluctance to create new categories of unprotected speech,<sup>132</sup> and the *Snyder* Court’s near-absolutist protection of Westboro’s First Amendment rights, the remainder of this Note argues that Westboro should be exposed to tort liability by deeming Westboro’s targeted messages unprotected under a revitalized fighting words doctrine.

#### A. The Fighting Words Doctrine Is Not Dead

Though commentators seeking the abolition of the fighting words doctrine have “seized on the fact that the Supreme Court has not affirmed a single fighting words conviction” since *Chaplinsky*,<sup>133</sup> the doctrine is not entirely dead,<sup>134</sup> as some scholars

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“root problem with the Supreme Court’s approach [in *Snyder*] 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.” *Id.* at 129. This idea is “rooted in the Lockean natural rights tradition, which deeply influenced the adoption of the Bill of Rights.” *Id.*; see also *supra* note 123 and accompanying text.

<sup>128</sup> See *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring). This point is given credence by the hypothetical situation presented in Justice Breyer’s concurring opinion. *Id.*; see also Krauss, *supra* note 123, at 15; see also *infra* note 140 and accompanying text.

<sup>129</sup> See discussion in Introduction *supra* Part I.

<sup>130</sup> See *Snyder*, 131 S. Ct. at 1227 (Alito, J., dissenting) (“It is apparent . . . that the enactment of these laws is no substitute for the protection provided by the established IIED tort . . . there is absolutely nothing to suggest that Congress and the state legislatures, in enacting these laws, intended them to displace the protection provided by the well-established IIED tort.”). Justice Alito recognized that the Maryland law, enacted after the *Snyder* funeral protest, would not have changed the situation, as Westboro would have been acting in compliance with its restrictions. *Id.* Justice Alito noted “the verbal attacks that severely wounded [*Snyder*] in this case complied with the new Maryland law regulating funeral picketing.” *Id.*

<sup>131</sup> See Paige Lavender, *Westboro Baptist Church Vows to Defy Rules After Congressional Smackdown*, HUFFINGTON POST (Aug. 4, 2012, 3:23 PM), [http://www.huffingtonpost.com/2012/08/04/westboro-baptist-church-\\_n\\_1741963.html](http://www.huffingtonpost.com/2012/08/04/westboro-baptist-church-_n_1741963.html) (“Steven Drain, spokesman for Westboro, told CNN the new restrictions were ‘really not going to change our plans at all.’ ‘We’re going to continue to [protest],’ Drain said.”).

<sup>132</sup> See discussion *supra* Part II.A.

<sup>133</sup> Friedlieb, *supra* note 41, at 402; see also discussion *supra* Parts II.B.1, II.B.2.

<sup>134</sup> *Contra, e.g.*, Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980) (describing the fighting words doctrine as “nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression” and “not constitutionally justifiable”). Gard dismissed the common justification that the doctrine protects a private individual from being insulted by another private individual, calling it an “improbable supposition.” *Id.* at 580. Gard contends that the “interest in preventing

contend. As discussed in Part II.B.2 above, the doctrine has indeed not been applied to uphold any convictions since *Chaplinsky*; nonetheless, though it has been narrowed<sup>135</sup> enough to warrant at least some criticism of its viability,<sup>136</sup> the doctrine is still alive in First Amendment jurisprudence.

The Supreme Court's affirmation in *R.A.V. v. City of St. Paul* that fighting words remain unprotected by the First Amendment demonstrates the weakness of the scholarly contention that the fighting words doctrine is "dead."<sup>137</sup> While the Court did strike down the fighting words statute at issue in the case, the Court stated that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."<sup>138</sup> It is also noteworthy that, while no Supreme Court cases have affirmed convictions since *Chaplinsky*, "fighting words cases are generally prosecuted by the states, and state appellate and supreme courts have repeatedly affirmed fighting words convictions."<sup>139</sup>

Furthermore, *Snyder v. Phelps* itself contravenes any contention that the fighting words doctrine has met its demise. Justice Breyer's concurring opinion cited *Chaplinsky* and addressed fighting words by employing a hypothetical situation.<sup>140</sup>

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minor indignation and hurt feelings is too trivial for the law's cognizance." *Id.* at 581. The effects of the speech at issue in *Snyder*, however, clearly surpass mere "minor indignation and hurt feelings," and it bears mentioning that much of the scholarly criticism of the fighting words doctrine preceded *Snyder* and the phenomenon of funeral picketing.

<sup>135</sup> See discussion *supra* Part II.B.2.

<sup>136</sup> See Burton Caine, *The Trouble With "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 551-52 (2004). Professor Caine opined that the Supreme Court has "worn down the fighting words doctrine into a shadow of itself." *Id.* Caine cites as evidence fact that the "words whose very utterance inflict injury" prong of the doctrine has been largely ignored by the Court and has been virtually abandoned. See *id.* Because of this, Caine argues that the "chill" that *Chaplinsky* poses under present doctrine demands "univocal repeal." See *id.* Again, it is noteworthy that Caine's article preceded the Court's decision in *Snyder* and the phenomenon of funeral picketing. Furthermore, Caine's treatment of the "words whose very utterance inflict injury" prong is addressed *infra* Part IV.D.3.

<sup>137</sup> See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>138</sup> *Id.* at 393. Though the Court did strike down the statute at issue on grounds of content-based discrimination, the fact that the Court addressed the fighting words doctrine in this manner implies that the fighting words doctrine is still alive and well. See Friedlieb, *supra* note 41, at 402 (stating that the Court has "repeatedly affirmed the doctrine's continued vitality—most recently in *R.A.V.*").

<sup>139</sup> Friedlieb, *supra* note 41, at 402; see also, e.g., *People v. Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994); *Estes v. State*, 660 S.W.2d 873 (Tex. App. 1990); *State v. Read*, 680 A.2d 944 (Vt. 1996). Friedlieb notes that, as such crimes are ordinarily misdemeanors carrying light penalties, many defendants "likely opt not to spend the time or money challenging convictions for fighting words offenses." Friedlieb, *supra* note 41, at 402 n.84. This results in "the number of cases at the appellate level likely drastically underreflect[ing] the number of cases at the trial court level and even more so the number of arrests on fighting words-related charges." *Id.*

<sup>140</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring). Justice Breyer employed a hypothetical situation illustrative of fighting words: "Suppose that A were

Justice Alito directly addressed fighting words and *Chaplinsky* in his dissent.<sup>141</sup> Addressing Justice Alito’s “attempt[] to draw parallels between [*Snyder*] and hypothetical cases involving defamation or fighting words,”<sup>142</sup> Chief Justice Roberts noted that there was “no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or ‘fighting words.’”<sup>143</sup> This statement indicates that, although the Court did not find that Westboro’s speech was outside the scope of First Amendment protection under fighting words, the fighting words category is still good precedent, and the doctrine is still “alive.”<sup>144</sup>

In the face of legal scholars’ contentions that the doctrine is virtually dead,<sup>145</sup> and their calls for the doctrine’s abolition,<sup>146</sup> the Supreme Court “has not indicated the slightest interest in eliminating the doctrine,”<sup>147</sup> and thus the fighting words doctrine remains as valid precedent within First Amendment jurisprudence.<sup>148</sup>

*B. The State Traditionally Protects the Dignity of the Deceased and the Dignitary Rights of the Bereaved Family*

American law recognizes a number of dignitary rights of the family of the deceased. For instance, in cases where a corpse has been mistreated in some manner,

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physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A’s use of unlawful, unprotected means.” *Id.* Invoking fighting words, Justice Breyer concluded by noting that, in some cases, the use of “certain words as means would be similarly unprotected” by the First Amendment. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>141</sup> See *id.* at 1222 (Alito, J., dissenting); see also discussion *infra* Part IV.C.

<sup>142</sup> *Id.* at 1215 n.3 (majority opinion).

<sup>143</sup> *Id.* (citing *Snyder v. Phelps*, 580 F.3d 206, 218 n.12 (4th Cir. 2009)).

<sup>144</sup> This is further supported by the justices’ questions during oral arguments in *Snyder*. Some of the justices asked whether fighting words, as a category of unprotected speech, could only be directed to an individual literally capable of resorting to violence. Transcript of Oral Argument at 32, *Snyder*, 131 S. Ct. 1207 (No. 09-751), available at [http://www.supremecourt.gov/oral\\_arguments/audio/2010/09-751](http://www.supremecourt.gov/oral_arguments/audio/2010/09-751) (“JUSTICE ALITO: ‘Well, it’s an older—it’s an elderly person. She’s really probably not in—in a position to punch this person in the nose.’ JUSTICE SCALIA: ‘And she’s a Quaker, too.’”).

<sup>145</sup> See *supra* notes 134 & 136.

<sup>146</sup> See generally Wendy B. Reilly, Note, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 RUTGERS L. REV. 947 (2000) (arguing for destruction of doctrine, or, in the alternative, offering solutions to the problems posed by the fighting words doctrine in its present form); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993) (arguing for elimination of fighting words doctrine as “manifest[ing] anachronistic male bias” and “enabl[ing] officials to use discretionary power to harass minorities or suppress dissident speech”); Caine, *supra* note 136 (averring that the Supreme Court has “worn down the fighting words doctrine into a shadow of itself”).

<sup>147</sup> Friedlieb, *supra* note 41, at 402.

<sup>148</sup> See Reilly, *supra* note 146, at 984 (noting that though, as presently conceived, the fighting words doctrine has “limited utility,” it “survives with the approval of the Supreme Court and continues to be cited as a valid aspect of American jurisprudence”).

the family of the deceased may be able to recover for negligence, or intentional or negligent infliction of emotional distress.<sup>149</sup> The family may also be able to assert a right to privacy. Justice Anthony Kennedy once noted that “[f]amily 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>150</sup> States also traditionally have strict regulations for funeral directors and crematories, which are enacted for the purpose of protecting the dignity of the deceased and the burial rights of the family.

*C. Justice Alito’s Solitary Dissent in Snyder*

Justice Samuel Alito was the only member of the Court who believed that the facts in *Snyder* mandated an in-depth inquiry as to the targeted nature of the protest at issue. Alito also recognized that the First Amendment does not function as a near-absolute license providing speakers immunity from liability where their speech causes injury, noting that the speech at issue contained both matters of public *and* private concern.<sup>151</sup>

Justice Alito’s dissent began with a phrase implicitly evoking fighting words— “[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”<sup>152</sup>—a theme that resonates through his opinion.<sup>153</sup> Prior to explicitly citing the fighting words doctrine and *Chaplinsky*, Justice Alito aptly recognized that “it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech,”<sup>154</sup> and noted that the Court had previously recognized that words may “by their very utterance inflict injury.”<sup>155</sup> Justice Alito continued:

The First Amendment does not shield utterances that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>156</sup>

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<sup>149</sup> See Heyman, *supra* note 127, at 156 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 63 362 (5th ed. 1984)).

<sup>150</sup> Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004) (holding that photographs of suicide victim’s body were exempt from disclosure under Freedom of Information Act as “constitut[ing] an unwarranted invasion of personal privacy”); see also Heyman, *supra* note 127, at 156.

<sup>151</sup> See discussion *infra* Part IV.C.

<sup>152</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

<sup>153</sup> See *id.* at 1222-28.

<sup>154</sup> *Id.* at 1223.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Justice Alito also referenced a similar sentiment from *Cantwell v. Connecticut*. *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“[P]ersonal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.”)).

Calling Westboro’s speech a “brutal[] attack[]” on Matthew Snyder, Justice Alito stated that “[w]hen grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”<sup>157</sup> This evokes the premise that tort law is designed as a vehicle for the redress of private individual wrongs that damage unwilling victims.<sup>158</sup>

Justice Alito noted that Westboro could have chosen to stage its protest at a variety of different locations,<sup>159</sup> but it chose Matthew Snyder’s funeral because it was “expected that [Westboro’s] verbal assaults w[ould] wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief.”<sup>160</sup> Justice Alito mentioned this publicity-seeking strategy, as well as the press release that Westboro issued,<sup>161</sup> as indicative of Westboro’s speech being a targeted attack on the Snyders.<sup>162</sup>

Contrary to the Court’s holding that the context of Westboro’s speech did not alter the First Amendment’s protection thereof,<sup>163</sup> Justice Alito contended that Westboro’s choice to protest at Snyder’s funeral in lieu of any of the “other countless available venues” would lead any reasonable person to assume that there was a connection between the messages on the placards and the deceased.<sup>164</sup> Continuing with his characterization of the protest as an attack on the Snyders, Alito again contradicted the majority’s contextual argument by stating that, in the context of a funeral, those signs that could be construed as directed at the Snyders<sup>165</sup> would likely be “interpreted as referring to God’s judgment of [Matthew Snyder].”<sup>166</sup> Alito furthered his argument that Westboro had intentionally attacked the Snyders by recognizing that other signage could have been construed as falsely suggesting that Matthew Snyder was a

<sup>157</sup> *Id.*; *cf. id.* at 1220 (majority opinion) (conceding that the “contribution [of Westboro’s funeral protest] to public discourse may be negligible”).

<sup>158</sup> *See supra* notes 125-126 and accompanying text.

<sup>159</sup> *Snyder*, 131 S. Ct. at 1224 (Alito, J., dissenting) (noting that Westboro could have protested at, *inter alia*, the United States Capitol, the White House, Supreme Court, or Pentagon, or at the Maryland State House or the United States Naval Academy, where Westboro had been earlier in the day).

<sup>160</sup> *Id.* Alito continued: “The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain.” *Id.*

<sup>161</sup> The press release stated that Westboro was going to “picket the funeral of Lance Cpl. Matthew Snyder. He died in shame, not honor—for a fag nation cursed by God . . . Now in Hell—sine die.” *Id.* at 1225.

<sup>162</sup> *Id.* at 1225 (“This announcement guaranteed that Matthew’s funeral would be transformed into a raucous media event and began the wounding process.”). Recall that the Court has previously recognized that families “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 their deceased. *Nat’l Archives & Records Admin v. Favish*, 541 U.S. 157, 168 (2004); *see also supra* Part IV.B.

<sup>163</sup> *See* discussion *supra* Part III.B.3.

<sup>164</sup> *Snyder*, 131 S. Ct. at 1225 (Alito, J., dissenting).

<sup>165</sup> *See supra* note 92 and text accompanying.

<sup>166</sup> *Snyder*, 131 S. Ct. at 1225 (Alito, J., dissenting).

homosexual, and that a reasonable bystander could have likely concluded that the signs were meant to suggest such a sentiment in a derogatory fashion.<sup>167</sup>

As discussed in Part III.B.3, the Court in *Snyder* did not consider Westboro's website "epic" that derided Matthew Snyder and his family, as it was not properly included in Snyder's petition for certiorari.<sup>168</sup> Justice Alito, however, used the language of this epic as further evidence that Westboro intended to specifically attack Matthew Snyder and his family, as well as evidence that Westboro's speech at issue went "far beyond commentary on matters of public concern."<sup>169</sup> Alito recognized that the Snyders were private citizens, and that while speech regarding the Catholic Church or the United States military constitutes speech on matters of public concern, anything regarding Matthew Snyder's private conduct could not constitute the same.<sup>170</sup>

The overarching theme of Alito's opinion recognizes that there has never been a Supreme Court decision holding that the First Amendment *per se* trumps a private citizen's claim for intentional infliction of emotional distress.<sup>171</sup> The First Amendment was enacted to ensure a free interchange of ideas, and the fact that a group's speech involves matters of public concern does not, and should not, in and of itself trump a private citizen's interests. Permitting a targeted victim, such as Albert Snyder, to sue for intentional infliction of emotional distress would not "stifle or chill speech," nor would that be the goal.<sup>172</sup> Allowing these tort suits would "merely hold speakers liable when they purposefully target and exploit particularly vulnerable individuals with what are arguably unprotected 'fighting words' that cause severe emotional distress."<sup>173</sup> Professor Levinson noted that, in countries that have gone a step further and criminalized hate speech, "none of the posited adverse effects, such as making repressed speakers more dangerous, has occurred."<sup>174</sup>

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<sup>167</sup> *See id.*

<sup>168</sup> *See supra* notes 120-122 and accompanying text.

<sup>169</sup> *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting).

<sup>170</sup> *See id.*

<sup>171</sup> *See* Krauss, *supra* note 123, at 16. Krauss noted that the Supreme Court of Albany County, New York provides an excellent illustration of this point: "The First Amendment was not enacted to enable wolves to parade around in sheep's clothing, feasting upon the character, reputation, and sensibilities of innocent private persons. It was enacted to assure a free interchange of ideas." *Id.* at 16 n.92 (citing *Esposito-Hilder v. SFX Broad., Inc.*, 654 N.Y.S.2d 259, 263 (N.Y. Sup. Ct. 1996)).

<sup>172</sup> *See* Rosalie Berger Levinson, Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided *Snyder*, 46 SUFFOLK U. L. REV. 45, 76 (2013). Levinson expressed a similar conclusion as a counter to the assertion that "restricting hate speech will not stop hatred; it simply drives the expression underground where it becomes more dangerous." *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 76 n.228. Levinson referred to Canada and "many European countries" as examples of this premise. *Id.* (citing Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 216-17 (1991) ("Other countries that have adopted group libel laws, including Canada and Great Britain, have not reported a catastrophic erosion of civil liberties or free speech.")).

It should be recognized that retired Supreme Court Justice John Paul Stevens stated that he would have “joined [Alito’s] powerful dissent in the recent case holding that intentional infliction of severe emotional harm is constitutionally protected speech.”<sup>175</sup> Stevens was the last sitting member of the Supreme Court who was also a military veteran.<sup>176</sup> Stevens borrowed a phrase from Justice Alito, stating that “the First Amendment does not transform solemn occasions like funerals into ‘free-fire zones.’”<sup>177</sup> Stevens also noted that *Snyder* did not involve a cartoon about a public figure, as was at issue in *Hustler*; rather, it involved a verbal assault on private citizens attending the funeral of their Marine corporal son.<sup>178</sup>

Alito readily recognized that while Westboro’s speech was predominantly on matters of public concern,<sup>179</sup> its speech was also peppered with “actionable speech.”<sup>180</sup> Simply because the vast majority of Westboro’s protest involved matters of public concern does not mean that it should have been afforded absolute freedom from liability. “The First Amendment allows recovery for defamatory statements that are interspersed with non-defamatory statements on matters of public concern, and there is no good reason why [Westboro’s] attack on Matthew Snyder and his family should be treated differently.”<sup>181</sup> Thus, Snyder should have been allowed recovery for, at minimum, any injury caused by signage that could have been reasonably interpreted as being directed at the Snyder family. These messages of private concern were not worthy of First Amendment protection.

#### *D. Funeral Protests Call for Revitalization of the Fighting Words Doctrine*

##### 1. Westboro’s Signage Includes Targeted *Ad Hominem* Attacks on Grieving Families

###### *a. Targeted Attack of Matthew Snyder and His Family*

Just as Justice Alito asserted, a reasonable person would likely conclude that, when displayed on signs outside a private military funeral, the following messages would be construed as directed specifically at the grieving family: “You’re Going to Hell;” “God Hates You;” “Semper Fi Fags;” and “Thank God for Dead Soldiers.”<sup>182</sup> The Supreme Court deserves commendation for at the very least admitting that this

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<sup>175</sup> Jonathan H. Adler, *Stevens Hearts Alito*, VOLOKH CONSPIRACY (May 6, 2011, 10:28 AM), <http://www.volokh.com/2011/05/06/stevens-hearts-alito>.

<sup>176</sup> Krauss, *supra* note 123, at n.86.

<sup>177</sup> *See* Adler, *supra* note 175.

<sup>178</sup> Justice John Paul Stevens, *Address at the Federal Bar Council Annual Law Day Dinner* (May 3, 2011) (transcript available at [http://www.supremecourt.gov/publicinfo/speeches/Federal%20Bar%20Council%20Annual%20Law%20Day%20Dinner\(1613\\_001\).pdf](http://www.supremecourt.gov/publicinfo/speeches/Federal%20Bar%20Council%20Annual%20Law%20Day%20Dinner(1613_001).pdf)). Justice John Paul Stevens, *Address at the Federal Bar Council Annual Law Day Dinner* (May 3, 2011) (transcript available at <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx>).

<sup>179</sup> *See Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011). The majority immunized Westboro from tort liability because the “overall thrust and dominant theme of [their] demonstration spoke to” issues of public concern. *Id.*

<sup>180</sup> *Id.* at 1227 (Alito, J., dissenting).

<sup>181</sup> *Id.*

<sup>182</sup> *See supra* note 92 and accompanying text.



material might have easily been construed as not involving matters of public concern.<sup>183</sup> However, the Court neglected to address Justice Alito's desired holding<sup>184</sup>—the Court should have addressed the possible ramifications of Westboro stating to the Snyders that the deceased was “going to hell” and that he was hated by God. Instead, the Court held that the funeral setting did not alter the fact that Westboro's speech was on matters of public concern.<sup>185</sup> If, indeed, Westboro's speech on matters of purely private concern would have been actionable but for their comments on matters of public concern, it is “not clear jurisprudentially why their comments on matters of public concern should have had an immunizing effect.”<sup>186</sup>

Though delivered with considerable opprobrium, Westboro's speech, as it regarded the conduct and fate of America, was indeed not actionable; however, the Court misconstrued the funeral picket in *Snyder* when it concluded that Westboro was merely trying to communicate with the public about America's moral decline. Westboro directed its picketing specifically toward the Snyders and those mourning Matthew's death, as well as to the state and nation as a whole. Taken together, the Westboro news release regarding its intent to protest, the protest speech itself, and the website epic, indicate Westboro's intent for the protest; namely, to condemn the Snyder family for the way they raised Matthew, and to rejoice in Matthew's death. Westboro callously used the Snyder family, against their will and at a time of great sorrow, as a platform. The messages addressed to the Snyders were meant to subject them to public contempt, with an aim to discourage others from following their allegedly poor moral example.<sup>187</sup> Westboro admits, and even celebrates, the fact that it directs its signs and messages at individual people to use them as examples.<sup>188</sup> Thus, at minimum, the “You're Going to Hell” and “God Hates You” signs<sup>189</sup> were as much *ad hominem* attacks on the Snyders as they were purportedly comments on society at large, especially in the context of Matthew's private funeral.

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<sup>183</sup> See *Snyder*, 131 S. Ct. at 1217 (2011); see also Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?*, 61 AM. U. L. REV. 279, 325 (2011).

<sup>184</sup> Justice Alito would have held that the First Amendment “permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.” *Snyder*, 131 S. Ct. at 1228 (Alito, J., dissenting).

<sup>185</sup> See *supra* note 116 and accompanying text.

<sup>186</sup> See Strasser, *supra* note 183, at 325.

<sup>187</sup> See 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.COM, <http://godhatesfags.com/faq.html#individuals> (last visited Jan. 31, 2014).

<sup>188</sup> See *id.* Westboro believes that this personal targeting constitutes some version of Biblical “love,” albeit a backward one, and cites the Book of Timothy as evidence that warning people about their “immorality” is a necessary form of “love.” See *id.* (citing 1 *Timothy* 5:20 (“Those that sin, rebuke before all that others also may fear [God]”)).

<sup>189</sup> While the word “you” could indeed be construed in the plural form to address a group of people, such as the bystanders for the Snyder funeral and protest, it can just as easily be construed in the singular form, as an address directed at Matthew and the Snyders themselves. When viewed in light of Westboro's admission that it directs signs and messages at individuals, see *id.*, it is entirely plausible and reasonable to construe the signs at issue in *Snyder* as being directed specifically at Matthew Snyder and his family.

The Supreme Court held that the funeral setting did not alter the fact that Westboro’s speech was on matters of public concern, throwing much weight behind the fact that Westboro members were on public land during the protest.<sup>190</sup> The Court dismissed the plausible contention that a private funeral alters the context of the speech,<sup>191</sup> simply because the speech was on public property and purportedly contained messages of public concern. The proximity of the protest to the funeral service should have been granted more consideration, as it certainly altered the way that Westboro’s messages were construed. Matthew Snyder was clearly the only deceased person in the immediate area of the protest. “Thank God for Dead Soldiers” may facially appear to be a generalized message, but when considered in the context of the funeral setting, where Matthew was the only deceased soldier present, it could just as easily be considered an expression of jubilation and gratitude for the death of Matthew Snyder, specifically.<sup>192</sup> By that same token, those present could have easily thought that, in the context of the funeral and its attendant religious rites, Matthew was the target of “You’re Going to Hell.”

The website “epic” was most indicative of Westboro’s specific targeting of Matthew Snyder and his family. The Court, as mentioned in Part III.B.3 above, did not consider the epic in its opinion because it was not included in Albert Snyder’s petition for certiorari. Justice Alito viewed the majority’s elimination of the epic as an error. In his dissent, Alito opined that the epic was not merely “a distinct claim, but a piece of evidence that the jury considered in imposing liability for the claims now before this Court.”<sup>193</sup> Alito continued by stating that “[t]he protest and the epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress.”<sup>194</sup> When taken individually, the epic arguably falls more in line with a direct verbal assault on the Snyders than do the signs held by Westboro members; however, the Court’s refusal to consider the epic in its opinion avoided a truly full and exhaustive examination of the speech in its “content, form, and context . . . as revealed by the *whole record*.”<sup>195</sup> By avoiding consideration of the epic on a technicality, and ignoring the status of Albert Snyder as a private citizen, the Court was able to narrow its holding considerably and confine it solely to Westboro’s rights to engage in speech on matters of public concern while on public property. Had the epic been examined by the Court and coupled with the speech during the protest, the Court could have determined that the speech was targeted, and that it spoke more to

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<sup>190</sup> See discussion *supra* Part III.B.3.

<sup>191</sup> This despite prior recognition that families have a personal stake in objecting to unwarranted public exploitation that intrudes upon their grief and degrades the respect they seek to accord to their deceased. See *supra* note 150 and accompanying text.

<sup>192</sup> Indeed, Albert Snyder construed this sign in exactly that manner. See Heyman, *supra* note 127, at 122.

<sup>193</sup> Snyder v. Phelps, 131 S. Ct. 1207, 1226 n.15 (2011) (Alito, J., dissenting).

<sup>194</sup> *Id.*

<sup>195</sup> Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (emphasis added).

matters of private concern.<sup>196</sup> In this way, Westboro may have narrowly escaped exposure to liability and a curtailment of their speech.

Westboro's speech created an "atmosphere of confrontation."<sup>197</sup> In light of the above evidence, it is reasonable to consider that Westboro's speech was "directed at the person of the hearer"<sup>198</sup> (the "hearer" being Albert Snyder), and that certain speech by Westboro could be reasonably construed as "direct personal affronts"<sup>199</sup> to Albert Snyder and his family.

*b. Targeted Attacks on Other Victims of Violent Tragedy*

It is necessary to reiterate a point of discussion from Part III.A above—that Westboro's protest activities are not limited to the funerals of military servicemen.<sup>200</sup> Matthew Snyder's family is not the first, nor will it be the last, to be unwillingly targeted while celebrating the life of their deceased. For instance, Westboro has also targeted victims of violent and shocking tragedies, such as the Sandy Hook elementary school shootings and the Boston Marathon bombing, or the savage beating of Matthew Shepard.<sup>201</sup> All Westboro funeral protests are generally conducted in similar fashion, with an initial targeted announcement of Westboro's intent to protest followed by the protest itself, which is frequently accompanied by a website "epic" similar to the one employed by Westboro to target the Snyders.<sup>202</sup> It can be inferred that almost no group, outside of Westboro itself, is immune from Westboro's targeted protest attacks at funerals.

2. Westboro's Protest Speech Incites Acts of Violence and Could Be Reasonably Expected to Incite Violence from Grieving Families

As discussed above, Westboro typically notifies local police of its intended protests and coordinates location and time with local departments, just as they did for Matthew Snyder's funeral.<sup>203</sup> The presence of police officers is necessary to keep general order, as Westboro's protests usually draw attention and crowds; however, the police are even more necessary to shield Westboro members from physical attacks, which would be inevitable in the absence of police protection. As Westboro protests are generally well-guarded by law enforcement personnel, the documented instances of violence arising from these protests are few, but there are enough to demonstrate the potential that Westboro's speech has to incite or invite physical violence. There are also examples of physical violence perpetrated by Westboro members themselves.

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<sup>196</sup> See *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring). In recognizing that the Court's holding addressed *only* picketing on matters of public concern, and not on the effect of television broadcasting or internet postings, Justice Breyer implied that, had the Court considered the website epic, the entire outcome of *Snyder* would have been different. See *id.*

<sup>197</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 577 (D. Md. 2008).

<sup>198</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

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

<sup>200</sup> See *supra* text accompanying notes 67-75.

<sup>201</sup> See *supra* text accompanying notes 67-75.

<sup>202</sup> See, e.g., *supra* notes 73-74 and accompanying text.

<sup>203</sup> See *supra* note 90 and accompanying text.

Protesting outside the Vintage Restaurant in Topeka, Kansas on March 26, 1993, Westboro members were accosted by passersby who took offense to their extreme protest speech.<sup>204</sup> Eight Westboro members were hospitalized with a variety of minor injuries.<sup>205</sup> In 2003, elderly Westboro member Charles Hockenbarger, carrying a protest sign that read “Thank God for September 11,” was badly beaten by an unknown assailant and later hospitalized.<sup>206</sup> On May 21, 2006, Westboro members were protesting a Marine’s funeral in Seaford, Delaware, and were forced to flee in a police van for their own safety.<sup>207</sup> Though police were positioned between Westboro protesters and the large crowd of counter-protesters, one counter-protester broke through the police line and assaulted two Westboro members.<sup>208</sup> As the Westboro members were carted away by police, several counter-protesters threw eggs, stones, and bottles at the vehicle, breaking several windows.<sup>209</sup> On November 30, 2010, Wichita, Kansas police arrested double-amputee Army veteran Ryan Newell for felony conspiracy to commit aggravated battery.<sup>210</sup> Newell was sitting in his parked SUV outside a meeting of Westboro members with loaded firearms and ammunition in the vehicle.<sup>211</sup>

A counter-protester spit upon Shirley Phelps-Roper in January 2008 while protesting at Marine Corps Camp Lejeune in Jacksonville, North Carolina following the murder of Lance Cpl. Maria Lauterbach.<sup>212</sup> In yet another incident, while protesting a memorial in Joplin, Missouri for victims of a deadly tornado in May 2011, a Westboro member attempted to break through a counter-protest staged by a group of bikers called the “Patriot Guard Riders,” but was accosted and prevented from

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<sup>204</sup> *U.S. Domestic Terrorism: Westboro Baptist Church*, CTR. FOR GRASSROOTS OVERSIGHT, [http://www.historycommons.org/timeline.jsp?timeline=us\\_domestic\\_terrorism\\_tmln&haitian\\_elite\\_2021\\_organizations=us\\_domestic\\_terrorism\\_tmln\\_westboro\\_baptist\\_church&printerfriendly=true](http://www.historycommons.org/timeline.jsp?timeline=us_domestic_terrorism_tmln&haitian_elite_2021_organizations=us_domestic_terrorism_tmln_westboro_baptist_church&printerfriendly=true) (last visited Feb. 4, 2015) [hereinafter *Domestic Terrorism*].

<sup>205</sup> *Id.* Westboro dubbed the event the “Vintage Massacre” and began to picket the Vintage Restaurant every day thereafter. *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *5 Arrested for Attacks on Anti-Gay Protesters at Military Funeral*, FOXNEWS.COM (May 22, 2006), <http://www.foxnews.com/story/2006/05/22/5-arrested-for-attacks-on-anti-gay-protesters-at-military-funeral/>.

<sup>208</sup> *Id.* The counter-protester, David Jones, was convicted of third-degree assault and one count of disorderly conduct. *Id.*

<sup>209</sup> *Id.* Three counter-protesters were convicted of criminal mischief and disorderly conduct for their actions. *Id.* A sixteen-year-old counter-protester was also convicted of criminal mischief for slashing tires on Westboro’s rented van. *Id.*

<sup>210</sup> Tim Potter, *Veteran Now Faces Felony Conspiracy Charge*, WICHITA EAGLE (Dec. 4, 2010, 12:00 AM), <http://www.kansas.com/2010/12/04/1617714/vet-now-faces-felony-conspiracy.html>.

<sup>211</sup> *Id.* Newell received a “great outpouring of support” from around the U.S., with many offers to support him with donations to fund his defense. *Id.*

<sup>212</sup> See Martha Quillin, *N.C. Backs Suit Against Church That Pickets Military Funerals*, NEWS & OBSERVER (June 5, 2010), <http://www.newsobserver.com/2010/06/05/515804/nc-supports-suit-against-church.html>.

breaking through the group's line.<sup>213</sup> Apparently, the Westboro member was "repeatedly pushed and ha[d] his shirt torn off" before the police were able to separate him from the crowd by using pepper spray.<sup>214</sup> In August 2010, Westboro protesters were accosted while protesting the funeral of Marine Staff Sergeant Michael Bock in Omaha, Nebraska.<sup>215</sup> A man enraged with the Westboro protest drove by in his truck and sprayed mace on the Westboro members.<sup>216</sup> Outside of the Republican National Convention in August 2012, Westboro members had to be escorted away from angry crowds by police in riot gear following a "scuffle" with those opposed to their messages.<sup>217</sup>

Though not directly indicative of the potential for violent reactions from those opposed to Westboro's messages, it is worth noting a few instances in which Westboro members themselves have acted violently. In September 1993, a court convicted Westboro member Charles Hockenbarger of battery and criminal restraint stemming from his assault of a Lutheran minister who was counter-protesting a Westboro picket.<sup>218</sup> In January 1995, a court convicted Benjamin Phelps, grandson of Westboro pastor Fred Phelps, Sr., of misdemeanor assault stemming from an incident in which he spit on a passerby during a Westboro protest.<sup>219</sup>

The above incidents clearly illustrate that Westboro's protest speech has a strong tendency to incite violent reactions from the public and from counter-protesters. In the absence of the protection of law enforcement, there is a high likelihood that Westboro members would suffer great physical injury at the hands of the angered public. The mere fact that law enforcement must be present is indicative of the *expectation of violence*. Indeed, even where police have been present in significant numbers to protect Westboro members, counter-protesters have still managed to break through the lines to assault Westboro's protesters. From the above evidence, it is reasonable to infer that, especially in a vulnerable mental state such as that of Albert Snyder, Westboro's messages targeted at grieving families of slain military servicemen or victims of tragedy could incite violence from the same. If Westboro's speech could cause ordinary bystanders to resort to acts of physical violence, it is logical to presume that the same speech could just as easily, and perhaps understandably, provoke a violent reaction from family members of the deceased whose funerals Westboro protests.

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<sup>213</sup> *Domestic Terrorism*, *supra* note 204; *see also* Evan Hurst, *What Happened When Westboro Baptist Decided to Protest in Joplin, Missouri?*, TRUTHWINSOUT.ORG (May 30, 2011), <http://www.truthwinsout.org/blog/2011/05/16755>.

<sup>214</sup> Hurst, *supra* note 213.

<sup>215</sup> *Man Fires Pepper Spray on Protesters Outside Marine's Funeral*, CNN (Aug. 29, 2010, 11:41 AM), <http://www.cnn.com/2010/CRIME/08/28/nebraska.funeral.protest>.

<sup>216</sup> *Id.*

<sup>217</sup> Mike Schneider, *Westboro Baptist Church Members Clash With Protesters At GOP Convention*, HUFFINGTON POST (Aug. 28, 2012, 11:11 PM), [http://www.huffingtonpost.com/2012/08/28/westboro-rnc\\_n\\_1837653.html](http://www.huffingtonpost.com/2012/08/28/westboro-rnc_n_1837653.html).

<sup>218</sup> *Court Upholds Conviction, Sentence of Phelps Backer*, THE TOPEKA CAPITAL-JOURNAL (Feb. 21, 1998), [http://cjonline.com/stories/022198/kan\\_phelps.html](http://cjonline.com/stories/022198/kan_phelps.html).

<sup>219</sup> Roger Myers, *Appeals Court Upholds Phelps' Convictions*, THE TOPEKA CAPITAL-JOURNAL (May 24, 1997), [http://cjonline.com/indepth/phelps/stories/052497\\_phelps.shtml](http://cjonline.com/indepth/phelps/stories/052497_phelps.shtml).

In the wake of the Court’s decision in *Snyder*, Albert Snyder himself recognized the propensity for potential violence that the Court may have inadvertently created with its holding. Believing that “someone is going to get hurt,” Snyder opined:

You have too many soldiers and Marines coming back with post-traumatic stress syndrome, and [the Westboro protesters] are going to go to the wrong funeral and the guns are going to go off. And when it does [sic], I just hope it doesn’t hit the mother that’s burying her child or the little girl that’s burying her father or mother. It’s inevitable.<sup>220</sup>

### 3. Fighting Words Revitalization, By Renewed Focus on the “Words That By Their Very Utterance Inflict Injury” Prong, Would Allow Tort Recovery for Grieving Families

In the wake of *Snyder*, Westboro’s leaders have vowed to “quadruple” the number of funeral protests it conducts, saying that Westboro members “have not slowed down and [they] will not.”<sup>221</sup> Families will continue to be subjected to targeted Westboro cruelty at a particularly vulnerable point in time. Since *Snyder* appears to allow nearly-absolute tort immunity for First Amendment speech which concerns matters of some public import,<sup>222</sup> it leaves grieving families such as the Snyders without manner of recourse against those who would perpetrate undue emotional distress against them. Because Westboro has vowed to continue its prolific protesting activities at funerals, it is doubtless that more severe mental injuries will be inflicted by its speech in the future.

The Supreme Court has refused to add new categories of free speech absent a “longstanding historical tradition of treating the speech as unprotected.”<sup>223</sup> As discussed in Parts II.B.1 and II.B.2 above, the fighting words doctrine constitutes just such a “longstanding historical tradition,” and the Court continues to cite *Chaplinsky* and fighting words as a viable doctrine.<sup>224</sup> The reason why, traditionally, fighting words have been categorically excluded from First Amendment protection is “not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”<sup>225</sup> In contrast to past instances where the Court has declined to extend fighting words, such as the “fuck the draft” jacket in a public courthouse, or the use of “motherfucker” in various contexts,<sup>226</sup> targeted opprobrious speech at a funeral is much more “particularly intolerable” and “socially unnecessary”

<sup>220</sup> *Fallen Marine’s Father Says Anti-Gay Pickets Will Draw Gunfire*, CNN (Mar. 4, 2011, 8:50 AM), <http://www.cnn.com/2011/US/03/03/us.westboro.father/>.

<sup>221</sup> Devin Dwyer, *Westboro Baptist Church to ‘Quadruple’ Funeral Protests After Ruling*, ABC NEWS (Mar. 2, 2011), [http://abcnews.go.com/Politics/Supreme\\_Court/westboro-baptist-church-quadruple-military-funeral-protests-supreme/story?id=13039045](http://abcnews.go.com/Politics/Supreme_Court/westboro-baptist-church-quadruple-military-funeral-protests-supreme/story?id=13039045).

<sup>222</sup> This comment is not meant to address any possible ramifications of the *Snyder* decision on the tort of defamation.

<sup>223</sup> Charles & O’Neill, *supra* note 20, at 1766.

<sup>224</sup> See discussion *supra* Part IV.A.

<sup>225</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992).

<sup>226</sup> See discussion *supra* Part II.B.2.

as a means of communicating viewpoints. Westboro could still accomplish its protest goals through different means—that is, absent the specifically targeted elements of its speech—without injury to its First Amendment rights and without tortious injury to grieving individuals.<sup>227</sup>

Private citizens at private funerals deserve protection,<sup>228</sup> and where time, place, and manner restrictions on free speech do little or nothing to obviate the effects of targeted funeral picketing, these families deserve a means of recourse for the effects this picketing imparts. Revitalizing the fighting words doctrine with a narrow and limited application would render targeted messages at funeral pickets unprotected by the First Amendment, thereby exposing the speakers to liability and opening the door to tort recovery for grieving families who have been subjected to, and affected by, a targeted funeral picket.<sup>229</sup>

There is a ready remedy to curb targeted speech at funeral protests, and this lies in the “inflict injury” prong of the fighting words doctrine. In its narrowing of the doctrine since *Chaplinsky*,<sup>230</sup> the Supreme Court has neglected to focus on the “words which by their very utterance inflict injury” part of the doctrine, instead focusing almost solely on the “tend to incite an immediate breach of the peace” prong.<sup>231</sup> As such, the doctrine has focused mostly on retaliatory violence, providing greater protection to those who would respond with violence.<sup>232</sup> It fails to account for the drastic mental effects that can be brought about by targeted speech.

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<sup>227</sup> For example, Westboro’s goal of informing society at large about its alleged immorality, or the alleged negative effects of its tolerating homosexuality, would not be impinged by eliminating targeted website epics from its protest behavior, nor would Westboro’s efforts be hampered by limiting its speech to signs like “God Hates America” or even “God Hates Fags.” However indecent an ordinary reasonable person may find these messages, Westboro does not express any message that could be remotely construed as concerning private matters. Eliminating messages such as “Thank God for Dead Soldiers” and “You’re Going to Hell” from Westboro’s litany of protest speech would have no adverse effect on the broader message that Westboro wishes to convey, aside from the probability that its funeral protests would not draw as much public or media attention in the absence of this vitriolic targeting of grieving families.

<sup>228</sup> See discussion *supra* Part IV.B.

<sup>229</sup> But see Eugene Volokh, *The Phelpsians’ Picketing and Fighting Words*, VOLOKH CONSPIRACY (Mar. 8, 2010, 1:20 PM), <http://www.volokh.com/2010/03/08/the-phelpsians-picketing-and-fighting-words-2/> (arguing that, because “courts in recent decades [have] read the fighting words exception narrowly, to prevent the punishment of such speech,” the fighting words doctrine should not cover “condemning a dead soldier, much as it might offend the soldier’s relatives”). Professor Volokh contends that if fighting words had been found to cover the speech at issue in *Snyder*, the fighting words exception would grow to include a wider range of controversial speech. *Id.*; see also *infra* note 238. This “slippery slope” argument would likely be avoided by the narrow application of fighting words advocated by this Note. The solution this Note advocates does not function to suppress speech through public ordering; it only functions to compensate a private citizen for a wrongfully caused harm.

<sup>230</sup> See discussion *supra* Part II.B.2.

<sup>231</sup> See discussion *supra* Part II.B.2; see also Caine, *supra* note 136, at 551 (finding this first prong has been “so ignored as to be abandoned”); Reilly, *supra* note 146, at 984 (finding majority of courts, following Supreme Court’s lead, have neglected to use the first prong of fighting words).

<sup>232</sup> See, e.g., Reilly, *supra* note 146, at 947-50, 984.

A solution would be to keep the fighting words doctrine intact, but with a renewed focus on the “inflict injury” prong of the standard. Focusing on this prong in a fighting words inquiry could allow tort recovery, such as for intentional infliction of emotional distress, on the theory that targeted vitriolic speech inflicts injury and threatens the mental tranquility of the target.<sup>233</sup> The Court has shown that the fighting words doctrine will almost exclusively be used to address speech with a potential for ensuing violence. Starting and ending the inquiry with whether words alone would actually cause a person to respond with violence oversimplifies the doctrine. It is necessary to examine *why* a person would desire to react with physical violence when confronted with targeted hateful speech.<sup>234</sup> The tragic death of a family member causes significant psychological injury and a vulnerable emotional and mental state that, when aggravated and exacerbated by verbal abuse, can lead one targeted by that speech to respond with violence. This violent response may be immediate, as the Court has focused on almost exclusively since *Chaplinsky*, but it very well may not be immediate.<sup>235</sup> As Professor Wendy Reilly points out, “the build up of psychic harm [can] lead to violence at a later point.”<sup>236</sup> Both the immediate response and the non-immediate response are still physically violent reactions to injurious speech, which is the “same evil that the . . . current standard seeks to avoid.”<sup>237</sup>

If the Court focused on the “inflict injury” prong, in the narrow instances in which it is presented with First Amendment speech on matters of mixed public and private concern (like funeral protests), this would allow the injured to be compensated for unwillingly enduring the speech and for the detrimental effects of the speech on his or her mental health. A focus on this prong would not open the floodgates to “punishment of a vast range of controversial speech,”<sup>238</sup> because examining the injury caused by speech, in the narrow context of tort suits arising from speech on matters of mixed public and private concern, would not allow the state to regulate and punish this speech.<sup>239</sup> It merely would provide a means for private redress for injurious speech on the matters of private concern; namely, the chance for a private individual injured by such targeted speech, such as Albert Snyder, to recover for the damages caused

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<sup>233</sup> See, e.g., *id.* at 980.

<sup>234</sup> See *id.*

<sup>235</sup> See, e.g., *supra* notes 210-211 and accompanying text.

<sup>236</sup> Reilly, *supra* note 146, at 981.

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

<sup>238</sup> Volokh, *supra* note 229. Professor Volokh stated that “the ‘direct personal insult’ requirement is important, or else the doctrine would lead to the punishment of a vast range of controversial speech: picket signs that condemn strikebreakers; abortion clinic protests that call abortion providers ‘murderers’ or ‘babykillers’; military base protests that call soldiers ‘murderers’ or ‘babykillers’; a wide range of public speech that some see as racist, sexist, antigay, religiously bigoted, anti-immigrant, and so on.” *Id.* As argued in this Note, focusing on the “injury” prong in the narrow context of tort suits concerning speech on mixed public and private concern would not have such a drastic effect, as Volokh contends, because the privately concerned speech would still need to be targeted individually in order for potential plaintiffs to recover.

<sup>239</sup> A statutory proscription on fighting words in the funeral context would likely come close to being content- or viewpoint-based and therefore unconstitutional. See *generally* discussion *supra* Part II.B.2.



thereby. As mentioned in Part III.B.3 above, torts such as intentional infliction of emotional distress have rigorous requirements that would still need to be proven for the injured to recover for the effects of targeted opprobrious speech.<sup>240</sup>

The narrowed focus on “inflict injury” would be in line with the Court’s traditional categorical proscriptions of certain speech,<sup>241</sup> its recognition that “not all speech is of equal First Amendment importance,”<sup>242</sup> and the acknowledgement that the First Amendment does not provide a “special privilege to invade the rights and liberties of others.”<sup>243</sup> Having a narrow application would not potentially “interfere[] with a meaningful dialogue of ideas,” because organizations like Westboro would still be able to engage in non-targeted speech on matters of *strictly public concern* on public land, without fearing tort liability.<sup>244</sup> The threat of liability that would ensue from the refocus on “inflict injury” would not, therefore, run the risk of a “reaction of self-censorship on matters of *public import*.”<sup>245</sup> It would only risk a “reaction of self-censorship” as to matters of *private import*; namely, speech targeted at grieving families during a funeral.

#### *E. Counterpoints*

Subjecting speech on matters of mixed public and private concern to tort liability under this narrowed and refocused application of fighting words could raise a concern regarding the assessment of damages, especially where the speech at issue is considered particularly hateful or offensive to civil society. Jurors would likely be inclined, as they were at trial in *Snyder*,<sup>246</sup> to punish speakers with hefty punitive damages simply because the jurors disagree with the ideas being expressed. This would be contrary to the goal of this Note, in that it would more so serve to punish speech than to provide a balance of First Amendment and privacy interests. To prevent this potential outcome, punitive damages should not be an available remedy where targeted speech addresses matters of mixed public and private concern. Though this would be “contrary to current state tort law,”<sup>247</sup> it would protect speakers’ First Amendment rights to the extent that their speech would not be egregiously penalized. Mandating jury instructions that exclude punitive damages would mitigate the potential harm posed to First Amendment speech by large punitive damage awards.

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<sup>240</sup> See *supra* notes 117-119 and accompanying text.

<sup>241</sup> See discussion *supra* Part II.A.

<sup>242</sup> See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

<sup>243</sup> *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972).

<sup>244</sup> See *Dun & Bradstreet*, 472 U.S. at 760.

<sup>245</sup> See *id.* (emphasis added).

<sup>246</sup> See discussion *supra* Part III.B.2.

<sup>247</sup> See Reilly, *supra* note 146 (citing Anthony J. Sebok, *What Did Punitive Damages Do?: Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 189 (2003)) (“proof of the underlying tort [of IIED] creates a set of circumstances where the predicate of punitive damages would be proven as well”).

## V. CONCLUSION

When the content and the inherent purpose of speech become immaterial from a legal perspective, freedom of speech may be abused in a manner which contradicts the basic principles of a free society. Speech by hate groups can be utilized to willfully inflict injury on the targets of hate, turning the freedom of speech into a defense of unjust action.<sup>248</sup>

Because Westboro is especially prolific in its funeral protest activities and intends to continue with them in the future, and the *Snyder* decision did nothing to curb the specifically targeted messages within Westboro’s protest speech, injuries will continue to be inflicted on grieving families by the “church’s” targeted speech in the future. These families deserve privacy in their time of despair, and their deceased deserve the dignity traditionally accorded to them by the state and social mores. Where, as in *Snyder*, speech charged with such targeted vitriol is granted immunity from tort liability under the First Amendment, these families lack any remedy whatsoever for their suffering.

Modifying the focus of the fighting words doctrine as outlined above and applying it to funeral protest speech on matters of mixed public and private concern would open the door to tort liability for injury caused by those specifically targeted messages of private concern. Allowing tort recovery for injury caused by targeted speech on private matters would not infringe upon the First Amendment rights of the speakers, it would merely hold the speakers liable to private citizens who are able to meet rigorous tort elements and demonstrate severe injuries caused by the speech. Liability would not extend to any messages of *purely public* import. Allowing tort recovery in these instances would be in line with prior First Amendment jurisprudence, which dictates that not all speech is protected by the First Amendment, especially where it resorts to epithets or targeted personal abuse. Exposing speakers like Westboro to tort liability maintains a degree of substantive equality of rights—it balances the First Amendment interests of Westboro against the privacy rights of the grieving family, without summarily dismissing the importance of either.

Westboro would still be allowed to protest in any manner it chose, but would not be able to hide behind the fact that its speech is “predominantly on matters of public concern” as a blanket immunity to liability for its specifically targeted messages. Westboro would thus need to adjust its protest behavior to avoid tort liability in the future, and could accomplish this by simply eliminating targeted website “epics” and messages that could be construed as specifically directed at the deceased and the grieving family. Westboro could still engage in a meaningful dialogue of ideas without targeting emotionally vulnerable private citizens. The overarching goal and theme of Westboro’s speech would not be adversely affected by eliminating the privately-concerned elements; Westboro would still be able to relay its message regarding America’s immorality and tolerance of homosexuality without targeting specific individuals and grieving families. Exposure to tort liability would essentially coerce Westboro into self-censoring its protest speech, restricting it solely to matters of *purely public concern*. Taking it a step further, eliminating the privately-concerned elements of Westboro’s protests may have the effect of reducing media publicity for its

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<sup>248</sup> See Reilly, *supra* note 146 (citing DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 4-5 (1985)).

message, for Westboro's targeted vitriol is in large part responsible for the public attention drawn to the church's protests.

*Snyder* may have further ramifications where tortious injury and First Amendment speech intertwine: if speech on matters of public concern can have an immunizing effect on liability in the funeral protest context, then one must wonder whether matters of public concern will be trumpeted in other contexts, as well, to immunize tort liability. For illustration, "if one were to defame an individual Catholic as a pedophile while protesting against the Vatican, or if one were to attack an individual Jew as a swine who rejoices at drinking Gentile babies' blood while protesting the United States' support for Israel, tort law could be legitimately invoked,"<sup>249</sup> however, *Snyder* may very well allow the First Amendment to immunize the speaker in these scenarios. Revitalizing "fighting words" with a renewed focus on "words that by their very utterance cause injury" provides a potential solution to the problem *Snyder* created, in line with prior jurisprudence, that would not give rise to drastic negative ramifications for First Amendment speech protections.

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<sup>249</sup> Krauss, *supra* note 123, at 16.