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Building Picket Fences: Maryland's Funeral Picketing Law After Snyder v. Phelps

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Comment

BUILDING PICKET FENCES: MARYLAND'S FUNERAL PICKETING LAW AFTER *SYNDER v. PHELPS*

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In an episode of HBO's television drama *Six Feet Under*, funeral director David Fisher presides over the funeral of a young man named Marc Foster, who has been brutally murdered for being gay.[1] David, a devout Christian who is secretly gay, angrily confronts a group of anti-homosexual picketers at Foster's funeral as they shout "God hates fags!" and "Your son is burning in hell!" at Foster's grieving family.[2] One of the more vocal picketers proudly proclaims, "God killed Marc Foster and I'm here to celebrate!"[3] In a fit of anger, David rushes his antagonist and punches him in the face before being restrained by the police.[4]

In the United States today, dramas similar to the one portrayed in this scene occasionally unfold around the Westboro Baptist Church ("Westboro"), a radically anti-gay organization that has gained notoriety in recent years for picketing military funerals.[5] Westboro's offensive signs and slogans (most infamously "God Hates Fags") provoke public anger and, on some occasions, have led to violence.[6] In

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1. *Six Feet Under: A Private Life* (HBO television broadcast Aug. 19, 2001).

2. *Id.*

3. *Id.*

4. *Id.*

5. Barbara Bradley Hagerty, *A Peek Inside the Westboro Baptist Church*, NPR.ORG (Mar. 2, 2011), http://www.npr.org/2011/03/02/134198937/a-peek-inside-the-westboro-baptist-church.

6. *See, e.g.*, *5 Arrested for Attacks on Anti-Gay Protesters at Military Funeral*, FOX NEWS (May 22, 2006), http://www.foxnews.com/story/0,2933,196487,00.html (reporting a violent altercation between area residents and Westboro protesters, after which five people were criminally charged). For additional information on this subject, see THE MOST

Maryland, a recent incident attracted national attention. Westboro founder Fred Phelps, his daughters, and his grandchildren picketed the funeral of fallen marine Matthew Snyder.[7] The picketing occurred just prior to Snyder's funeral service, on a plot of public land located about 1,000 feet from the funeral site.[8] Unlike David Fisher, Snyder's father had the good fortune to avoid the protesters on the way to and from his son's funeral.[9] But when he went home and watched news coverage of the protest, he experienced shock and anger.[10]

In *Snyder v. Phelps*,[11] the United States Supreme Court held that the First Amendment shielded Phelps from paying compensatory damages to Snyder for the emotional distress inflicted by Phelps's speech.[12] Although it generated public controversy,[13] the Court's 8-1 decision reflected a well-justified extension of its prevailing First Amendment jurisprudence, under which speech related to social and political concerns enjoys special constitutional protection.[14]

After Phelps's protest at Snyder's funeral, the Maryland General Assembly passed a statute that prohibits picketing within 500 feet of funeral services.[15] While *Snyder* properly shielded Westboro picketers from tort liability,[16] it did not address the constitutionality of such "buffer zone" laws.[17]

HATED FAMILY IN AMERICA (BBC 2007) (documenting Westboro's beliefs, activities, and picketing of funerals for U.S. soldiers) and AMERICA'S MOST HATED FAMILY IN CRISIS (BBC 2011) (interviewing several of Phelps's estranged family members who left the church after the first documentary).

7. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

8. *Id.*

9. *Id.* at 1213–14.

10. *Id.*

11. 131 S. Ct. 1207 (2011).

12. *Id.* at 1220–21.

13. *See, e.g.*, Devin Dwyer, *Westboro Baptist Church to "Quadruple" Funeral Protests After Ruling*, ABC NEWS (March 2, 2011), http://abcnews.go.com/Politics/Supreme_Court/westboro-baptist-church-quadruple-military-funeral-protests-supreme/story?id=13039045#.TwOl09S0wiA (noting opposition to the Court's ruling by "a coalition of military families").

14. *See infra* Part II.A.

15. *See infra* Part I.C.2.

16. *See infra* Part II.A.

17. Snyder's lawsuit against Phelps did not implicate any such statutes, so the Court mentioned them only in passing. *See Snyder*, 131 S. Ct. at 1218 ("Maryland's law . . . was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.").

A recent split between the Courts of Appeals for the Sixth and Eighth Circuits on the constitutionality of two laws similar to Maryland's may soon be resolved as the Eighth Circuit rehears its case. Analyzing two virtually identical laws, creating 300-foot buffer zones around funerals during and for one hour before and after services, the Sixth Circuit upheld the law[18] while the Eighth Circuit initially invalidated the buffer zone.[19] At the time of this writing, the Eighth Circuit has vacated its opinion and will rehear the case en banc.

This Comment argues that the Eighth Circuit was right to grant a rehearing because its initial decision was incorrect.[20] The statutes at issue in these cases, like Maryland's new statute, are constitutional because they are content-neutral laws that are narrowly tailored to serve the important governmental interest of protecting mourners' privacy at funerals, and allow picketers ample alternative communicative channels.[21] Reasonable time, place, or manner regulations[22] of this nature do not infringe on picketers' First Amendment rights.[23] Rather, they are valid measures designed to protect the privacy of vulnerable mourners who may be otherwise held captive to unwanted speech at funerals.[24]

I. LEGAL BACKGROUND

Freedom of speech enjoys a historic pedigree in the United States.[25] The most important legal manifestation of American society's commitment to free speech can be found in the First Amendment

18. Phelps-Roper v. Strickland, 539 F.3d 356, 373 (6th Cir. 2008).

19. Phelps-Roper v. City of Manchester, 658 F.3d 813, 816–17 (8th Cir. 2011), *vacated, reh'g en banc granted* (Dec. 7, 2011).

20. *See infra* text accompanying note 171.

21. *See infra* Part II.B.

22. *See infra* Part II.C.1.

23. *See infra* Part II.C.2.

24. *See infra* Part II.B.

25. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1969) (arguing that the Framers and ratifiers of the First Amendment "intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America"). *But see* LEONARD WILLIAMS LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY, at vii–viii (1960) (contending the framing generation believed in a narrower scope for freedom of expression than Chafee suggested, and that broad libertarian theories of the First Amendment were not commonly advanced until after 1798, when the Jeffersonians used them to politically oppose the speech-restrictive Alien and Sedition Acts of the Adams Administration). For an intellectual history of the American Revolution that documents the rise of radical libertarian thought in late colonial America, see generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

to the Constitution, which guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[26] Nearly a century ago, the Supreme Court incorporated this key protection against the states through the Due Process Clause of the Fourteenth Amendment.[27] Thus, the First Amendment protects an individual's right to freedom of expression from infringements posed by both the federal government and the states.

This Part begins with a brief introduction to First Amendment theory and principles.[28] Next, it surveys some constitutional limits on a state's ability to impose criminal and civil liability for speech-based crimes and torts, focusing on the Court's most recent landmark First Amendment case, *Snyder v. Phelps*.[29] This is followed by a discussion of constitutional limits on a state's power to enact content-neutral statutes that impose incidental burdens on speech.[30] Particular attention in this discussion is given to Maryland's statute regulating picketing near funerals, as well as cases analyzing similar statutes.[31]

A. First Amendment Theory and Principles

Leading legal scholars agree that the First Amendment's free speech clause serves several essential functions in American society.[32] First, freedom of speech advances personal fulfillment by allowing people to realize their individual potential through the expression of their personal thoughts and ideas free from coercion.[33] Second, the right to free speech facilitates the discovery of truth by allowing people to test competing viewpoints against one another in the marketplace of ideas.[34] Third, freedom of expression promotes public participation and engagement with important political, social, and cultural decisions.[35] Fourth, freedom of speech contributes to a stable and flexible society by elevating reason and persuasion above force

26. U.S. CONST. amend. I.

27. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

28. *See infra* Part I.A.

29. *See infra* Part I.B.

30. *See infra* Part I.C.1.

31. *See infra* Part I.C.2.

32. *See, e.g.*, THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (explaining the values and functions of freedom of expression).

33. *Id.*

34. *Id.*

35. *Id.* at 7.

and suppression.[36] Philosophical justifications for free speech often explicitly or implicitly underlie Supreme Court interpretations of the First Amendment.[37] Indeed, these fundamental principles are carefully interwoven into the Court's modern First Amendment jurisprudence.

B. First Amendment Limits to Content-Based Restrictions on Speech

Perhaps the most fundamental way the First Amendment secures the essential values of freedom of expression is by placing constitutional limits on a state's power to impose liability based on the content of speech. This is accomplished principally through two mechanisms. First, the First Amendment constitutionally checks a state's authority to criminally punish speech by serving as a defense in criminal cases in which the proscribed *actus reus* consists of the expression of particular ideas or sentiments.[38] Second, the First Amendment serves as a defense in civil trials in which the cause of action is based on allegedly tortious speech.[39]

1. The First Amendment as a Shield in Criminal Prosecutions

Despite the central value that was placed on the ideal of individual liberty in America's early history,[40] the Supreme Court did not sustain any challenges to the First Amendment until the twentieth century. Early case law focused on the extent to which the government could criminally punish seditious speech.[41] These cases arose during World War I and addressed the constitutionality of laws drafted to suppress various types of speech that legislatures regarded as danger-

36. *Id.* For other influential works defending free speech, see generally JOHN STUART MILL, ON LIBERTY (1859) (defending freedom of speech on utilitarian grounds) and JOHN MILTON, AREOPAGITICA (1644) (arguing against government censorship).

37. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free . . . . They valued liberty both as an end and as a means."). Justice Brandeis's famous concurring opinion echoed philosophical arguments for freedom of expression based on the self-fulfillment and autonomy of the individual. *Id.*

38. *See infra* Part I.B.1.

39. *See infra* Part I.B.2.

40. *See* BAILYN, *supra* note 25, at 232 (highlighting the "infectious . . . spirit" and "intellectual dynamism" of libertarian idealism that existed on the eve of American independence).

41. Seditious libel is speech that criticizes the government. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52–53 (1919) (upholding defendant's conviction under the Espionage Act of 1917 on the grounds that defendant's criticism of military conscription created a "clear and present danger" of causing "substantive evils that Congress has a right to prevent").

ous or seditious.[42] In *Brandenburg v. Ohio*,[43] the Supreme Court announced the modern rule that the government may not punish speech unless that speech is (1) directed at inciting imminent lawless action and (2) is likely to incite such action.[44] *Brandenburg* and its progeny effectively guard unpopular, controversial speech—even "hate speech"—from state suppression.[45] Although the Court initially recognized a few exceptions to this speech-protective rule, such as the state's power to criminalize the utterance of "fighting words,"[46] later precedent has narrowed these doctrinal exceptions.[47]

2. The First Amendment as a Shield in Civil Lawsuits

If the reason for strict First Amendment limits on criminal punishment of speech is to preserve free and open debate, then this same reason militates in favor of limiting a state's power to allow civil damages for speech as well.[48] While perhaps not as severe as criminal punishment, the apprehension of private lawsuits can also deter citizens from expressing their views.[49] Therefore, in addition to shielding individuals from criminal punishment, the First Amendment also restrains the state power to permit civil damages based on tortious speech.[50]

42. *See, e.g.*, *Whitney*, 274 U.S. at 357 (communist speech); Gitlow v. New York, 268 U.S. 652 (1925) (socialist speech); Abrams v. United States, 250 U.S. 616 (1919) (anti-war speech).

43. 395 U.S. 444 (1969).

44. *Id.* at 447.

45. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (invalidating ordinance which criminalized invective based on "race, color, creed, religion, or gender").

46. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that the state may prohibit the utterance of words that "men of common intelligence would understand [to be] likely to cause an average addressee to fight").

47. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 114 (1980) (concluding that since *Chaplinsky* the "fighting words" doctrine had been so greatly narrowed by later cases that it "was no longer to be understood as a euphemism for controversial or dirty talk but was to require instead a quite unambiguous invitation to a brawl").

48. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (underscoring the United States' "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

49. *See id.* at 300–01 (Goldberg, J., concurring) (noting the "chilling effect" of state libel law on speech).

50. *See id.* at 283 (majority opinion) ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.").

a. The First Amendment as Defense to a Libel Action

Libel is a paradigmatic example of a private cause of action that brings into sharp relief the conflict between the individual's freedom of speech and the State's interest in redressing private wrongs. In *New York Times Co. v. Sullivan*, the Court held that when a public figure sues for defamation or libel, the First Amendment requires that she prove actual malice in order to recover damages.[51] A decade later, *Gertz v. Robert Welch, Inc.* narrowed the scope of this rule when it is a non-public figure who files a defamation or libel suit.[52] In *Gertz*, the Court held that the First Amendment forbids states from imposing liability without fault with respect to such defamation claims,[53] but that states may otherwise define for themselves the proper standard of liability for the defamation of private individuals.[54] The Court's reasoning was premised on maintaining an "equitable boundary" between the competing values of free speech and the state's interest in protecting its private citizens from reputational injury.[55] Taken together, *Sullivan* and *Gertz* collectively stand for the proposition that the First Amendment requires a robust "actual malice" rule when *public figures* seek to recover defamation damages, but a less strenuous liability rule when *private figures* sue.[56]

In addition to the public figure versus private figure distinction, the Court has also distinguished between speech that relates to purely private matters and speech that relates to public issues. The latter enjoys far more rigorous First Amendment protections.[57]

51. *Id.* at 279–80. The Court defined "actual malice" as (1) knowledge that the statements made are false, or (2) reckless disregard as to whether the statements made are true or false. *Id.* at 280.

52. 418 U.S. 323, 340–42 (1974).

53. Consistent with First Amendment principles of free speech, the Court reasoned that "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Id.* at 340.

54. *Id.* at 347.

55. *Id.* at 347–48.

56. *Compare Sullivan*, 376 U.S. at 279–80 (requiring actual malice before finding liability for defamation or libel of public figures), *with Gertz*, 418 U.S. at 347 (forbidding a strict liability standard when hearing defamation or libel claims).

57. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carry v. Brown 447 U.S. 455, 467 (1980)); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755–61 (1985) (noting that First Amendment protections are less stringent when the speech involved relates to matters of purely private concern).

b. Snyder v. Phelps*: First Amendment as Defense to the Intentional Infliction of Emotional Distress Tort Action*

The intentional infliction of emotional distress ("IIED") tort is also limited by the First Amendment.[58] For the past several decades, the leading case on this question has been *Hustler Magazine, Inc. v. Falwell*.[59] In *Hustler*, *Hustler* magazine published a parody advertisement attacking noted televangelist Jerry Falwell by implying that he lost his virginity to his mother in an outhouse.[60] The Court held that when a public figure or public official brings an IIED claim based on speech, the First Amendment limits a state's power to award damages.[61] Just as with libel and defamation claims, the plaintiff must prove "actual malice" on the part of the defendant before she may recover damages.[62] The Court based part of its analysis on the fact that Falwell was a public figure, reasoning that protecting criticism of public figures was "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."[63]

Speech directed to private figures recently received similar protection in *Snyder v. Phelps*, where the Court acknowledged that the First Amendment shielded a defendant from paying monetary damages for the emotional distress allegedly caused by his speech.[64] The defendant in *Snyder v. Phelps*, Fred Phelps, believes that the United States is evil and worthy of God's wrath because of, among other issues, its toleration of homosexuality, particularly in the military.[65] Phelps and the congregants of his church—the Westboro Baptist Church[66]—targeted the funeral of Matthew Snyder, a Marine Lance

58. In order to recover for damages under the tort of intentional infliction of emotional distress ("IIED") in Maryland, the plaintiff must prove that defendant "intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (citing Harris v. Jones, 380 A.2d 611, 614, 281 Md. 560, 565–66 (1977)).

59. 485 U.S. 46 (1988). *See also* W. Wat Hopkin, Snyder v. Phelps, *Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMENDMENT L. REV. 149, 163–75 (2010) (discussing the significance of *Hustler Magazine, Inc. v. Falwell*).

60. *Hustler*, 485 U.S. at 48. S*ee also* RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT*: THE FIRST AMENDMENT ON TRIAL (special ed. 1991) (1988) (detailing the history of *Hustler Magazine, Inc. v. Falwell*, up to and including the parties' oral arguments).

61. *Hustler*, 485 U.S. at 56.

62. *Id.*

63. *Id.* at 56–57.

64. 131 S. Ct. 1207, 1220–21 (2011).

65. *Id.* at 1213. Phelps also opposes the Catholic Church. *Id.* at 1217.

66. Fred Phelps established the Westboro Baptist Church in 1955. *Id.* at 1212. Most of the church's congregants are Phelps's own relatives. Hagerty, *supra* note 5. They regularly picket military funerals in order to express their view that God hates America because of

Corporal who was killed in the line of duty in Iraq.[67] On the day of Corporal Snyder's funeral in Westminster, Maryland, the congregants picketed on public land approximately 1,000 feet from the funeral site for about thirty minutes before the start of the ceremony.[68] They carried placards stating "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags."[69] The protesters did not enter the property on which the funeral was held or otherwise disrupt the burial service, but Corporal Snyder's father learned of the protest later that evening while watching a news report and experienced great emotional anguish as a result.[70]

The Supreme Court held that the First Amendment protected Phelps against tort liability.[71] Writing for the majority, Chief Justice Roberts evaluated the circumstances of the protest to determine whether protesters' speech concerned matters of "public concern."[72] Finding that the protesters expressed views on social and political issues of interest to the general public, the Court concluded that the

its tolerance of homosexuality in the military. The church has picketed hundreds of U.S. military funerals over several decades. *Snyder*, 131 S. Ct. at 1212.

67. *Id.* at 1212. Mathew Snyder was also a Catholic. *Id.* at 1226 (Alito, J., dissenting).

68. *Id.* at 1213 (majority opinion).

69. *Id.* Other signs included "God Hates the USA/Thank God for 9/11," "Pope in Hell," "God Hates You," "America is Doomed," and "You're Going to Hell." *Id.*

70. *Id.* at 1213–14. Corporal Snyder's father thereafter sued Phelps and his daughters in the United States District Court for the District of Maryland for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Snyder v. Phelps, 533 F. Supp. 2d 567, 597 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The ensuing trial concluded with the jury awarding Snyder $2.9 million in compensatory damages for the emotional distress inflicted upon him by the Phelpses. *Id.* The jury also awarded Snyder $8 million in punitive damages, but the District Court remitted this to $2.1 million. *Id.* On appeal, the United States Court of Appeals for the Fourth Circuit reversed. 580 F.3d 206, 221 (4th Cir. 2009). The Fourth Circuit agreed with Phelps that his speech was "fully protected" by the First Amendment, and that he was therefore entitled to judgment as a matter of law. *Id.* at 222–24.

71. *Snyder*, 131 S. Ct. at 1216. Justice Breyer wrote a concurring opinion that emphasized the fact-intensive nature and narrow quality of the holding. *Id.* at 1221 (Breyer, J., concurring). He opined that First Amendment analysis generally cannot end with the majority's inquiry into whether defendant's speech related to "matters of 'public concern.'" *Id.* Rather, Justice Breyer's preferred approach balances key "First Amendment values" against "state-protected . . . interests" whenever the two conflict. *Id.* Although more sympathetic to Snyder's argument than the majority, Justice Breyer ultimately agreed that the First Amendment barred recovery under the specific facts of this case. *Id.* at 1221–22. Since neither Snyder nor any other funeral attendee could see the signs from the funeral, Justice Breyer concluded that upholding the application of Maryland's tort law would restrict public speech and would fail to "proportionately" further Maryland's interest in protecting its citizens. *Id.*

72. *Id.* at 1215 (majority opinion).

protesters' speech was entitled to "special" First Amendment protection and barred Snyder from recovery.[73]

The Court found that Phelps's signs, however crude in their manner of expression, nevertheless discussed political and moral issues of national importance, such as clerical scandals and government policy relating to homosexuality in the military.[74] Since these statements communicated Phelps's position on these issues to a public audience, the statements plainly related to matters of public concern.[75] The Court rejected Snyder's argument that Phelps was invoking the First Amendment as a mere pretext to insulate a personal attack from liability.[76] Indeed, Phelps's long history of similar protests and well-documented views on homosexuality and the military belied the notion that his speech was primarily motivated by a personal animus against Snyder.[77] The Court especially emphasized that mere "outrageousness" (the appropriate standard for IIED claims)[78] is a constitutionally impermissible standard for First Amendment claims because it is too subjective and gives jurors the discretion to punish unpopular expression.[79]

In dissent, Justice Alito characterized Phelps's protest as a brutal, personal attack on Snyder, a private figure, that made "no contribution to public debate."[80] Justice Alito analogized Phelps to an assailant who physically attacks a random victim, knowing that his assault

73. *Id.* at 1216. The Court began its analysis with an examination of the content and context of the protesters' speech. This speech primarily consisted of placards with statements such as "Priests Rape Boys" and "Fags Doom Nations." *Id.* at 1216–17.

74. *Id.* at 1217.

75. *Id.*

76. *Id.*

77. *Id.* The majority opinion also argued that the form of Phelps's speech did not convert it into private speech. Even though Phelps admittedly used Snyder's funeral as a platform to garner publicity, his choice of location bore a strong relation to his public views. Since "Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies," it made logical sense for the church to voice these views at a military funeral. *Id.*

78. *See id.* at 1215 (citing Harris v. Jones, 380 A2d 611, 614, 281 Md. 560, 565–66 (1977)) (affirming that plaintiffs in Maryland IIED cases must prove that the defendant "intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress").

79. *Id.* at 1219. The Court also affirmed the Fourth Circuit's reversal on the torts of seclusion and civil conspiracy. The majority opinion reasoned that its "captive audience" doctrine, a narrow exception designed to protect especially vulnerable listeners, could not be extended to the circumstances of this case—Snyder was not a "captive" to the unwanted speech because Phelps did not actually disrupt his son's funeral. *Id.* at 1220. Thus, Snyder could not establish that his "substantial privacy interests" were invaded in an "essentially intolerable manner." *Id.* (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

80. *Id.* at 1222 (Alito, J., dissenting).

will be covered by the news, as a deliberate strategy to amplify his message to the public.[81] Just as the Court would not find an assailant's attack to be constitutionally protected, Justice Alito argued, neither should it have protected Phelps's verbal assault by confusing Phelps's views with his tortious means of attracting publicity for those views.[82]

Also, Justice Alito forcefully critiqued the Court's "public issues" rationale for protecting Phelps's speech. Arguing that the Court inaccurately classified the funeral protest, Justice Alito considered Phelps's speech predominantly personal rather than ideological in nature.[83] Unmoved by the fact that the protest occurred on a public street, the dissent argued that just as an assault can occur on public land, so too can IIED.[84]

C. First Amendment Limits to Content-Neutral Regulations

Besides offering powerful defenses against speech-based criminal and civil liability,[85] the First Amendment also delimits a state's authority to enact content-neutral speech regulations.[86] A number of states, including Maryland, have used content-neutral "buffer zone" laws to regulate picketing at or near funeral services.[87]

1. Content-Neutral Regulations Generally

States sometimes enact laws that do not aim to suppress particular ideas but nonetheless place incidental burdens on freedom of ex-

81. *Id.* at 1226. In such a case, the dissent continued, it is important to distinguish between the *means* of the tortfeasor's act (the assault) and his *end* (the speech); only the latter is constitutionally protected. *Id.* at 1226–27. The failure to make this distinction conflates means with ends, and this Justice Alito contended was the majority's grave error. *Id.* at 1226.

82. *Id.*

83. *Id.* at 1227. Furthermore, even assuming that the picketers mixed some ideological speech into their personal attack of Matthew Snyder, Justice Alito criticized the Court's implicit assumption that actionable speech should be protected simply by virtue of its commingling with protected speech. *Id.* at 1226–27. He contended that Phelps's lack of a personal grudge against Snyder was legally insignificant; if anything, it would make Phelps even more blameworthy, not less, that he used a "cold and calculated strategy to slash a stranger as a means of attracting public attention." *Id.* at 1227.

84. *Id.*

85. *See supra* Part I.B.

86. *See infra* Part I.C.1.

87. *See infra* Part I.C.2.

pression.[88] Such laws are said to be content-neutral because they regulate the time, place, or manner in which ideas and views may be expressed but do not discriminate against speech based on its substantive content.[89] When a content-neutral law (unrelated to the suppression of a particular viewpoint) imposes burdens on speech in public fora, the Court has held that the law must be narrowly tailored to serve an important state interest and must leave the speaker with ample alternative channels of communication.[90]

Under this First Amendment rule, some kinds of expressive conduct may be forbidden entirely. For instance, in *United States v. O'Brien*, the Court upheld the conviction under the Selective Service Act of a man who had burned his draft card in protest of the Vietnam War.[91] The Court held that the Selective Service Act was justified by Congress's constitutional power to maintain an effective military and that the Act was narrowly tailored to further that end.[92] Similarly, the Court in *Members of City Council of Los Angeles v. Taxpayers for Vincent* upheld a city ordinance that prohibited posting signs (including political signs) on public property.[93] The Court recognized that advancing aesthetic values by preventing the unsightly littering of signs was a legitimate governmental interest.[94] Because the ordinance did not impact individuals' rights to speak or hand out literature, it left open ample means of alternative communication.[95]

88. *E.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding municipal authority to "control the use of its public streets for parades or processions" by regulating the "time, place, and manner" in which such processions may be conducted).

89. *See e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that time, place, and manner regulations must not regulate the content of the speech).

90. *See id.* ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"(quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

91. 391 U.S. 367, 396, 386 (1968).

92. *Id.* at 381–82. The Court rejected O'Brien's argument that Congress enacted the provision against burning draft cards with the legislative intent to stifle anti-war protest speech, relying upon the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 382–83.

93. 466 U.S. 789, 817 (1984).

94. *Id.* at 816–17.

95. *Id.* at 812.

2. Picketing Regulations

Some states have enacted laws to regulate picketing activity within a certain time and distance of funerals. Maryland's funeral picketing statute states in pertinent part: "A person may not engage in picketing activity within 500 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession."[96] Other states have enacted similar statutes.[97] While the Supreme Court has not yet ruled on the constitutionality of any of these laws, two United States Courts of Appeals have done so.

In *Phelps-Roper v. Strickland*, the Sixth Circuit Court of Appeals upheld Ohio's funeral protest law as a content-neutral measure narrowly tailored to serve a significant state interest in protecting mourners' privacy while leaving ample alternative means of speech for protesters.[98] The Ohio statute created a 300-foot buffer zone during, as well as one hour before and after the funeral.[99] The court relied on a Supreme Court decision upholding state bans on residential picketing[100] and protesting near medical centers where abortions were performed.[101] These cases relied on the theory that certain audiences—for example, private residents in their homes or abortion patients entering clinics—are "captive" to unwanted speech by virtue of their unique inability to avoid the speech.[102] In select circumstances, the Court has held that the vulnerability of these "captive audiences" gives rise to a governmental interest that is sufficiently strong to protect them from unwanted speech with regulations.[103] The Sixth Circuit extended the "captive audience" doctrine to funeral attendees, reasoning by analogy that mourners are just as emotionally vulnerable as

96. MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2002 & Supp. 2011).

97. *See, e.g.*, COLO. REV. STAT. ANN. § 18-9-125 (West 2004 & Supp. 2011) (setting a buffer zone of 100 feet from a funeral); KY. REV. STAT. ANN. § 525.055 (West 2006 & Supp. 2011) (establishing a buffer zone of 300 feet between protesters and funerals).

98. 539 F.3d 356, 373 (6th Cir. 2008).

99. OHIO REV. CODE ANN. § 3767.30 (LexisNexis 2005 & Supp. 2011).

100. *Strickland*, 539 F.3d. at 363 (citing Frisby v. Schultz, 487 U.S. 474, 476 (1988)).

101. *See id.* (citing Hill v. Colorado, 530 U.S. 703, 715–18 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994)). These cases recognized an important state interest in protecting the medical privacy of abortion patients who were "captive" to unwanted speech near medical facilities due to their "medical circumstance." *Id.*

102. *See, e.g.*, *Frisby*, 487 U.S. at 487 ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980)).

103. *Id.*

abortion patients and just as unable to avoid unwanted speech as private residents.[104]

By contrast, in *Phelps-Roper v. City of Manchester*, the Eighth Circuit struck down a similar funeral protest ordinance under the First Amendment, finding that the ordinance did not serve any significant government interest.[105] Exactly as in *Strickland*, the ordinance at issue banned picketing within 300 feet of funeral site during, as well as within one hour before or after the funeral service.[106] Acknowledging its sister circuit's contrary opinion in *Strickland*, the court's brief opinion nonetheless declined to recognize a significant state interest in sheltering funeral attendees from unwanted speech.[107] Subsequently, however the Eighth Circuit vacated its decision and granted a rehearing of the case en banc.[108]

II. ANALYSIS

There are two different methods states might use to address the type of funeral picketing that occurred in *Snyder v. Phelps*. The first method is reactive: the state can simply wait for private individuals harmed by picketers to bring civil actions against the alleged wrongdoers and let judges and juries sort out the claims.[109] This first method of restricting funeral picketing has been rightfully limited by the Supreme Court, as the power of judges and juries to impose speech deterrents violates the spirit and evolution of First Amendment doctrine.[110] The second method is proactive: the state legislature can enact laws restricting picketing activities within a certain timeframe or geographical radius from funeral ceremonies.[111] This latter method, which includes Maryland's current approach, strikes an appropriate balance between the privacy concerns of funeral attendees and the fundamental freedoms of the First Amendment.[112]

104. *Strickland*, 539 F.3d at 366.

105. 658 F.3d 813, 816–17 (8th Cir. 2011), *vacated, reh'g en banc granted* (Dec. 7, 2011).

106. *Id.* at 815.

107. *See id.* at 816–17 (finding that protection for unwilling listeners does not extend outside the home).

108. *Id.* at 814. As of the time of this writing, the rehearing has not been held.

109. *See infra* Part II.A.

110. *See infra* Part II.A.

111. *See infra* Part II.B.

112. *See infra* Part II.B.

A. The Supreme Court Correctly Barred Private Litigation as a Means of Deterring Invasive Speech at Funerals

Maryland followed the first method of dealing with picketing at funerals in *Snyder v. Phelps*—that is, waiting for funeral mourners to sue picketers.[113] This policy, however, has been foreclosed, or at least substantially limited,[114] by the Court's decision in *Snyder*, which shielded Phelps from having to pay monetary damages for his "outrageous" speech.[115] This section argues that the Court reached the correct result.[116] Although *Snyder* extended First Amendment protections further than the Court's holding in *Hustler* by immunizing speech targeted against private (as opposed to only public) figures,[117] the underlying rationale behind *Hustler* supported such an extension.[118] Allowing juries to award damages based on the perceived "outrageousness" of speech, even when directed to purely private figures, would confer juries with an arbitrary and censorial power that is unacceptable in light of fundamental First Amendment values.[119]

1. The Court Properly Extended First Amendment Protections to Speech Directed to Private Figures in IIED Cases When the Speech at Issue Relates to Issues of Public Concern

In essence, the Court's decision in *Snyder* can be cast as a straightforward syllogism of law and fact. The first premise is that the First Amendment may be raised as a defense in a state tort suit if the defendant's allegedly tortious speech relates to "public issues."[120] The second premise is that speech is considered to relate to public issues if it can "be fairly considered" to relate to matters of concern to the community, such as debated social or political issues.[121] The third

113. *See supra* Part I.B.2.b.

114. According to Justice Breyer's reading of the Court's opinion, the Court balanced Phelps's First Amendment right against Maryland's interest in enforcing IIED claims, and grounded its decision in light of the specific facts of the case, namely, that the picketers had complied with police directions and could not be observed from the funeral. Snyder v. Phelps, 131 S. Ct. 1207, 1221–22 (2011) (Breyer, J., concurring). If Justice Breyer's reading is an accurate description of the Court's holding, then a state may arguably enforce IIED claims against funeral picketers in the future, consistent with *Snyder*, if the picketers are visible or audible to the funeral attendees.

115. *See supra* Part I.B.2.b.

116. *See infra* Part II.A.1.

117. *See supra* Part I.B.2.b.

118. *See infra* Part II.A.1.

119. *See infra* Part II.A.1.

120. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (stating that speech relating to public issues is entitled to special First Amendment protection).

121. *Id.* at 1216 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

premise is that Phelps's speech plainly related to matters of political and social concern to the community.[122] From these well-established premises, it follows that Phelps's speech was of public concern and therefore merited special First Amendment protection which shielded it against Snyder's suit.

While this argument is persuasive with respect to speech directed to public figures, some have argued that the First Amendment should not offer similar immunity to speech attacking private persons.[123] According to this line of reasoning, protecting criticism of public figures serves essential First Amendment values, but protecting hateful speech directed to private individuals does not.[124] These critics argue that, just as it did in *Gertz*, the Court should have distinguished between public and private figures, rigorously protecting only speech related to the former type.[125] In other words, in the context of IIED claims, *Snyder* should have been to *Hustler* what *Gertz* was to *Sullivan* in the context of defamation claims.[126]

This argument, however, is ultimately incongruent with the Court's overall First Amendment jurisprudence because "[s]peech about private figures is generally constitutionally protected."[127] Although critics might cite *Gertz* as one example of a case where speech about a private figure was not constitutionally protected, *Gertz* is not apposite because it involved a defamatory *statement of fact*—the false

122. *Id.* at 1217. As the Court emphasized, the speech expressed in the Westboro Baptist Church's signs, despite their vulgar manner of expression, clearly related to debated social issues such as "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy." *Id.*

123. *See, e.g.*, Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381, 403 (2008) ("When religious advocacy is used to attack private individuals, assuredly the principle of voluntariness offers no basis for immunity from civil redress." (footnote omitted)).

124. As Justice Alito argued in dissent, "commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, [but] speech regarding Matthew Snyder's purely private conduct does not." *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting). Justice Alito likened Westboro's conduct to that of a "private feud" and 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." *Id.* at 1227–28.

125. According to this view, permitting state tort law to operate more freely in the realm of private speech is an equitable way to balance the privacy interests of some citizens against the free speech right of other citizens. *See id.* at 1215–16 (majority opinion) (explaining that speech involving private matters does not hinder debate or meaningful dialogue on public issues).

126. *See supra* text accompanying notes 51–56.

127. Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort,* 2010 CARDOZO L. REV. DE NOVO 300, 304.

accusation that Gertz was a Communist conspirator—in contradistinction to an *idea or opinion*—such as the immorality of homosexuality.[128] Because "there is no constitutional value in false statements of fact," the speech in *Gertz* was not entitled to special constitutional protection.[129] By contrast, Phelps's speech consisted of ideas and opinions on matters of public concern, which are entitled to special constitutional protection under the First Amendment.[130] As the Court in *Gertz* itself affirmed, "[u]nder the First Amendment there is no such thing as a false idea."[131] Thus, it would have been improper to decline to protect Phelps's ideological and religious speech simply because it was directed at a private figure.

Indeed, Professor Eugene Volokh has noted a related difficulty with allowing juries in IIED cases to decide on a case-by-case basis when speech—even speech about private figures—is too "outrageous."[132] As Professor Volokh argues, the category of private figures includes many people who are deeply immersed in public matters.[133] Authors, professors, and criminals, for instance, may not be public figures, but may nevertheless be intimately involved in important public issues.[134] Accordingly, even though eliminating First Amendment barriers to private IIED lawsuits might not necessarily result in a proliferation of IIED litigation, the potential threat of such lawsuits could easily exert a chilling influence on public debate by deterring individuals from taking controversial positions on important issues.[135] Moreover, requiring jurors to decide which speech is too "outra-

128. *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974) (describing labeling Gertz as a Communist as a false statement of fact), *with Snyder*, 131 S. Ct. at 1219 (describing Westboro's speech as ideas).

129. *Gertz*, 418 U.S. at 340.

130. *Snyder*, 131 S. Ct. at 1219. It might well be the case that certain parts of Westboro's speech were not opinions or ideas, but rather, were false and malicious statements of fact about private individuals. For example, on its website, Westboro denounced the Snyder family. While a colorable argument may be made that these statements should be interpreted as false statements of fact and not hyperbole, the Court ultimately declined to consider these statements in its opinion because Snyder did not raise them in his petition for certiorari. *Id.* at 1214 n.1.

131. *Gertz*, 418 U.S. at 339.

132. See Volokh, *supra* note 127, at 309 (criticizing reliance on IIED action as a way to regulate speech because it is a "vague law [that] impermissibly delegates basic policy matters to . . . 'juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application.'" (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972))).

133. *Id.* at 305.

134. *Id.*

135. *See id.* at 302 (arguing that "the vagueness of the 'outrageousness' standard [which is the standard for IIED claims] exacerbates the risk that the emotional distress tort will deter . . . speech").

geous" is to effectively imbue juries with censorial power, a result incompatible with fundamental First Amendment principles.[136]

2. *Justice Alito's Dissenting Opinion Failed to Establish Why Phelps's Speech Was Undeserving of First Amendment Protections*

Because the Court rightly extended First Amendment protections to speech directed to private plaintiffs in IIED cases when the speech at issue relates to public concerns, its decision in *Snyder* should be applauded. Justice Alito's sole dissent is worthy of consideration but is ultimately unpersuasive. According to Justice Alito's most compelling argument, Phelps is like someone who physically assaults a victim in order to generate news coverage of his views.[137] While the substantive content of such an assailant's speech would be fully protected, his unlawful means of obtaining a channel of communication for that speech—that is, his assault—would not enjoy similar immunity from civil or criminal liability.[138] Likewise, while Fred Phelps should be generally free to write and speak as he pleases under the First Amendment, he should not be afforded the judicial privilege of inflicting gratuitous harm on grieving family members with impunity just so that he can gain a special platform through which to express his views.[139]

At first glance, this argument seems plausible. It is admittedly likely that the only reason Phelps selects military funerals as the stage of choice for picketing is because he expects that such a controversial venue will generate the most publicity for his church's extreme views.[140] Upon closer analysis, however, Justice Alito's analogy is flawed.

No one doubts that constitutional protections for free speech do not extend to assaults or other wrongful acts, even when those acts

136. *Id.* at 308. As Professor Volokh argues, "Even if a First Amendment specialist, steeped in the First Amendment insistence on viewpoint neutrality, might set aside the viewpoint of speech in deciding whether the speech is outrageous, there's no reason to be confident that a lay juror will do the same." *Id.* Indeed, jurors are instructed to consider "all the factors that can make speech outrageous," and many jurors will presumably interpret this to include the substantive content of the speech. *Id.*

137. Snyder v. Phelps, 131 S. Ct. 1207, 1226 (2011) (Alito, J, dissenting).

138. *Id.*

139. *Id.*

140. *Cf.* Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008) ("[Phelps-Roper] openly admits . . . that a 'funeral is the occasion of her speech, not its audience.'").

may be undertaken with an expressive purpose.[141] The hypothetical assailant in Justice Alito's example, however, commits two unique acts: first, the assault; then, the speech.[142] These two discrete acts are easily distinguished from one another both in terms of their purpose[143] and their timing.[144] By contrast, the elements that constitute Phelps's verbal "assault"—"outrageous" statements such as "God hates fags"—are *exactly identical to* his speech.[145] Therefore, unlike the assailant in Justice Alito's analogy, one cannot disentangle Phelps's "assault" from his constitutionally protected speech.[146]

In the case of the hypothetical assailant, the government logically can punish the wrongful assault without implicating First Amendment concerns, as long as it confines itself to punishing *only* the wrongful assault and not the speech that follows it.[147] By contrast, the emotional harm which Snyder sought to remedy in *Snyder v. Phelps* was directly created by Phelps's speech itself, not some other wrongful act that was purely a means to advance his speech.[148] The government may not impose liability for such a verbal "assault" consistent with the First Amendment; any such liability would by definition curtail free speech.

141. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984))).

142. *See Snyder*, 131 S. Ct. at 1226 (Alito, J, dissenting) (discussing both the assault and the opportunity it provides).

143. The unlawful assault is not itself the message, but rather, is merely a means to the end of transmitting the message to the public.

144. The assault occurs prior to the speech.

145. Evidence during the trial, including expert testimony, established that the mental association between his dead son and Westboro's picketing caused Snyder to experience emotional anguish and severe depression. *Snyder*, 131 S. Ct. at 1214 (majority opinion).

146. Of course, one might argue that the content of Phelps's speech remains distinct from its venue and timing, and that courts should therefore be permitted to instruct juries that they are to award damages only for the tortious *manner* in which speech is expressed without regard to content. Even if this may be possible in theory, however, there is good reason to be skeptical about the ability of courts to apply such fine distinctions in practice. Rather, juries faced with deciding whether the expression of provocative and emotionally charged speech is "extreme and outrageous" are likely to be highly influenced by the content of that speech in making their determination. *See* Volokh, *supra* note 127, at 307–09 (expressing doubt that the jury, without any consideration of the reviling content of Phelps's speech, sincerely concluded that Snyder was "damaged to the tune of $2.9 million by speech (1) that he saw once . . . on television, (2) that he knew was not remotely reflective of the views of his community, and (3) that he knew was said by people who are held in contempt by the community" (footnote omitted)).

147. *E.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (explaining that conduct cannot merely be protected as speech just because the person engaging in the conduct was expressing an idea).

148. *See supra* note 145 and accompanying text.

B. Maryland's Funeral Picketing Statute Is Content-Neutral, Narrowly Tailored to Serve a Compelling State Interest, and Leaves Ample Alternative Means of Communication for Protesters

The second method of dealing with intrusive picketing at funerals—special regulations targeted at funeral picketing—is currently in place in Maryland and other states that have passed "buffer zone" laws in the wake of *Snyder v. Phelps*.[149] Although *Snyder* mentioned these laws in passing, the Supreme Court has not yet addressed their constitutionality.[150] This section argues that Maryland's statute is a constitutional time, place, and manner regulation because it is content-neutral, narrowly tailored to serve an important governmental interest, and allows for ample alternative channels of communication.[151]

Although the Supreme Court correctly determined that the type of IIED claims at issue in *Snyder* are constitutionally impermissible, this does not imply that mourners have no legal options against the invasive behavior of groups like Westboro. Mourning the dead is a venerable and universal human practice, and mourners indeed deserve respectful privacy during their time of grieving.[152] Unlike the enforcement of IIED claims, which relies on the problematic standard of jury-determined "outrageousness," Maryland's law reflects a reasonable effort to balance picketers' right to free speech against the privacy interests of emotionally vulnerable mourners who are captive to unwanted speech at funerals.

The relevant statute creates a 500-foot buffer zone around every "funeral, burial, memorial service, or funeral procession."[153] Because this provision is content-neutral, it should be upheld as long as it serves an important governmental interest, is narrowly tailored to fur-

149. *See supra* Part I.C.2.

150. *See supra* note 17 and accompanying text.

151. *See supra* note 90.

152. *See* Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 297 (2008) ("The idea of paying respect to the dead is a concept as old as civilization itself. Respecting the dead and a time of mourning is revered by the religious and the non-religious alike. Some view respecting the dead and a time of mourning as a simple matter of human decency." (footnote omitted)).

153. MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2002 & Supp. 2011). The statute also contains a provision making it unlawful to "address speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace." *Id.* §10-205(B). This Comment is concerned only with the "picketing" provision. *See id.* §10-205(C) ("A person may not engage in picketing activity within 500 feet of a funeral, burial, memorial service, or funeral procession . . . .").

ther that interest, and allows for alternative means of communication.[154]

1. Maryland's Picketing Statute Is Content-Neutral

As a threshold matter, it should be noted that Maryland's statute is content-neutral. It does not, on its face, discriminate against certain types of speech on the basis of substantive content, but rather, proscribes picketing in general terms, irrespective of the viewpoint expressed.[155] Given that Westboro is the only organization of note to protest at funerals, it is admittedly likely that the only, or at least the primary, reason for enacting this law was to curtail the Westboro's funeral picketing activity.[156] However, legislative intent is unlikely to be a legally relevant consideration with respect to this issue. The Supreme Court has held that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[157] Therefore, the statute is unlikely to be invalidated just because the Maryland legislature might have intended to stifle Fred Phelps with its passage. Rather, since the statute is content-neutral, it may only be invalidated if it fails to satisfy the remaining three elements.

2. Maryland's Picketing Statute Serves the Compelling State Interest of Protecting the Privacy of Captive Audiences

In the exercise of their police powers, states have important interests in protecting the privacy of vulnerable individuals who are captive to unwanted speech.[158] As a general rule, it is true that a state may not shelter people from offensive or hurtful speech.[159] Those who find speech offensive typically must "avert their eyes" but are otherwise required under the First Amendment to tolerate their fellow citizens' expression of beliefs, even when they regard those beliefs

154. *See supra* Part I.C.1.

155. *See* CRIM. LAW § 10-205 (c) (prohibiting "picketing activity").

156. *See, e.g.*, Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES Apr. 17, 2006, at A14 (reporting state legislative reactions to the Westboro Baptist Church's picketing activity).

157. United States v. O'Brien, 391 U.S. 367, 383 (1968). *But see* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540 (1993) (stating the Court will consider a "city council's object from both direct and circumstantial evidence" in evaluating the neutrality of a law and that relevant evidence includes "contemporaneous statements made by members of the decisionmaking body").

158. *See supra* text accompanying note 103.

159. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) (opining that those who took offense to the defendant's jacket—bearing the slogan "Fuck the Draft"—could "avoid further bombardment of their sensibilities simply by averting their eyes").

as abhorrent.[160] The Supreme Court has recognized, however, that a state has an interest in protecting certain vulnerable listeners from having their privacy invaded in an "essentially intolerable manner."[161] The "captive audience" doctrine has led the Court to uphold bans on residential picketing as well as restrictions on picketing near medical facilities where abortions are performed.[162]

The Sixth Circuit logically extended the "captive audience" doctrine to funeral attendees, recognizing the truth that "individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility."[163] The court continued:

> [J]ust as a resident subjected to picketing is "left with no ready means of avoiding the unwanted speech," mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service. And just as "[p]ersons who [] attempt[] to enter health care facilities . . . are often in particularly vulnerable physical and emotional conditions," it goes without saying that funeral attendees are also emotionally vulnerable.[164]

The Sixth Circuit's synthesis of "captive audience" precedent aptly identifies the criteria which the Supreme Court has historically concentrated on as being the most legally significant factors in determining when an audience is "captive" to unwanted speech. Specifically, these criteria are (1) the audience's inability to avoid the unwanted speech and (2) the audience's condition of unique emotional or physical vulnerability.[165]

Funeral mourners plainly fall into both categories. It can scarcely be doubted that mourners are in highly vulnerable emotional states during the burials of their loved ones.[166] Furthermore, mourners cannot simply "avert their eyes" from the offending speech, because walking away from the picketers would mean abandoning the burial service of their loved one. This is clearly not an option. In light of these considerations, the Sixth Circuit's conclusion is compelling. Mourners' obvious vulnerability, coupled with their equally obvious inability to avoid funeral picketers, makes them sufficiently "captive"

160. *Id.* at 20–21.

161. *Id.* at 21.

162. *See supra* Part I.C.2.

163. Phelps-Roper v. Strickland, 539 F.3d 356, 364–65 (6th Cir. 2008).

164. *Id.* at 366 (alterations in both) (internal citations omitted).

165. *E.g.*, Hill v. Colorado, 530 U.S. 703, 729 (2000).

166. *Strickland*, 539 F.3d at 366.

to justify finding an important state interest in protecting them against noisy or otherwise intrusive activities taking place near funerals.[167] Thus, the same reasons that allow states to restrict picketing in residential areas or near health facilities also justify regulations of picketing at funeral sites.[168]

While a three-judge panel for the United States Court of Appeals for the Eighth Circuit initially held in *Manchester* that a state had no legitimate interest in protecting mourners' privacy interests, the court recently vacated the panel decision and granted a rehearing en banc.[169] The concurring opinion by Judge Murphy may provide an illuminating preview of how the court will analyze the case when it issues its forthcoming en banc decision:

> In *Snyder v. Phelps* . . . the Court suggested there are likely other locations outside of the home and health facilities where the government can permissibly regulate First Amendment activities. . . . The funeral attendees in *Snyder* were not captive to unwanted communication because the main area used by the protesters was approximately 1000 feet from the site of the funeral, the attendees could see no more than the tops of the picket signs, and the picketing did not interfere with the funeral. . . . The Court indicated, however, that protesters' "choice of where and when to conduct [their] picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' . . . ."[170]

Unlike the Eighth Circuit panel's cursory majority opinion,[171] Judge Murphy's concurring opinion correctly identifies the relevant issue: are funeral attendees "captive to unwanted communication" so much so that the situation warrants a governmental intervention in the form of a reasonable "time, place, or manner" regulation of picketing near funerals?[172] Judge Murphy also rightly views *Snyder v. Phelps* as a useful guidepost for answering this question.[173]

167. *Id.*

168. *Id.*

169. Phelps-Roper v. City of Manchester, 658 F.3d 813, 816–17 (8th Cir. 2011), *vacated, reh'g en banc granted* (Dec. 7, 2011).

170. *Id.* at 818 (Murphy, J., concurring) (internal citations omitted). Judge Murphy continued, "I respectfully suggest that *Snyder* provides the proper method of analysis for deciding whether the Manchester ordinance is constitutional." *Id.*

171. The majority opinion's entire First Amendment analysis was contained in two short paragraphs. *Id.* at 816–17 (majority opinion).

172. *Id.* at 818 (Murphy, J., concurring).

173. *Id.*

In *Snyder*, the Supreme Court declined to hold that Snyder was a "captive audience" for the purpose of recognizing the state's interest in enforcing Snyder's tort claims, mostly because, as the Court emphasized, the picketers were so far away from the funeral site that Snyder was not even aware of their signs until he returned home and saw them on the news later that night.[174] Under those circumstances, it would strain credulity to hold that Snyder was "captive" to words on signs he could not even see from the funeral. This conclusion, however, would almost certainly have differed had Phelps, say, been protesting a mere ten feet away from the burial service, and shouting loud and offensive slogans at the mourners during the burial ceremony. Under these facts, it is easy to see that the mourners would indeed have been a "captive" audience to the disruptive picketers, because they would not have been able to avoid the speech without leaving the funeral of their departed loved one.

As the Court in *Snyder* noted in dicta, states may subject picketing to "reasonable time, place or manner restrictions."[175] Maryland's funeral picketing law did not exist at the time the events in *Snyder* transpired,[176] but in its current form it is one such reasonable "time, place, and manner" regulation.[177] As the Sixth Circuit cogently reasoned in *Strickland*, states have an important interest in preventing the disruption of burial services and protecting the privacy interests of "captive" mourners by regulating the time, place, and manner of picketing at or near funeral sites.[178] The Eighth Circuit was correct to vacate its contrary opinion,[179] and it now has the opportunity to provide a more persuasive "captive audience" analysis on rehearing.

3. Maryland's Picketing Statute Is Narrowly Tailored to Achieve Its Constitutional Goal

In addition to serving an important governmental interest, Maryland's law is narrowly tailored to achieve that interest. The law prohibits picketing within 500 feet of funerals.[180] This distance is greater than the 300-foot zone that was properly upheld by the Sixth Circuit

174. Snyder v. Phelps, 131 S. Ct. 1207, 1221–22 (2011).

175. *Id.* at 1218 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

176. *Id.*

177. *See supra* Part I.C.2.

178. Phelps-Roper v. Strickland, 539 F.3d 356, 364–66 (6th Cir. 2008).

179. Phelps-Roper v. City of Manchester, 658 F.3d 813, 816–17 (8th Cir. 2011), *vacated, reh'g en banc granted* (Dec. 7, 2011).

180. *See supra* Part I.C.2.

in *Strickland*[181] but less than the 1,000-foot distance of the picketers in *Snyder v. Phelps*, under which the Supreme Court declined to view Mr. Snyder as a "captive audience."[182] On balance, Maryland's law is closer to *Strickland* in terms of the permitted proximity, which makes the restriction more persuasive overall.

As the court in *Strickland* noted, funeral picketing laws are in many respects much narrower than other content-neutral laws that the Supreme Court has upheld in the past. These "buffer zone" laws mandate no "'limitations on the number, size, text, or images' of placards, and [] 'no limitation on the number of speakers or the noise level, including the use of amplification equipment.'"[183] In sum:

> [T]he Funeral Protest Provision is in certain aspects narrower than the analogous measures in *Frisby*, *Hill*, and *Madsen*. Phelps-Roper is not silenced during a funeral or burial service, but must merely stay 300 feet away within a brief window of time, outside of which she may say what she wants, wherever she wants, and when she wants, with no limitation on the number of speakers or the noise level, including the use of amplification equipment, and no limitations on the number, size, text, or images of placards.[184]

This same analysis applies with equal force to Maryland's statute, except that picketers must stay at least 500, rather than 300, feet away. Although this distance is 200 feet greater than the buffer zone upheld in *Strickland*, it nonetheless "serves a similar purpose, and . . . protects a group of individuals who may arrive and depart from the funeral or burial service in a coordinated fashion."[185] Indeed, while the statute

181. *See supra* Part I.C.2.

182. *See supra* Part I.B.2.b.

183. *Strickland*, 539 F.3d at 370.

184. *Id.* at 371 (footnote omitted).

185. *Cf. id.* at 370 (finding that even though the buffer zone in that case was 200 feet greater than the buffer zone in *Hill v. Colorado*, 530 U.S. 703 (2000), it served a similar purpose). Although the 300-foot buffer zone in *Strickland* was greater than the buffer zones previously upheld, Maryland's 500-foot zone is 200 feet greater still. While this Comment takes the position that the Maryland statute is narrowly tailored, there is some merit to the argument that 500 feet may be too great a distance to be considered narrowly tailored, given that there is no Supreme Court precedent upholding a radius that large in this context. If picketers were to challenge the Maryland statute, they would be able to distinguish Maryland's 500-foot buffer from existing precedent, including *Strickland*'s 300-foot buffer. Moreover, a 500-foot radius might well extend to private residences, thereby interfering with property owners' right to picket on their own private property. All other things being equal, the smaller the radius, the more likely courts will view the law as being narrowly tailored. Thus, in order to better insulate the law from constitutional attack, the Maryland legislature might consider amending the statute to create a 100-, 150- or 300-foot zone, instead of the more aggressive 500-foot zone created by current law.

in *Strickland* was somewhat narrower than Maryland's statute in terms of distance,[186] the Maryland statute is narrower in terms of time by constricting protests only during the funeral rather than for a time during, before, and after the funeral as Ohio does.[187] Overall, therefore, the law is narrowly tailored to achieve its constitutional goal.

4. Maryland's Picketing Statute Allows for Ample Alternative Channels of Communication for Protesters

Lastly, Maryland's buffer zone law leaves open ample alternative channels of communication through which groups like Westboro can freely express their views. Over the past several decades, Westboro has repeatedly expressed its views over the Internet and on television, has garnered extensive news coverage, and engaged with citizens in public locations throughout the United States.[188] Maryland's funeral picketing law affects none of these activities. Nor does it prevent Phelps or any of his congregants in the future from proselytizing door-to-door or by telephone; distributing literature in person or by mail or email; protesting in public places (other than cemeteries during a burial service); appearing on television or radio programs; placing advertisements in print; publishing books, newsletters, or pamphlets; disseminating their views in online social media; or creating as many websites as they wish in order to communicate their views.[189] These are ample alternative channels of communication through which Westboro or any other group can freely express its beliefs.[190]

III. CONCLUSION

Snyder v. Phelps was a case surrounded by controversy. Popular disappointment with the outcome is understandable in light of the forum Fred Phelps and Westboro chose to express their extremely of-

186. *Compare* OHIO REV. CODE ANN. § 3767.30 (LexisNexis 2005 & Supp. 2011) (creating a 300-foot buffer zone), *with* MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2002 & Supp. 2011) (creating a 500-foot buffer zone).

187. *Compare* CRIM. LAW § 10-205 (banning picketing during services), *with* § 3767.30 (banning picketing an hour before, during, as well as after services).

188. *See supra* notes 5–10 and accompanying text.

189. *Cf. Strickland*, 539 F.3d at 372 ("[P]rotestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. They may go door-to-door to proselytize their views. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment." (quoting Frisby v. Schultz, 487 U.S. 474, 483–84 (1988))).

190. *Cf. id.* at 373 ("[T]here is no merit to any contention that the Funeral Protest Provision leaves [Phelps-Roper] without ample alternative channels of communication."). Indeed, it is difficult to see any merit in arguments to the contrary.

fensive views. However, the Court's opinion in *Snyder* was ultimately correct.[191] A sound First Amendment jurisprudence requires that speech on issues of public concern be strictly protected, even if such speech might occasionally cause emotional harm to private citizens. Moreover, allowing plaintiffs to extract monetary damages based on the "outrageous" nature of defendants' speech in IIED claims would unconstitutionally empower juries to define the limits of acceptable public discourse, contrary to fundamental First Amendment principles.[192] By contrast, Maryland's funeral picketing law does not suffer from this problem, because it does not impose liability on speech based on a subjective standard such as "outrageousness." Rather, Maryland's statute is a content-neutral measure[193] that is narrowly tailored[194] to serve the important governmental interests of protecting the privacy of "captive" audiences at funeral services and preventing the disruption of burial services.[195] The statute also leaves Fred Phelps and Westboro with ample alternative channels of communication through which they can freely express their views.[196] For these reasons, narrowly drawn picketing regulations are a sensible and constitutional means of protecting the privacy of vulnerable mourners from Westboro's antics.

191. *See supra* Part II.A.
192. *See supra* Part II.A.
193. *See supra* Part II.B.1.
194. *See supra* Part II.B.3.
195. *See supra* Part II.B.2.
196. *See supra* Part II.B.4.