

---

---

## **Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided *Snyder***

Rosalie Berger Levinson\*

*“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>1</sup>*

### ABSTRACT

The Supreme Court in *Snyder* extolled the protected status of hate speech as essential to First Amendment values, even when targeting a private funeral where it caused significant emotional harm to grieving family members. The Court in essence ruled that hate speech, no matter how offensive and intentionally hurtful, is protected if it addresses a matter of public concern in a public place. This article contends that the near-absolutist position the Court espoused in *Snyder* does not comport with established First Amendment jurisprudence, which acknowledges several categories of unprotected or less protected speech. Nor can the Court’s analysis be reconciled with other decisions, which recognize that in some contexts concerns for human dignity, equality, and privacy outweigh First Amendment values. A review of this jurisprudence demonstrates why virulent, outrageous hate speech that targets private individuals for the purpose of directly inflicting egregious psychological harm should not enjoy unlimited First Amendment protection when injured parties bring civil tort suits for damages.

### I. INTRODUCTION

For the past twenty years, the Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its

---

\* Professor of Law, Valparaiso University Law School. This article grew out of a speech the author delivered as part of the *Donahue Lecture Series* at Suffolk University Law School in February 2012.

1. DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 4-5 (1985).

tolerance of homosexuality, particularly in the military.<sup>2</sup> The picketing has also targeted the Catholic Church for sex scandals involving its clergy.<sup>3</sup> Fred Phelps, a disbarred lawyer and the church's founder, together with six parishioners/relatives, traveled to Maryland to picket the funeral of Marine Matt Snyder, who was killed in Iraq in the line of duty.<sup>4</sup> In compliance with local law enforcement officers, the picketing took place on public land approximately 1000 feet from the Catholic Church where the funeral was held.<sup>5</sup> For about thirty minutes before the funeral began, the picketers displayed signs declaring "Thank God for Dead Soldiers," "God Hates Fags," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell," among other hateful messages.<sup>6</sup> Although Matt was not gay, he was Catholic and the funeral was held at a Catholic Church.<sup>7</sup> Matt's father knew that Phelps and his followers were at the main entrance of the church property, so he rerouted the procession.<sup>8</sup> He still saw the tops of the picketers' signs, but admitted that he did not know what was written on them until he watched a news broadcast later that evening.<sup>9</sup>

Adding insult to injury, shortly after the funeral, Phelps's daughter posted a message on Westboro's website denouncing the Snyders and asserting that they taught their son to defy his Creator, to commit adultery, and to follow the Roman Catholic Church, which "support[s] the largest pedophile machine in the history of the entire world."<sup>10</sup> The posting proclaimed that Matt's parents

---

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

3. *Id.*

4. *Id.*

5. *Id.*

6. Snyder, 131 S. Ct. at 1213.

7. *Id.*

8. Brief for Petitioner at 4, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497, at \*1.

Mr. Snyder knew that the Phelpses would be present; nonetheless, he attempted to put them out of his mind and focus instead on his son's burial. On the day of the funeral, the Phelpses placed themselves at the main entrance of St. John's Catholic Church property to ensure that Mr. Snyder and his family would encounter them. In response, Matthew Snyder's funeral procession was re-directed to an alternate entrance. (Vol. VIII at 2244.) Even after readjusting their route, the Snyders were only 200-300 feet from the Phelpses during the funeral procession. (Vol. VII at 2079, 2141.) On the way from the viewing to the funeral, as Mr. Snyder was trying to focus on the memory of his son, he looked at his daughters and saw the Phelpses' signs behind them. (Vol. VIII at 2144.)

*Id.*; see Sean Gregory, *Should the Highest Court Protect the Ugliest Speech?*, TIME MAG., Oct. 9, 2010, <http://www.time.com/time/magazine/article/0,9171,2021068,00.html> ("Al Snyder rerouted the funeral procession so his family wouldn't have to see the protesters . . . . But Snyder couldn't concentrate during the funeral. He kept wondering how much of the protest the 1,200 mourners had seen as they drove to the church in Westminster, Md.")

9. Snyder v. Phelps, 131 S. Ct. 1207, 1213-14 (2011).

10. *Id.* at 1226.

“raised him for the devil.”<sup>11</sup> The Supreme Court, however, addressed only the question of whether a tort action could be brought based on the funeral picketing.<sup>12</sup>

Mr. Snyder sued Phelps and the Westboro church for intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy.<sup>13</sup> As to the first claim, the district court carefully instructed the jurors that they could find in favor of Mr. Snyder only if they determined that: (1) the defendants’ actions were directed specifically at the Snyder family, (2) the Westboro Church’s speech would be highly offensive to a reasonable person, (3) the speech would be viewed as extreme and outrageous, and (4) the speech was so offensive and shocking as not to be entitled to First Amendment protection.<sup>14</sup> The jury found for Mr. Snyder on all three claims and held the Westboro Church liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.<sup>15</sup> The district court remitted the punitive damages award to \$2.1 million,<sup>16</sup> but the Fourth Circuit subsequently reversed the entire judgment, holding that the First Amendment protected the Church’s speech.<sup>17</sup>

The Supreme Court agreed with the Fourth Circuit, holding eight-to-one that the jury verdict could not stand because the First Amendment shielded Phelps and the Westboro Baptist Church from any tort liability for engaging in peaceful picketing on public property on a matter of public concern.<sup>18</sup> Writing for the majority, Justice Roberts stressed that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>19</sup> He asserted that when it comes to speech on public issues, we “must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment.”<sup>20</sup> He explained that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle

---

11. *Id.*

12. *Id.* at 1214 n.1. The Fourth Circuit, however, did address the website posting. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011). It held that it was part of the same hyperbolic rhetoric displayed on the placards at the funeral that was protected by the First Amendment. *Id.* at 224–26; *see also* Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 35, 36 (2011) (arguing that by ignoring video, Court decided case on “half of the record”).

13. *Snyder*, 131 S. Ct. at 1214. Additional claims of defamation and publicity given to private life were dismissed on summary judgment. *Id.*

14. *Snyder*, 580 F.3d at 215 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

15. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011).

16. *Id.*

17. *Snyder*, 580 F.3d at 223–24, *aff’d*, 131 S. Ct. 1207 (2011). The court reasoned that the speech was opinion or rhetorical hyperbole about matters of public concern entitled to full protection under the First Amendment. *Id.* at 219–23.

18. *Snyder*, 131 S. Ct. at 1220.

19. *Id.* at 1215 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

20. *Id.* at 1219 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

public debate.<sup>21</sup> The fact that the speech occurred at a private funeral did not “transform the nature of Westboro’s speech,” nor did the fact that the Westboro Church chose to target and exploit the Snyder funeral in order to increase publicity for its views.<sup>22</sup> Ultimately, the Court concluded that Westboro’s speech was entitled to “special protection” under the First Amendment and that the standard of outrageousness used to impose tort liability posed too great a danger that a jury would punish Westboro for its views on matters of public concern.<sup>23</sup> Thus, no recovery was permitted.

In addition, the Court ruled that Snyder could not recover for the tort of intrusion upon seclusion.<sup>24</sup> It refused to apply the captive audience doctrine to insulate family members at a funeral, at least absent evidence that the picketing interfered with the funeral service.<sup>25</sup>

The issue of targeted hate speech is not new.<sup>26</sup> One of the most notorious cases arose thirty-five years ago when a group of neo-Nazis, led by Frank Collin, sought permission to hold a demonstration in Chicago.<sup>27</sup> The Chicago Park District resurrected an old, unused ordinance that required a sizeable bond be posted for the privilege of speaking in Marquette Park.<sup>28</sup> Angered by Chicago’s actions, Collin looked for a new site for his group’s demonstration, and, in 1977, he decided to focus on Skokie, Illinois because of its large Jewish population comprising almost fifty percent of the village, or 30,000 residents out of Skokie’s total population of 70,000, including between 800 and 1200 Holocaust survivors.<sup>29</sup> Like Phelps, Collin’s intent was to exploit his highly vulnerable victims with outrageous speech in order to attract maximum media publicity. He admitted that he “planned the reaction of the Jews. They are hysterical[;] . . . We used the First Amendment at Skokie.”<sup>30</sup>

Collin’s group began the verbal assault by distributing thousands of leaflets in the North Shore area, including Skokie, which featured a hideous picture of a swastika with hands that reached out to choke a stereotypical caricature of a Jew.<sup>31</sup> The words on the pamphlet, “emblazoned in large bold-faced type,” ominously announced: “WE ARE COMING!” along with smaller print stating

---

21. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

22. *Id.* at 1217.

23. *Id.* at 1219.

24. *Id.* at 1219–20.

25. *Snyder*, 131 S. Ct. at 1220. For discussion of the captive audience doctrine, see *infra* notes 157–158 and accompanying text.

26. For purposes of this article, targeting means intentionally pointed at or directed toward particular individuals—a calculated verbal assault.

27. *Downs*, *supra* note 1, at 19–20.

28. *Id.* at 20.

29. *Id.* at 21. Counting family members of survivors, the number swelled to 5000. *Id.* at 21.

30. *Id.* at 71 (arguing that Collin’s intent to convey political message “took backseat to the intent to win a hostage”).

31. *Downs*, *supra* note 1, at 22.

that the Nazis targeted the North Shore because “where one finds the most Jews, there one will find the most Jew haters.”<sup>32</sup> The leaflets urged “‘fierce anti-Semites’ to action.”<sup>33</sup>

In an interview reported by the *Chicago Sun-Times*, Frank Collin stated that he fully anticipated the Jewish reaction—namely outrage and hysteria—and he explained:

We want to . . . get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves . . . I hope [the survivors are] terrified. I hope they’re shocked. Because we’re coming to get them again. I don’t care if someone’s mother or father or brother died in the gas chambers. The unfortunate thing is not that there were six million Jews who died. The unfortunate thing is that there were so many Jewish survivors.<sup>34</sup>

Skokie responded by enacting three ordinances: (1) a permit/insurance bond requirement, (2) a military uniforms prohibition, and (3) a racial slur law, which barred the distribution of materials that promote or incite racial or religious hatred.<sup>35</sup> The Village also brought a lawsuit in state court to enjoin the march on grounds that Nazis appearing in uniform, displaying their swastikas in the Skokie neighborhood was likely to inflict psychological trauma.<sup>36</sup> Experts described the injury as “menticide”—the intentional infliction of emotional harm through the process of resurrecting the emotional and psychological responses to the original Holocaust.<sup>37</sup> Although the trial court issued an injunction, the evidence did not persuade the Illinois Supreme Court and the court found it insufficient to justify the suppression of speech.<sup>38</sup> The court determined that display of the swastika was protected political speech, not unprotected “fighting words.”<sup>39</sup>

In a second suit, this one filed by the Nazis in the Northern District of Illinois, the court similarly rejected the fighting words doctrine as a defense to

---

32. *Id.* at 28.

33. *Id.*

34. *Id.* (citing Bob Greene, *Chicago’s Nazis Switch—Main Target Now Is the Jews*, CHI. SUN-TIMES, Sept. 29, 1976).

35. DOWNS, *supra* note 1, at 30.

36. *Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 21 (Ill. 1978). The original injunction barred the group from demonstrating in Skokie in uniforms or handing out any anti-Semitic material or displaying the swastika. *Id.*

37. DOWNS, *supra* note 1, at 84-88. Downs poignantly describes his interviews with the survivors and recounts reports of heart attacks, nervous breakdowns, and a fifty-percent increase in the number of Jews who came to a local center for psychological counseling during this conflict.

38. *See Skokie*, 373 N.E.2d at 23-25. The Illinois Appellate Court modified the original injunction by allowing Collin to come to Skokie in uniform, but it ruled that swastikas were unprotected “fighting words.” *Skokie v. Nat’l Socialist Party of Am.*, 366 N.E.2d 347, 354-55 (Ill. App. Ct. 1977).

39. *Skokie*, 373 N.E.2d at 23-25; *Skokie*, 366 N.E.2d at 354-55. “Fighting words” is a recognized category of unprotected speech. *See infra* Part II.B.

the Skokie ordinances.<sup>40</sup> Like the Supreme Court in *Snyder*, the federal appellate court in Chicago affirmed that the expression of ideas cannot be curtailed simply because words are found to be offensive to some listeners.<sup>41</sup> The Seventh Circuit refused to stop the march. It found the insurance bond, military uniform prohibition, and racial slur laws to be unconstitutional and ordered the Village to immediately provide a permit to Frank Collin.<sup>42</sup>

Both state and federal tribunals rejected the Village's argument that the Nazis were invading the privacy of Jewish residents by targeting their neighborhood. The judges reasoned that the residents could avoid confrontation by simply staying away from the demonstration at the Town Hall.<sup>43</sup> In short, the courts determined that the emotional trauma of having Nazis march in the neighborhood of those who had experienced the horrors of the Holocaust did not trump the First Amendment.

The Jewish Defense League (JDL), among other groups, responded by announcing that they would hold a counter-demonstration and that "the streets of Skokie will run with Nazi blood."<sup>44</sup> Ultimately, it was the JDL's threat, not judicial intervention, that persuaded Frank Collin to cancel the Skokie march.<sup>45</sup> Instead, the Nazis demonstrated in Marquette Park and at the Federal Plaza in Chicago in the summer of 1978. The counter-demonstrators significantly outnumbered the small group of Nazis and massive police protection was required to control "several burgeoning fights."<sup>46</sup>

What these two incidents have in common is that targeted, outrageous hate speech was afforded First Amendment protection despite its harsh impact on vulnerable victims. This article proposes a more nuanced approach to resolving such cases. In several recent decisions, Justice Breyer has expounded his view that, when addressing difficult First Amendment questions, the Court should engage in a "proportionate" balancing test, looking to the amount of harm the speech inflicts and weighing this against the extent of the burden that the regulation imposes on freedom of speech.<sup>47</sup> In his separate concurrence in

---

40. Collin v. Smith, 447 F. Supp. 676, 686 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978).

41. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

42. See DOWNS, *supra* note 1, at 68–78. The Supreme Court refused to intervene and denied certiorari. See Smith v. Collin, 439 U.S. 916 (1978) (denying certiorari).

43. See Collin, 578 F.2d at 1207.

44. See DOWNS, *supra* note 1, at 57, 78–79.

45. *Id.* at 80 (noting that Collin "did not want to lose his life at Skokie" and that fellow members told press they would not go to Skokie regardless of Collin's orders).

46. See *id.* at 81.

47. See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring) (rejecting strict scrutiny in favor of proportionality standard); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2766 (2011) (Breyer, J., dissenting) (reasoning that critical question is "whether, overall, 'the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide'" (citations omitted)); Ashcroft v. ACLU, 542 U.S. 656, 689 (2004) (Breyer, J., dissenting) (arguing where burden imposed on adult access to materials minimal, governmental regulation need not meet strict scrutiny); Bartnicki v. Vopper, 532 U.S. 514, 536–37, 540 (2001) (Breyer, J., concurring) (arguing where competing constitutional values such as

*Snyder*, he rejected the majority's myopic focus on the public concern content of the Westboro Church's speech.<sup>48</sup> Rather, he emphasized that a careful analysis of the facts is required where First Amendment values and state-protected interests "seriously conflict."<sup>49</sup> He joined the majority only because the picketing occurred in a lawful place in compliance with all police direction, and the placards could not be seen from the funeral ceremony.<sup>50</sup> Thus, he believed that sustaining the damages award "would punish Westboro for seeking to communicate its views on matters of public concern *without proportionately advancing* the State's interest in protecting its citizens against severe emotional harm."<sup>51</sup>

Although disagreeing with how Justice Breyer struck the balance in *Snyder*, this article proposes that Justice Breyer's careful, contextual balancing test should be applied in determining when the need to protect targeted hate speech is outweighed by the impact such speech has on competing constitutional and societal values. It proposes that private individuals who are subjected to targeted hate speech should be permitted to recover damages for IIED, even when the speech addresses a matter of public concern.

Part II describes the recognized, accepted categories of unprotected speech and their close relationship to targeted hate speech.<sup>52</sup> Part III explains that unqualified "special protection" for speech on public issues is inappropriate because targeted hate speech inherently threatens competing constitutional values, such as equality, religious freedom, human dignity, and privacy.<sup>53</sup> Part IV applies Justice Breyer's use of a balancing test and demonstrates why private individuals who are victims of outrageous targeted hate speech should be permitted to invoke the tort of IIED to recover compensatory damages for their psychological injury.<sup>54</sup>

---

privacy at stake, proper analysis focuses on whether speech restriction disproportionate when measured against harm); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 840-41 (2000) (Breyer, J., dissenting) (asserting he would not apply strict scrutiny standard "mechanically"); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 689-90 (2008) (Breyer, J., dissenting) (arguing proportionality balancing approach may be most appropriate in adjudicating claims under newly incorporated Second Amendment). In *Heller*, Justice Breyer stated that a "sort of 'proportionality' approach," which asks "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests" is regularly used in "various constitutional contexts, including election-law cases, speech cases, and due process cases." *Heller*, 554 U.S. at 689-90. As such, the approach was proper for adjudicating claims under the Second Amendment. *Id.* at 689.

48. *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring).

49. *Id.*

50. *Id.*

51. *Id.* at 1222 (emphasis added).

52. *See infra* Part II.

53. *See infra* Part III.

54. *See infra* Part IV.

---

---

## II. CATEGORIES OF UNPROTECTED SPEECH AND THEIR RELATIONSHIP TO TARGETED HATE SPEECH

In *Snyder*, Justice Roberts recited the accepted mantra about the First Amendment—how speech on public issues is central to democratic self-governance,<sup>55</sup> and how government cannot censor speech based on its content,<sup>56</sup> regardless of its offensiveness.<sup>57</sup> However, seventy years ago, the Supreme Court identified several categories of speech as unprotected and therefore subject to governmental regulation and proscription. In a 1942 decision, the Court acknowledged that fighting words, obscenity, and libel are not protected because they are “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>58</sup> To that list the Court has added incitement of illegal activity<sup>59</sup> and true threats.<sup>60</sup> In all these rulings, the Court recognized the need to balance free speech against other societal values, even where the speech addressed a matter of public concern.

Notably for this discussion, three of the categories of unprotected speech, namely libel, fighting words, and true threats, acknowledge that when speech targets particular individuals and subjects them to emotional and dignitary harms, the assaultive expression may be unprotected.<sup>61</sup> A fourth category, obscenity, recognizes society’s interest in protecting its moral environment and “the quality of life” from material that is arguably linked to antisocial behavior.<sup>62</sup> Similarly, the unprotected status of speech that incites imminent lawlessness confirms that speech closely linked to unlawful conduct loses its protection.<sup>63</sup>

Because these categories are defined by their content, they represent an

---

55. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 954–55 (4th ed. 2011).

56. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972); see also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987) (expressing core concern that content-based restrictions “distort public debate”).

57. *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (holding that burning flags constitutes protected speech, no matter how offensive); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that laws prohibiting burning of American flag violate First Amendment).

58. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

59. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

60. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); see also *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (recognizing as categories of unprotected speech “speech integral to criminal conduct,” “fraud,” and “speech presenting some grave and imminent threat the Government has the power to prevent”). In addition to these well-established exceptions to the prohibition on content-based restrictions, we can add plagiarism, official secrets, misleading advertising, and disrespectful words uttered to a judge, teacher, or other authority figure. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 883 (1994).

61. See *infra* Part II.A-C.

62. See *infra* Part II.E.

63. See *infra* Part II.D.

exception to the usual rule that content-based restrictions on speech are prohibited by the First Amendment. Further, they affirm that sometimes the harm triggered by speech outweighs the value of the expression, even where the speech addresses a matter of public concern. The following sections briefly describe these categories and their relationship to targeted hate speech.

#### A. Libel and Other Torts

Because the Supreme Court in *Snyder* addressed the question of whether victims of tortious speech may seek compensation for injury,<sup>64</sup> the law of libel is a good place to start. As noted, the Supreme Court in 1942 listed libel as a category of unprotected speech.<sup>65</sup> Ten years later, in *Beauharnais v. Illinois*,<sup>66</sup> the Court ruled that the First Amendment also did not protect group libel. Justice Frankfurter reasoned that the State of Illinois had good cause to punish such speech because of the strife, including documented riots, caused by the expression of racial and religious hatred.<sup>67</sup>

In a landmark 1964 ruling, the Supreme Court, in *New York Times Co. v. Sullivan*,<sup>68</sup> decided that recovery for defamation is constrained by the First Amendment when governmental officials sue for libel based on speech about them that is of public importance to self-governance.<sup>69</sup> The Court, however, did not bar a damage remedy, but instead permitted recovery if the public official could prove that the defamatory material was published with knowledge of its falsity or reckless disregard for its truth.<sup>70</sup> Subsequently, in *Gertz v. Robert Welch, Inc.*, the Court ruled that when private individuals, as opposed to public officials or public figures,<sup>71</sup> are defamed, they should not be held to the same stringent standards.<sup>72</sup> The Court recognized the important state interest in compensating private individuals for injury to their reputations, even when the speech touched on a matter of public concern.<sup>73</sup>

---

64. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011); *Snyder v. Phelps*, 580 F.3d 206, 215 (4th Cir. 2009).

65. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

66. 343 U.S. 250 (1952).

67. *Id.* at 258–59.

68. 376 U.S. 254 (1964).

69. *Id.* at 271–73.

70. *Id.* at 279–80.

71. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154–55 (1967), where the Court extended the actual malice standard to reach prominent individuals in the community when the libelous speech is of public interest. *Id.*

72. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). The Court held that a private individual must prove fault (at least negligence in failing to ascertain the truth or falsity of the published material) and actual damages. Further, neither presumed nor punitive damages are available unless the victim demonstrates that the defamatory material was published with knowledge of its falsity or reckless disregard for its truth. *Id.* at 349.

73. *Id.* at 342–43. For further discussion of the Court's analysis in *Gertz*, see *infra* notes 120–125 and accompanying text.

A few years later, in *Hustler Magazine v. Falwell*,<sup>74</sup> the Court specifically addressed the question raised in *Snyder*, namely whether the First Amendment prohibits injured parties from recovering for the tort of IIED. Recognizing that the Reverend Jerry Falwell was a renowned public figure involved in a political dispute regarding the evil of pornography, the Court reasoned that he should be held to the same strict standard established for libel.<sup>75</sup> Thus, in order to recover damages for their emotional injury, public officials and public figures must prove that their attackers published false statements of fact with actual malice.<sup>76</sup>

A key question posed in *Snyder* was whether *private* individuals, as opposed to public officials and public figures, may sue for damages under this tort without meeting the stringent actual malice standard.<sup>77</sup> In *Hustler*, the Supreme Court noted that “[g]enerally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude.”<sup>78</sup> It was only “in the area of public debate about public figures” that the First Amendment restricted tort liability.<sup>79</sup> The Fourth Circuit in *Snyder* acknowledged that private individuals, like Mr. Snyder, may be entitled to greater protection, but it held that the statements on the placards displayed by the Westboro Baptist Church expressed protected opinion or hyperbolic political speech, which may never form the basis for civil liability.<sup>80</sup>

Surprisingly, the Supreme Court did not address Mr. Snyder’s status as a private victim. Instead, it broadly ruled that the critical factor was the Westboro Baptist Church’s speech was of public concern.<sup>81</sup> It ignored the *Gertz* Court’s distinction between public and private victims, which recognized that private individuals are more worthy of protection by the state because they have not acted to thrust themselves into the public limelight and thus have not waived their interests in privacy and dignity.<sup>82</sup> The *Gertz* Court also explained that public officials and public figures are less in need of protection because they have greater access to the media to respond to defamatory material.<sup>83</sup> The Supreme Court discussed none of this in *Snyder*.

---

74. 485 U.S. 46 (1988).

75. *Id.* at 55–56. Justice Rehnquist explained that, although the parody ad attacking Rev. Falwell was “a distant cousin” to political cartoons, it must be protected to provide “breathing space” for the First Amendment. *Id.*

76. *Id.* at 56.

77. *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

78. *Hustler*, 485 U.S. at 53.

79. *Id.*; *see also* *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., concurring) (describing plaintiffs as “limited public figures” who had “voluntarily engaged in a public controversy” and thus had “a lesser interest in privacy than an individual engaged in purely private affairs”).

80. *Snyder*, 580 F.3d at 222–24.

81. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

82. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

83. *Id.* at 344. *But see* Quin S. Landon, Note, *The First Amendment and Speech-Based Torts: Recalibrating the Balance*, 66 U. MIAMI L. REV. 157, 176, 180–81 (2011) (arguing private/public victim distinction no longer viable in today’s internet world).

### B. Fighting Words

In *Chaplinsky*, the Supreme Court ruled that the First Amendment does not protect fighting words.<sup>84</sup> The Court defined this category as words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>85</sup> It explained that “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.”<sup>86</sup> The Court recognized that where the primary purpose of the expression is to verbally assault the target of the speech, it is not deserving of constitutional protection. The fighting words doctrine recognizes the unique harms caused by targeted abusive speech, and thus could have provided the basis for protecting Mr. Snyder and the Holocaust survivors in Skokie.

The first part of the *Chaplinsky* definition—utterances that inflict injury—acknowledges that injury to sensibilities, such as that inflicted by targeted hate speech, may be sanctioned, even if First Amendment values are at stake. In subsequent cases, however, the Supreme Court has focused its attention primarily on the second part of the fighting words definition, namely words that incite an immediate breach of peace. Fighting words have been narrowly described by the Court as an invitation to exchange fisticuffs, a one-on-one confrontation likely to incite the listener to acts of violence.<sup>87</sup> By 1971, the Supreme Court clarified that the First Amendment protects words that simply offend sensibilities because, to quote Justice Harlan, “one man’s vulgarity is another’s lyric.”<sup>88</sup> The doctrine of fighting words has been relegated to personally abusive epithets directed at one-on-one unambiguous invitations to a brawl.<sup>89</sup> And even as to this narrow definition, the Supreme Court has not sustained a conviction based on fighting words since 1942.<sup>90</sup>

The Supreme Court’s reluctance to sanction words that are targeted and clearly intended to cause severe psychological, as opposed to physical, injury is

---

84. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

85. *Id.*

86. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

87. *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

88. *Cohen v. California*, 403 U.S. 15, 25 (1971).

89. See DOWNS, *supra* note 1, at 9-13 (providing in-depth critique of *Chaplinsky*).

90. CHEMERINSKY, *supra* note 55, at 1034. But see *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 683-84 (7th Cir. 2003) (“reluctantly” holding Klan constitutionally entitled to demonstrate in Gary’s downtown, despite its intent to outrage residents of city with eighty-four percent black population); *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 206-08 (S.D. Tex. 1982) (holding Klan’s free speech targeting Vietnamese fishermen pretext for intimidation and provocative statements constituted unprotected fighting words). In the *Gary* case, Judge Posner acknowledged that a “realistic conception of ‘fighting words,’ which have long been understood not to be protected by the First Amendment, might well be thought to extend to the words ‘Ku Klux Klan’ and to the sinister and offensive symbols” that represent it. *City of Gary*, 334 F.3d at 683-84 (citation omitted). Judge Posner went on to question why the privilege of free speech should extend to words not intended to persuade, but instead “to incite a violent reaction,” but he ultimately concluded that the speech was protected under current jurisprudence. *Id.* at 684.

very troublesome. The Court's narrow definition of fighting words has been aptly described as a paradigm based on a male point of view, which assumes an encounter between two persons of relatively equal power acculturated to respond to face-to-face insults with violence.<sup>91</sup> Hate speech, however, is often targeted at the least powerful, most vulnerable segments of our society. By focusing solely on whether the speech will provoke violence, the Court accepts as true that the government's only valid interest is in ensuring peace and tranquility, whereas the real harm posed by fighting words, including targeted hate speech, is not physical violence, but the emotional damage inflicted by the words themselves. The tort of IIED should provide a remedy to targeted victims when grave psychological injury is purposefully inflicted by means of an outrageous, abusive verbal attack.

### C. True Threats

The Supreme Court in 2003 reaffirmed that true threats are not protected by the Constitution.<sup>92</sup> In a landmark case, the Court ruled that states may criminalize cross burning provided the prosecutor proves the defendant burned a cross with the purpose to intimidate.<sup>93</sup> It characterized cross burning as a "particularly virulent form of intimidation."<sup>94</sup> The Court explained that burning a cross has a lengthy history as a symbol of hate in this country and when used to intimidate, "few if any messages are more powerful."<sup>95</sup> It provided the following definition: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>96</sup> Notably, the Court stated that it was immaterial whether the speaker intended to carry out the threat; the purpose of the prohibition is to

---

91. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 453-54 (1990).

92. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Over thirty years earlier the Supreme Court acknowledged that true threats are unprotected, but cautioned that: "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). The Court determined that *Watts's* threatening statement about the President was political hyperbole—not a true threat. See also Eric Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 184, 196 (2011) (arguing that Supreme Court "overvalues the importance of free speech and undervalues the harm caused by that speech," and urging that "personally directed attacks on individuals that could reasonably be interpreted as a real threat to that person are not protected by the First Amendment"); Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 368 (2011) (opining that "Supreme Court has offered little guidance with respect to what constitutes a threat that is outside First Amendment protection," leaving lower federal courts after *Black* with "radically different accounts of what the Constitution requires").

93. *Black*, 538 U.S. at 363.

94. *Id.*

95. *Id.* at 357.

96. *Id.* at 359; see also Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1118-19 (2010) (noting that in wake of several hate speech incidents involving nooses, number of state and city legislatures passed laws banning display of nooses with intent to intimidate).

protect individuals from the fear of violence, and thus the intent to intimidate sufficed.<sup>97</sup>

Justice Thomas, in a dissenting opinion, would have gone further. Growing up in the segregated South—in Georgia in the 1950s—he asserted that cross burning should not be protected by the First Amendment at all, even without proof of intent to intimidate.<sup>98</sup> To Justice Thomas, cross burning conveyed only one message, that is a message of terror and lawlessness that deserves no First Amendment protection.<sup>99</sup>

As a child of Holocaust survivors, I can attest that swastikas convey to survivors the same message as burning a cross—not just “we don’t like you,” but that “we want to exterminate you.”<sup>100</sup> Certainly Frank Collin asserted that message in the leaflets he distributed to the homes of the survivors in the northern suburbs of Chicago and in his interview with the *Chicago Sun-Times*.<sup>101</sup> Even if hate groups must be permitted to spout their venomous racial and religious hatred, the First Amendment should not protect them from civil liability when they target vulnerable groups, like Holocaust survivors, with words intended to place them in fear of bodily harm or death. Courts should recognize that targeted hate speech that consists of “true threats” is not deserving of any protection under the First Amendment.

#### D. The Law of Incitement

After grappling for years with the question of when speech that incites unlawful conduct should lose its protected status, the Supreme Court in *Brandenburg v. Ohio*,<sup>102</sup> ruled that a criminal conviction for incitement could be sustained only where the speaker intentionally incites imminent lawless conduct that will likely produce the illegal action.<sup>103</sup> Unlike some of the other categories of unprotected speech, the Court adopted a contextual approach, looking at surrounding circumstances (“the likelihood of success”) to assess at what point the threat posed by speech justified its proscription. The Court has acknowledged that the mere tendency of speech to encourage unlawful conduct

---

97. *Black*, 538 U.S. at 359–60; *see also* *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc) (asserting that speaker need not have means to carry out threat as long as threat was knowingly communicated), *cert. denied*, 539 U.S. 958 (2003), *abrogated in part by* *United States v. Keyser*, No. 10–10224, 2012 WL 6052248, at \*4–5 (9th Cir. Dec. 6, 2012).

98. *Virginia v. Black*, 538 U.S. 343, 388–400 (2003) (Thomas, J., dissenting).

99. *Id.*

100. *See* *Downs*, *supra* note 1, at 48–50 (describing how survivors viewed Nazi invasion of Skokie as piercing “illusion of safety”).

101. *See supra* notes 31–34 and accompanying text.

102. 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

103. *Id.* at 447; *see also* *Chemerinsky*, *supra* note 55, at 1020–28.

is not enough.<sup>104</sup> However, as the link between the inciting speech and the unlawful conduct gets closer, the speech can be criminally sanctioned.

The *Brandenburg* analysis raises a controversial question with regard to hate speech generally: How much evidence of a link between hate speech and hate crimes is necessary to establish that hate speech may be sanctioned as inciting lawlessness? Many constitutional scholars argue that empirical data and other research sufficiently establish the link.<sup>105</sup> When hate speech involves a targeted, direct confrontation, the potential for violence is greater, as reflected in both the fighting words and *Brandenburg* doctrines. In dissenting from the denial of certiorari in the *Skokie* case, Justice Blackmun, joined by Justice White, argued that the First Amendment rights of the Nazis should have been weighed against the potentially explosive and dangerous situation confronting the Village.<sup>106</sup>

The Supreme Court has recognized that bias-inspired conduct is exceptionally dangerous and harmful. In upholding a state law that imposed greater punishment for hate-motivated crimes where victims are chosen because of their race,<sup>107</sup> the Court explained that such crimes are more likely not only to inflict distinct emotional harms on victims, but also to provoke retaliatory crimes and to incite community unrest.<sup>108</sup> As the *Skokie* incident demonstrated, truly outrageous verbal assaults raise the same concerns.<sup>109</sup>

### E. Obscenity

The Supreme Court has consistently recognized that obscenity is a category of speech that lies outside the First Amendment.<sup>110</sup> When the Court reaffirmed

---

104. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

105. See Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 363–64 (2009) [hereinafter *Four Observations*] (“Recent scholarship shows how practically every instance of genocide came on the heels of a wave of hate speech depicting the victims in belittling terms. . . . Discriminatory action of any kind presupposes a group that labors under a stigma of some kind. The prime mechanism for the creation of such stigma is hate speech.”); Delgado & Yun, *supra* note 60, at 879 (reviewing evidence that allowing persons to stigmatize and revile others causes aggression and often escalates to bullying and physical violence); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 456 (1987) (justifying suppression of hate speech on grounds of its potential to incite violence); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52–54 (1985) (arguing that “[r]ecent experimental research on pornography shows that . . . [e]xposure to [it] increases normal men’s immediately subsequent willingness to aggress against women under laboratory conditions. . . . It also significantly increases attitudinal measures known to correlate with rape. . . .”).

106. *Smith v. Collin*, 439 U.S. 916, 918 (1978) (Blackmun, J., dissenting).

107. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

108. *Id.* at 487–88; see also *Virginia v. Black*, 538 U.S. 343, 352–57 (2003) (acknowledging link between cross burning and racially motivated violence justified state statute that banned burning cross with intent to intimidate).

109. See *supra* notes 45–46 and accompanying text. The difficulty with the *Brandenburg* analysis, of course, is proving that the speaker *intended* to incite *imminent* violent action. Imminent violence was threatened by the JDL, but perhaps not by Frank Collin. See *supra* notes 45–46 and accompanying text.

110. *Roth v. United States*, 354 U.S. 476, 483 (1957).

its unprotected status in 1973, it relied in large part on “the interest of the public in the quality of life and the total community environment.”<sup>111</sup> In addition, the Court noted that obscenity may be linked to antisocial behavior, including violence against women.<sup>112</sup> The majority cited the Hill-Link Minority Report of the Commission on Obscenity and Pornography as demonstrating “an arguable correlation between obscene material and crime.”<sup>113</sup> Subsequently, in 1986, the Meese Commission on Pornography concluded, based on experimental studies, that exposure to violent pornography increased willingness to act violently.<sup>114</sup>

Hate speech, like obscenity, impairs the quality of life and adversely affects communities. Further, like obscenity, studies have shown that it has at least an “arguable correlation” with violent crime.<sup>115</sup> Although this is true of all hate speech, this article focuses only on targeted hate speech, which causes more direct, quantifiable harm to its victims. However, it is important to recognize that the broader secondary effects of hate speech on society as a whole are the same as those that have been used to justify the unprotected status of obscenity.

#### *F. The Relationship Between Unprotected Categories of Speech and Targeted Hate Speech*

The previous discussion demonstrates that under some circumstances, hate speech may fall within a category of unprotected expression. First, if it takes the form of fighting words, targeting specific individuals and inviting a fight, the Supreme Court has held that it can be proscribed.<sup>116</sup> Second, targeted hate speech may constitute an unprotected “true threat” if it is done with the intent to intimidate and the threat creates fear of bodily injury or death.<sup>117</sup> Third, if the hate speech incites imminent lawless conduct, namely, hate crimes, and there is a likelihood of such occurring, it will not receive protection under the First Amendment.<sup>118</sup>

The Court’s analysis of unprotected categories of speech establishes that the First Amendment has never been viewed as absolutely insulating speech regardless of the harm it causes. Indeed, as to all of these categories of unprotected expression, the Supreme Court determined that the speech impeded other values that outweighed the First Amendment. It is particularly important to recognize that, even where the speech was deemed a matter of public

---

111. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 58 (1973).

112. *Id.* at 61; *see also* MacKinnon, *supra* note 105.

113. *Paris Adult Theatre*, 413 U.S. at 58.

114. *See generally* U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY (1986).

115. *See supra* note 105.

116. *See supra* notes 84-89 and accompanying text.

117. *See supra* notes 95-96 and accompanying text.

118. *See supra* notes 102-104 and accompanying text.

concern, it did not receive absolute First Amendment protection. Speakers who convey true threats or who incite lawlessness, are not insulated from criminal liability, simply because their speech addresses a matter of public concern. The First Amendment does not shield racists who advocate white supremacy when they burn crosses.<sup>119</sup>

The Court's myopic focus on the content of Westboro's speech in *Snyder* is particularly incompatible with its analysis of the related tort of libel. In *Gertz*, the Court weighed the competing interests and determined that the First Amendment restricts, but does not foreclose, the ability of states to provide a damage remedy for defamatory speech, depending both on the nature of the speech *and* on the status of the victim.<sup>120</sup>

Prior to 1974, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*,<sup>121</sup> held that the same liability standard should govern all libel actions whenever the speech addressed a matter of public concern. The status of the plaintiff as a public official, public figure, or private individual was deemed irrelevant.<sup>122</sup> The Supreme Court in *Gertz*, however, expressly rejected the *Rosenbloom* analysis. It held that, even if the speech involved a matter of public concern, this did not foreclose an action by *private* individuals seeking compensatory damages against those who negligently publish defamatory material.<sup>123</sup> Further, if the speech targeted public officials or public figures, the Supreme Court, in *N.Y. Times Co.*, ruled that damages are still permitted if false statements are published with reckless disregard for their truth.<sup>124</sup> In *Gertz*, Justice White acknowledged the tension between freedom of expression and human dignity, and he identified the civil law of libel as the mechanism that accommodates these competing forces.<sup>125</sup> By balancing the competing forces, the Court determined when the state's interest in protecting reputation became paramount. The civil law of IIED should likewise be interpreted to accommodate competing interests when victims of targeted, outrageous hate speech seek a remedy for their emotional injury.

Although libel has traditionally been viewed as unprotected, the Supreme

---

119. See *Virginia v. Black*, 538 U.S. 343 (2003) (holding First Amendment permits states to regulate cross-burning).

120. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–44 (1974).

121. 403 U.S. 29, 43–44 (1971).

122. *Id.* at 43.

123. *Gertz*, 418 U.S. at 342–43. The Court cited the difficulty of defining what is a matter of public concern. *Id.* at 346; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (“In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*.”); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976) (“It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test.”). Punitive damages, however, could be awarded only where the plaintiff could prove actual malice. *Gertz*, 418 U.S. at 349.

124. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

125. *Gertz*, 418 U.S. at 403 (1974) (White, J., dissenting).

Court's 1942 affirmation of the unprotected status of libel also referred to fighting words—words “which by their very utterance inflict injury”—which certainly encompasses targeted hate speech.<sup>126</sup> The Court's continued recognition of the unprotected status of group libel, a form of hate speech, in the 1952 *Beauharnais* case, suggests a solid basis for recognizing that targeted hate speech, like libel, has traditionally not enjoyed full protection under the First Amendment.<sup>127</sup> Before *Snyder*, the Supreme Court recognized that there are values in our society that outweigh the importance of uninhibited debate on public issues.

### III. WHY A BALANCING TEST IS MORE APPROPRIATE IN ADJUDICATING TARGETED HATE SPEECH CLAIMS

The Supreme Court in *Snyder* erred in myopically focusing on the content of Westboro's speech and asserting that it demanded “special protection” under the First Amendment.<sup>128</sup> In concluding his majority opinion in *Snyder*, Justice Roberts emphasized its narrow reach, acknowledging the “sensitivity” required when First Amendment and state law rights “clash.”<sup>129</sup> The opinion, however, ignored precedent and failed to fully appreciate competing constitutional values, which are often implicated in targeted hate speech cases. Even when targeted hate speech does not fall within one of the unprotected speech categories discussed in Part II, the fact that it involves a matter of public concern should not be determinative. Rather, targeted hate speech claims should be analyzed under a more nuanced balancing test, which recognizes competing constitutional and societal values at stake.

The Supreme Court has acknowledged the difficulty of adjudicating First Amendment claims when more than one constitutional value is implicated. For example, it has ruled that where a legal challenge raises both First Amendment Establishment Clause and Free Exercise Clause concerns, there must be some “play in the joints.”<sup>130</sup> This means that even when one of the religion clauses would not necessarily be violated by governmental action, the Court should still take the constitutional value into account in determining whether governmental

---

126. See *Texas v. Johnson*, 491 U.S. 397, 430 (1989); *supra* note 58 and accompanying text.

127. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *Beauharnais* has never been overruled by the Supreme Court, although some lower courts have expressed doubt as to whether it remains good law after *N.Y. Times Co.* See, e.g., *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989); *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 141–42 (1992) (arguing that *Beauharnais* “has been eclipsed as good law for . . . sound reasons”). But see *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari and favoring *Beauharnais* as precedent).

128. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

129. *Id.* at 1220 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989)).

130. *Locke v. Davey*, 540 U.S. 712, 718–19 (2004) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970)).

regulation can be sustained.<sup>131</sup>

Similarly, in the context of freedom of speech, the Court in essence applied a more nuanced approach when the competing values of free speech and the right to vote were implicated. In *Burson v. Freeman*, the Court upheld a restriction on distributing political campaign information within one hundred feet of the entrance to a polling place.<sup>132</sup> Although the plurality purported to apply strict scrutiny, it upheld the law without closely scrutinizing whether a particular footage was necessary to prevent voter intimidation.<sup>133</sup> It recognized the “conflict” between the two rights, and it ignored the mandated strict nexus between means and goals normally required to uphold governmental regulation of speech.

Justice Breyer has openly rejected the use of strict scrutiny in First Amendment cases and has instead repeatedly endorsed use of a proportionality balancing test.<sup>134</sup> His analysis resembles the method that constitutional courts in legal systems around the world have adopted for adjudicating rights claims, including conflicts between constitutional rights and values.<sup>135</sup> Further, in the context of adjudicating a Second Amendment claim, he, as well as Justices Stevens, Souter, and Ginsburg, argued that our rights adjudication has always included elements of proportionality and balancing.<sup>136</sup> Targeted hate speech cases inevitably present a conflict between free speech and one or more competing constitutional values, such as equality, privacy, religious freedom, and First Amendment dignitary rights. This section explores this jurisprudence and its application to the *Skokie* and *Snyder* cases.

First, when hate speech targets individuals because of their membership in certain groups, several constitutional scholars have asserted the overriding importance of the competing value of equality.<sup>137</sup> In particular, hate speech

---

131. *See id.*

132. 504 U.S. 191, 211 (1992).

133. *Id.* at 210–11.

134. *See supra* note 47 and accompanying text. In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), Justice Kagan joined Justice Breyer in rejecting the use of strict scrutiny in favor of “proportionality review.” *Id.* at 2551–52.

135. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 799–801 (2011) (tracing how American courts used proportionality balancing tests in past). The authors argue that the experience in foreign constitutional courts demonstrates that this approach “can protect rights more consistently and coherently than can [the U.S.] tiered review. The American approach limits the flexibility of judges in the face of complexity, falsely portrays adjudication as a mechanical exercise in applying law that is akin to a ‘constitutional code,’ and creates unnecessary inconsistency and arbitrariness.” *Id.* at 800; *cf.* Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001) (arguing rule-like structure of First Amendment forbids balancing).

136. *District of Columbia v. Heller*, 554 U.S. 570, 693–719 (2008) (Breyer, J., dissenting).

137. *See* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 14–16 (2004) (discussing psycho-social harms triggered in victims of direct targeted hate speech, including depression, repressed anger, and diminished self-concept); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (compiling leading essays on why equal protection concerns should trump First Amendment); Toni M. Massaro, *Equality and Freedom of*

based on immutable traits, such as race, gender, or sexual preference, unjustly stigmatizes its victims and is exceptionally hurtful. Scholars, such as Richard Delgado and Mari Matsuda, have written extensively about the long-term emotional and psychological distress that victims of racist hate speech experience.<sup>138</sup> Catherine MacKinnon has focused on gender-based hate speech, which she argues perpetuates prejudice against women in our society.<sup>139</sup> Further, Owen Fiss and Charles Lawrence present the persuasive argument that class-based hate speech silences members of marginalized groups, thus actually subverting First Amendment values.<sup>140</sup> Indeed, many constitutional scholars have argued that we cannot achieve a truly egalitarian society without some regulation of hate speech.<sup>141</sup> Similar to the judicially acknowledged adverse effects of obscenity,<sup>142</sup> hate speech deeply affects the quality of life in our society.

Several federal antidiscrimination statutes recognize that harassing hate speech based on race, gender, religion, or national origin may be civilly sanctioned, and the Supreme Court has ruled that the First Amendment does not protect this speech. The Court has interpreted Title VII of the Civil Rights

---

*Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 252 (1991) (arguing for accommodationist approach). Massaro's approach balances equality against the First Amendment and allows regulation of verbally harassing speech when (1) it "is intended to incite or stigmatize individuals on the basis of protected characteristics," (2) it "is 'addressed directly' to those insulted or stigmatized," and (3) it "makes use of insulting or 'fighting words'." Massaro, *supra*; Taylor, *supra* note 96, at 1117 (noting that since 1980s debate about regulation of hate speech "has been strongly polarized, with one side advocating regulation in the name of equality and the other denouncing regulation as censorship"; the former group sees hate speech as "a means of perpetuating systematic discrimination and oppression of minority groups," and they see freedom of speech as "a screen that protects racism, homophobia, misogyny, and other forms of discrimination").

138. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in MATSUDA ET AL., *supra* note 137, at 93–96 (discussing humiliation, isolation, and self-hatred); Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336–38 (1989) [hereinafter *Legal Storytelling*] (documenting injury, including debilitating emotional distress, restriction of personal freedom, and loss of self-esteem and self-identity).

139. CATHARINE A. MACKINNON, ONLY WORDS 72 (1993) ("Both [First Amendment and Fourteenth Amendment law] show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others.").

140. Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 287–88 (1995) (arguing that targeted cross burning silences blacks and discourages them from participating in "the deliberative activities of society"; by sanctioning hate speech, the state seeks "to end a pattern of behavior that silences one group and thus distorts or skews public debate"); Lawrence, *supra* note 91, at 453, 468 (explaining how "[t]he subordinated victim . . . is silenced by her relatively powerless position in society," and how "[r]acism is an epidemic infecting the marketplace of ideas and rendering it dysfunctional").

141. MACKINNON, *supra* note 139, at 72; *Four Observations*, *supra* note 105, at 368 (noting social costs of unregulated hate speech, which singles out and diminishes status of certain groups in society, depriving them of credibility); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1599, 1626 (2010) (arguing that hate-speech regulation is "a visible assurance offered by society to all of its members that they will not be subject to abuse, defamation, humiliation, discrimination, and violence on grounds of race, ethnicity, religion, gender, and in some cases sexual orientation"; he argues that criminal group libel statutes are necessary to secure to minority groups "a sense of security in the enjoyment of their most fundamental rights").

142. See *supra* note 111 and accompanying text.

Act of 1964<sup>143</sup> to prohibit racially or sexually harassing speech that denies employees equality in the workplace.<sup>144</sup> It has interpreted Title IX<sup>145</sup> to create a remedy for sexually harassing speech that denies students equality in the classroom.<sup>146</sup> Title VI of the Civil Rights Act of 1964<sup>147</sup> similarly bars race-based harassment and intimidation in all programs that receive federal financial assistance.<sup>148</sup> In all these contexts, the constitutional value of equality embedded in the Fourteenth Amendment is understood to trump free speech.<sup>149</sup> These laws provide a civil remedy, including damages, for discriminatory “conduct,” even where that conduct consists solely of words.<sup>150</sup>

The value of equality and human dignity should be acknowledged beyond the workplace and the classroom. Indeed, most liberal democracies recognize that hate speech desensitizes its listeners and demonizes its victims. These nations have determined they have a duty to protect minorities as equal members of an increasingly multiracial, multiethnic, and religiously pluralistic society.<sup>151</sup> For example, Canada’s National Criminal Code prohibits willfully

---

143. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

144. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986).

145. 20 U.S.C. §§ 1681-1688 (2006).

146. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632-33 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286-89 (1998).

147. 42 U.S.C. §§ 2000d to 2000d-7.

148. Hate speech on college campuses has been a particularly difficult issue. In the early 1990s, the National Institute Against Prejudice and Violence estimated that twenty to twenty-five percent of minority students were victimized at least once during their college years. See Delgado & Yun, *supra* note 60, at 872. Professor Delgado reports that, in response to an upsurge in campus racism, many colleges and universities enacted campus hate speech codes, and the courts are split as to the constitutionality of such codes. *Id.* at 873-74.

149. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (suggesting, in dicta, that “sexually derogatory “fighting words”” might be constitutionally punished under Title VII); *Booth v. Pasco Cnty.*, 829 F. Supp. 2d 1180, 1202-03 (M.D. Fla. 2011) (holding that union could not claim First Amendment protection for sending out discriminatory Legal Updates Memo, because Congress’s interest in prohibiting discriminatory workplace speech did not present constitutional problems); *Doe v. City of N.Y.*, 583 F. Supp. 2d 444, 449 (S.D.N.Y. 2008) (holding that racist e-mails targeting Arab-American law enforcement officer, asserting that Muslims and Arab Americans were untrustworthy and unreliable and thus could not serve in law enforcement, were not political speech; rather, e-mails constituted sufficiently severe or pervasive harassment on basis of prohibited category so as to preclude First Amendment protection); *Baty v. Willamette Indus., Inc.*, 985 F. Supp. 987, 995 (D. Kan. 1997) (holding First Amendment does not foreclose defendant’s liability for hostile work environment sexual harassment consisting solely of written and oral comments); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 858 (Cal. 1999) (reasoning that remedial injunction prohibiting continued use of racial epithets in workplace does not violate right to freedom of speech if there has been judicial determination that such racial epithets contribute to hostile work environment).

150. 42 U.S.C. §§ 2000d to 2000d-7 (2006).

151. See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 38 (Michael Ignatieff ed., 2005) (“In much of the developed world one uses racial epithets at one’s legal peril, one displays Nazi regalia and the other trappings of ethnic hatred at significant legal risk, and one urges discrimination against religious minorities under threat of fine or imprisonment, but in the United States all such speech remains constitutionally protected.”); Waldron, *supra* note 141 (noting England, Canada, France, Denmark, Germany, New Zealand, and some Australian states have hate speech legislation). Further, Article X of the European Convention on Human Rights asserts that the right of free expression “may be

promoting hatred against any identifiable group.<sup>152</sup> The Supreme Court of Canada upheld the conviction of a high school teacher who made remarks to students that attacked Jews as “treacherous,” “subversive,” “sadistic,” “money-loving,” “power hungry,” and “child killers.”<sup>153</sup> The Court emphasized that hate speech harms its victims and society as a whole and that the societal harm outweighs the minimal impairment of legitimate speech.<sup>154</sup> Thus, although the Canadian Charter of Rights and Freedom has a provision protecting free speech similar to our First Amendment, the Canadian Supreme Court applied a proportionality analysis and ruled that the harm to society of unregulated verbal assaults intended to promote hatred outweighed the speech interests.<sup>155</sup> Many constitutional scholars have questioned why our country remains an “outlier”; they contend that we should emulate or at least more closely study the experience in other modern democracies that value equality and human dignity over hate speech.<sup>156</sup>

---

subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others.” Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 10, § 2. The United Nations’ Universal Declaration of Human Rights similarly states that individual liberties, such as free expression, may be limited to secure “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), at art. 29 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>. The Universal Declaration of Human Rights (UDHR) protects all people from discrimination and from incitements to discriminate, contrary to the protection of hate speech under the First Amendment in the United States. See Thomas J. Webb, Note, *Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 455–58 (2011) (discussing five prominent international treaties and covenants targeting and condemning hate speech).

152. Canada Criminal Code, R.S.C. 1985, c. C-46, § 319(1).

153. *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 714 (Can.).

154. *Id.* at 745–49 (rejecting American view that “the suppression of hate propaganda is incompatible with the guarantee of free expression”).

155. *Id.* at 758. Similarly, although Germany’s constitution protects free speech, its hate-speech laws protect against insult, defamation, and other forms of verbal assault. See Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1551 (2003). But see Massey, *supra* note 127, at 189–91. Massey contends that the text of the American and Canadian constitutions differ in that the Canadian Charter states that its guarantees “be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Massey, *supra* note 127, at 189–91 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982, c. 11 (U.K.)). He goes on to argue that Canada, unlike the United States, has a long tradition of parliamentary supremacy, allowing the legislative majority to balance competing interests, and that “myriad subtle and profound differences between the two societies and their political and legal systems” has led Canada, but not the United States, to adopt international human rights conventions that mandate suppression of hate speech. *Id.*

156. See John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 540 (2006) (explaining United States’ emergence as a “hub” for internet-born hate speech; primary medium today for terrorist recruitment); Stephen R. McAllister, *Would Other Countries Protect the Phelps’ Funeral Picketing?*, 2010 CARDOZO L. REV. DE NOVO 408, 415 (2010) (“The United States stands virtually alone in the world in its tolerance of hateful speech.”); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT’L L. & POL’Y, 253, 254 (2003)

The Nazis in Skokie viciously launched a racist attack on Jewish survivors of the Holocaust in their neighborhood. The Westboro Church verbally assaulted the Snyders' Catholic faith near the Catholic Church where they sought to bury their dead son. Hate speech need not necessarily target members of marginalized groups, and this article's definition of hate speech extends to vulnerable individuals even where the expression does not convey a hateful message of inferiority to historically oppressed groups. However, when it does target members of such groups, the constitutionally recognized values of equality and antisubordination should be given significant weight in determining whether the First Amendment shields the speaker from civil liability.

Second, targeted hate speech invades privacy. The Supreme Court's perfunctory treatment of the issue in *Snyder* ignores precedent. The Court has emphasized that privacy interests are at their highest when speech threatens individuals in their homes.<sup>157</sup> However, it has also stated that the so-called captive audience doctrine applies whenever "substantial privacy interests are being invaded in an essentially intolerable manner."<sup>158</sup> The captive audience doctrine should not be limited to speech that invades the home. Such a mechanical test is inappropriate in constitutional analysis.<sup>159</sup>

Supreme Court precedent has recognized the importance of privacy outside the home. In upholding regulation of speech near the entrance of abortion

---

(noting that 165 nations have ratified Convention on the Elimination of All Forms of Racial Discrimination). The United States, while ratifying the Convention, specifically reserved the right not to enforce hate speech regulations that conflict with our Constitution. See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf>. Notably, in recent years the Supreme Court has looked to the practices and norms of foreign nations in analyzing other provisions in the U.S. Constitution. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (looking to "opinion of the world community" to confirm conclusion that juvenile death penalty violates Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (looking to other nations that have affirmed right of homosexual adults to engage in intimate, consensual conduct, in interpreting substantive due process right to privacy to prohibit state's sodomy law).

157. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

158. *Cohen v. California*, 403 U.S. 15, 21 (1971).

159. For example, in *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995), the Supreme Court has upheld a thirty-day ban on attorney letters sent to victims of disasters. *Id.* The Court recognized that the need to protect the sensibilities of disaster victims outweighs the speech interest of lawyers. *Id.* If such letters were sent to the victim's place of business, certainly the harm would be the same. See also Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 203 (1994) (arguing publicly expressed targeted verbal assaults constitute substantial invasion of privacy when exposing victim's deeply felt, personal feelings); Alan Brownstein & Vikram David Amar, *Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?*, 2010 CARDOZO L. REV. DE NOVO 368, 380 (2010) (noting telephone-harassment statutes have been upheld against First Amendment challenges even when calls directed to business, rather than private residence). In the context of funeral mourners, Brownstein & Amar contend that Phelps "could be prosecuted for telephone harassment and his conviction would be upheld against constitutional challenge" if he had communicated the messages through a telephone call to the grieving parents shortly before or after the funeral rather than displaying them on signs.

facilities,<sup>160</sup> the Court acknowledged the state's strong interest in protecting the privacy of individuals in "particularly vulnerable physical and emotional conditions" from "potential trauma to patients associated with confrontational protest."<sup>161</sup> Further, in a concurring opinion, Justice Douglas argued that privacy interests were intolerably invaded when riders on a mass transit system were subjected to political advertisements on buses.<sup>162</sup> Notably in these cases, the fact that the speech involved "public debate" was not determinative.<sup>163</sup>

Although other Supreme Court decisions reason that outside the privacy of the home, you should simply "avert your eyes,"<sup>164</sup> this ignores the reality of psychological trauma. The *Skokie* case presents the classic example. The Nazis intended to hold their demonstration in front of the town hall, and Holocaust survivors were told they could avoid the emotional harm by simply not going there.<sup>165</sup> The courts ignored the evidence that the presence of Nazis in uniform flaunting their swastikas in the center of town would inflict extreme psychic trauma on victims of the Holocaust. Expert witnesses testified about the trauma of "menticide," which is the intentional infliction of emotional harm through the process of resurrecting the emotional and psychological responses to the original Holocaust.<sup>166</sup> The fact that the Nazis were not actually taking their demonstration to the homes of the victims did not alter the psychic trauma. As one survivor remarked, the Nazis' planned demonstration on the public steps of the village hall was an assault on the community, the "psychological equivalent of an 'attack right at our home.'"<sup>167</sup>

Similarly, in the context of private funerals, when individuals are at their most vulnerable, the competing privacy interests should be given greater weight. The Supreme Court, in fact, acknowledged this concept in 2004 when

---

160. *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

161. *Id.* at 715, 729; *see also* *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (upholding injunction prohibiting protests within thirty-six feet of abortion clinic's entrance due to psychological consequences triggered by protests); *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783 (1979) (upholding ban on union solicitation of hospital corridors and sitting rooms). The Court upheld the ban to protect patients for whom "psychological attitudes . . . play a good part in determining the success of their treatment." *Baptist Hosp. Inc.*, 442 U.S. at 783 (citation omitted).

162. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (1974) (Douglas, J., concurring). The Court also recognized a captive audience sufficient to restrict offensive speech for radio broadcasting (in a car) during hours when children might be listening. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978).

163. *See* *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) ("[E]ven if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.").

164. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (holding that passersby are not held "captive" by nudity displayed on outdoor movie screens).

165. *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978).

166. *See supra* notes 36-37 and accompanying text.

167. *Downs*, *supra* note 1, at 49. Similarly, Phelps issued a news release in advance announcing the group's intent to picket Matt Snyder's funeral and recognizing there would be a community reaction. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd* 131 S. Ct. 1207 (2011). Although Mr. Snyder rerouted the funeral to avoid seeing the protest, this did not eliminate the emotional trauma. *See* Brief for Petitioner, *supra* note 8.

it upheld a law allowing the family of Vincent Foster, deputy counsel to President Clinton, to use the Freedom of Information Act to prevent the release of photographs concerning the condition of their loved one's body at the scene of death.<sup>168</sup> The Court noted that privacy rights are critical in the context of funerals, and explained: "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."<sup>169</sup> The Court emphasized that by preventing the release of photographs, the government was protecting the "privacy of the living" and the privilege of surviving family members "to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased."<sup>170</sup>

Seven years later, in *Snyder*, the Supreme Court ruled that the Westboro Baptist Church's targeting of a private funeral did not affect the constitutional analysis.<sup>171</sup> The Court refused "to expand the captive audience doctrine" to protect the Snyder family.<sup>172</sup> Only Justice Alito, in dissent, acknowledged Mr. Snyder's right to privately grieve. Justice Alito opined that funerals present circumstances where "the emotional well-being of bereaved relatives is particularly vulnerable. Exploitation of a funeral for the purpose of attracting public attention 'intrudes upon their . . . grief,' and may permanently stain their memories of the final moments before a loved one is laid to rest."<sup>173</sup>

The majority should have recognized that the Westboro Baptist Church invaded "substantial privacy interests . . . in an essentially intolerable manner."<sup>174</sup> In a ruling before *Snyder* involving the Westboro Baptist Church, the Sixth Circuit, contrary to the Supreme Court, held that the captive audience doctrine should extend to funerals.<sup>175</sup> It determined that the government had "an important interest in the protection of funeral attendees, because a deceased's survivors have a privacy right 'in the character and memory of the deceased.'"<sup>176</sup> The court reasoned that individuals mourning the loss of a loved one share a privacy interest similar to individuals in their homes because "mourners cannot easily avoid unwanted protests without sacrificing their right

---

168. See generally *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

169. *Id.* at 168.

170. *Id.* at 168-69; see also *Brownstein & Amar*, *supra* note 159, at 379 (arguing "that there is a long standing cultural tradition in our society, often enforced by law, requiring sensitivity to the impact of death on family members").

171. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011).

172. *Id.* at 1220.

173. *Id.* at 1227-28 (Alito, J., dissenting) (internal citations omitted).

174. See *supra* note 158 and accompanying text.

175. *Phelps-Roper v. Strickland*, 539 F.3d 356, 362, 366 (6th Cir. 2008) (upholding funeral-protest statute based on state's significant interest in protecting funeral attendees).

176. *Id.* at 366 (internal citation omitted).

to partake in the funeral or burial service.”<sup>177</sup>

A third constitutional value, which played a prominent role in both the *Snyder* and *Skokie* cases, involves the right of individuals not to be conscripted into conveying speech that they find reprehensible. In his dissent, Justice Alito emphasized that the Westboro Church was exploiting the private funeral for the purpose of attracting public attention to its message of hatred.<sup>178</sup> Further, during oral argument, Justice Ginsburg remarked that the Westboro Church had successfully hijacked many private funerals, and that it was “exploiting a private family’s grief” despite the availability of numerous alternative forums for protest.<sup>179</sup> For over twenty years, Phelps and his group had in fact exploited over 600 military funerals, as well as the funerals of police officers, firefighters, and victims of natural disasters.<sup>180</sup> Press releases before each event ensured the Church’s protest would attract maximum public attention.<sup>181</sup> Sometimes, in fact, it used the threat of protest to bargain for greater publicity. Justice Alito explained that the Westboro Church adopted a strategy that recognized the more outrageous its protest, the more grief it would cause and, “because the media is irresistibly drawn to the sight of persons who are visibly in grief,” the more free publicity it would win.<sup>182</sup>

The Church’s exploitation strategy proved to be very successful. For example, after the shooting in Tucson of Congresswoman Gabby Gifford, the Westboro Church announced its intent to picket the funeral of the youngest victim of the shooting spree, nine-year-old Christina Green.<sup>183</sup> The press release proclaimed that Christina was “better off dead.”<sup>184</sup> In exchange for canceling the protest at the funeral, the Westboro Church was able to obtain free airtime on the radio.<sup>185</sup> Frank Collin adopted this same exploitation strategy to win publicity for his neo-Nazi organization. By targeting extremely vulnerable Holocaust survivors in Skokie, he leveraged Chicago to permit him to demonstrate at Marquette Park.<sup>186</sup>

Many constitutional scholars have persuasively argued that individuals should not be conscripted into conveying a message antithetical to their beliefs:

---

177. *Id.*; see also *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc) (upholding city ordinance aimed at protecting mourners from picketing at funerals, and overruling earlier Eighth Circuit decisions which restricted government’s interest in protecting unwilling listeners to residential settings).

178. *Snyder v. Phelps*, 131 S. Ct. 1207, 1224 (2011) (Alito, J., dissenting).

179. Transcript of Oral Argument at 30, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751) [hereinafter *Snyder v. Phelps Transcript*], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-751.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-751.pdf).

180. *Snyder*, 131 S. Ct. at 1224 (Alito, J., dissenting).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Snyder v. Phelps*, 131 S. Ct. 1207, 1224 (2011) (Alito, J., dissenting).

185. *Id.* It did the same thing in 2006 when it threatened to protest the funeral of five Amish girls killed by a crazed gunman. *Id.* at 1224-25.

186. DOWNS, *supra* note 1, at 26–27.

“[W]hen the government restricts private speech to further that dignitary and autonomy interest, it is regulating the speech of some individuals for the purpose of protecting First Amendment-related interests of other persons.”<sup>187</sup> Thus, the state should be permitted to impose tort liability on the Westboro Church in order to protect mourners “from being forced to facilitate a message they reject and abhor.”<sup>188</sup>

A fourth constitutional value raised by Mr. Snyder involved religious freedom. Although the Westboro Church argued it was engaged in religious expression, Mr. Snyder urged the Court to recognize his First Amendment right to freely exercise his Catholic faith in burying his son.<sup>189</sup> He questioned: “What kind of a society have we become when we can’t even bury our dead?”<sup>190</sup> The Supreme Court ignored Mr. Snyder’s competing constitutional rights, despite the fact that some of the signs were implicitly critical of the Catholic service being held for Matt Snyder. It determined that because there was no physical disruption of the funeral, there was no tangible interference with Mr. Snyder’s right to practice his faith.<sup>191</sup>

All of these competing constitutional values—equality, privacy, religious freedom, and the right not to be conscripted into conveying the speech of another—may not be at stake in every challenge to targeted hate speech, or they may carry different weight in different contexts. Certainly, however, their existence should be acknowledged in assessing whether, on balance, tort liability is constitutionally permissible in a particular case.

#### IV. APPLICATION OF JUSTICE BREYER’S PROPORTIONALITY TEST TO TARGETED HATE SPEECH

As noted, Justice Breyer has argued that in adjudicating First Amendment claims, the Court should balance the harm caused by the speech against the burden imposed on freedom of expression by governmental regulation.<sup>192</sup> As discussed in Part III, the harm caused by targeted hate speech often includes

---

187. Brownstein & Amar, *supra* note 159, at 382; *see also* DOWNS, *supra* note 1, at 123–27 (invoking Kantian principle of “ultimate ends” to argue that First Amendment should not shield those who willfully target and substantially harm their victims in order to achieve publicity).

188. Brownstein & Amar, *supra* note 159, at 382.

189. Brief for Petitioner, *supra* note 8, at 55; *see also* Chelsea Brown, Note, *Not Your Mother’s Remedy: A Civil Action Response to the Westboro Baptist Church’s Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 233 (2009) (arguing trial court’s rejection of Westboro Church’s Free Exercise Clause defense protected Snyders’ choice of worship).

190. John Gibeaut, *Grave Encounters*, A.B.A. J., Oct. 1, 2010, [http://www.abajournal.com/magazine/article/grave\\_encounters/](http://www.abajournal.com/magazine/article/grave_encounters/).

191. Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

192. Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2765–66 (2011) (Breyer, J., dissenting). Justice Breyer asserts that the critical question should be “whether, overall, ‘the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.’” *Id.* at 2766 (quoting United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 841 (2000)).

injury to competing constitutional values. During the oral argument in *Snyder*, Justice Breyer quoted the famous line written by Justice Brandeis: “The right to be let alone is the most important [constitutional right].”<sup>193</sup> He suggested that the competing interests at stake should be weighed and that, perhaps, a compromise could be reached.<sup>194</sup> He pondered whether the Court could rein in the burden on speech by removing the jury or eliminating punitive damages as a remedy for IIED.<sup>195</sup>

Ultimately, no compromise was reached, and Justice Breyer joined the majority in holding that the Westboro Church’s right to engage in political discourse trumped all competing interests.<sup>196</sup> However, application of Justice Breyer’s balancing test does not necessarily support this result. The Court undervalued the competing constitutional interests and did not give sufficient weight to the psychological harm that targeted hate speech caused the Snyder family.<sup>197</sup> On the other side of the balance, the Court exaggerated the burden on speech and failed to explore the possibility of restricting the tort of IIED, as it did with regard to libel, rather than prohibiting any recovery outright.

First, regarding the harm produced by targeted hate speech, Part III of this article discussed the broad societal and individual costs to the competing constitutional values of equality, privacy, freedom of religion, and human dignity, which are often implicated in targeted hate speech cases. In addition, focusing specifically on Mr. Snyder, the Court undervalued his personal injury. Mr. Snyder testified at trial:

I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights. I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son’s last hour on earth. . . . [S]omebody could have stabbed me in the arm or in the back and the wound would have healed. But I don’t think this will heal.<sup>198</sup>

The Supreme Court failed to recognize that the emotional harm caused by targeted hate speech is no less serious, no less deserving of compensation, and no less in need of deterrence than harm that takes the form of physical or

---

193. *Snyder v. Phelps* Transcript, *supra* note 179, at 46. Justice Breyer’s reference may be found in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

194. *Snyder v. Phelps* Transcript, *supra* note 179, at 47.

195. *Id.*

196. *See supra* notes 49–51 and accompanying text.

197. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) (“The Court now holds that the First Amendment protected [defendants’] right to brutalize Mr. Snyder.”).

198. *Snyder v. Phelps*, 580 F.3d 206, 213 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

financial injury.<sup>199</sup> The harmful effect of discriminatory hate speech that marginalizes and dehumanizes vulnerable individuals is well documented. Studies show that victims experience psychological and physiological symptoms such as fear, rapid pulse rate, difficulty breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.<sup>200</sup>

Unfortunately, the Court's insensitivity to psychological injury in *Snyder* reflects a broader pattern. As discussed in Part II.B, the Supreme Court has largely ignored the definition of fighting words as words "which by their very utterance inflict injury," and instead it has focused its concern only on words which incite immediate physical injury.<sup>201</sup> In other contexts, the Court has demonstrated its reluctance to rely on psychological injury to trump the First Amendment. For example, although the First Amendment bars relief when plaintiffs seek damages for mental or emotional injury caused by defendant's speech, the Court has permitted plaintiffs to recover damages for "actual" economic pecuniary loss.<sup>202</sup> Similarly, the Court recently rejected psychological studies linking violent video games to the desensitization of minors as insufficient to justify the state's interest in protecting minors from this "speech."<sup>203</sup>

This article proposes a careful assessment of the harm factor, giving appropriate weight to the competing constitutional and societal values that targeted hate speech threatens, as well as the personal psychological injuries it causes. The tort of IIED, by definition, is limited to situations where the targeted, abusive, verbal attack causes harm that is truly severe—"so severe that no reasonable man could be expected to endure it."<sup>204</sup> This element ensures that liability will be imposed only where the wounds "are truly severe and incapable of healing themselves."<sup>205</sup>

The second element in Justice Breyer's balancing test mandates a careful assessment of the extent of the burden imposed on speech when speakers are

---

199. *Snyder*, 580 F.3d at 213. Mr. Snyder, in fact, called expert witnesses at trial who testified to the physical manifestations of his emotional injury, including exacerbated diabetes and depression. *Id.*

200. See DOWNS, *supra* note 1; *Legal Storytelling*, *supra* note 138, at 2336–41.

201. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words); *supra* Part II.B (discussing Supreme Court's focus on words inciting immediate physical injury).

202. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (holding First Amendment does not bar economic damages resulting from defendant's tortious breach of promise not to disclose source of information).

203. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011). The state and lower federal courts' refusal to recognize the crime of "menticide" in the *Skokie* case reveals this same reluctance to appreciate psychological injury. See *Collin v. Smith*, 447 F. Supp. 676, 697 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978) (opining that "psychological trauma . . . is much more difficult to identify and prove than damage to reputation," and that "it is particularly difficult to distinguish a person who suffers actually [sic] psychological trauma from one who is only highly offended, and the [Supreme] Court has made it clear that speech may not be punished merely because it offends").

204. *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (internal quotation marks omitted)).

205. *Id.* (quoting *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. 1991)).

subjected to liability for outrageous, willfully targeted expression that is assaultive or designed to intimidate. Several factors are relevant when considering whether tort liability for IIED should survive a First Amendment challenge. First, the Supreme Court has noted the difference between civil and criminal sanctions on speech,<sup>206</sup> and here only milder civil damages are proposed. In addition, the tort remedy for IIED is narrowly circumscribed.<sup>207</sup> The Supreme Court has already ruled that public officials and public figures may recover for IIED only if they prove that the speaker made false statements of fact with reckless disregard for the truth.<sup>208</sup> The *Hustler* Court expressed concern that public figures and public officials could otherwise simply recharacterize IIED to avoid the First Amendment restrictions on libel law the Court had imposed to protect robust debate on public issues.<sup>209</sup> Many have criticized the Court's decision to superimpose libel law on the very different IIED tort where the truth or falsity of the verbal assault is irrelevant to the harm inflicted.<sup>210</sup> This article, however, focuses only on the availability of the tort to redress harm to targeted *private* individuals who, as the Supreme Court acknowledged in *Gertz*, have not waived their privacy and dignity interests and thus are more deserving of the state's protection.<sup>211</sup>

As to private individuals, virtually all states recognize IIED as defined by the *Second Restatement of the Law of Torts*: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . ." <sup>212</sup> Courts have narrowly construed each element.<sup>213</sup> As noted, only evidence of severe injury will suffice: "[R]ecovery will be meted out sparingly, its balm reserved

---

206. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (noting whereas Supreme Court upheld imposition of civil sanctions for sexually explicit speech, federal statute imposing criminal liability on violators had to be scrutinized more closely).

207. See Michael K. Steenson, *Civil Actions for Emotional Distress and R.A.V. v. City of St. Paul*, 18 WM. MITCHELL L. REV. 983, 990 (1992) ("[E]ven absent constitutional limitations on the right to recover for the intentional infliction of emotional distress, the courts have limited the use of the tort by imposing significant restrictions on the right to recover.").

208. See *supra* note 70 and accompanying text.

209. See *supra* notes 74–76 and accompanying text.

210. See, e.g., Paul A. LeBel, *Emotional Distress, The First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315, 334–35 (1989); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 430 (1988) ("The emotional distress tort . . . has nothing to do with truth or falsity.").

211. See *supra* notes 82–83 and accompanying text.

212. RESTATEMENT (SECOND) OF TORTS § 46.71 (1965). For a history of the development of this tort, see Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 126–27 (1990).

213. See *Rawlings v. Travelers Prop. Cas. Ins. Co.*, No. 3:07-CV-1608-O, 2008 WL 2115606, at \*4 (N.D. Tex. May 20, 2008) (cautioning IIED tort judicially created for limited purpose of recovery in rare instances in which defendant intentionally inflicts severe emotional distress in manner so unusual that victim has no other recognized theory of redress); see also Love, *supra* note 212, at 127 (noting from 1980 through 1990 fewer than sixty cases reported per year).

for those wounds that are truly severe and incapable of healing themselves.”<sup>214</sup> In addition, the conduct must be “extreme and dangerous” to meet the “outrageous” standard.<sup>215</sup> Courts frequently cite the *Restatement’s* explanation of this element:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.<sup>216</sup>

Further, the plaintiff must prove that the defendant acted for the purpose of causing severe emotional distress or that he knew the consequences were substantially certain to result.<sup>217</sup>

Although the Supreme Court in *Snyder* asserted that “outrageousness” is too subjective a standard for a jury to apply,<sup>218</sup> it is no more subjective than the standards the Court has adopted to safeguard other constitutional rights,<sup>219</sup> and

---

214. *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. App. 1991); *see also* *Bass v. Hendrix*, 931 F. Supp. 523, 531 (S.D. Ohio 1996) (explaining hurt feelings will not suffice); *Valadez v. Emmis Commc’ns*, 229 P.3d 389, 395 (Kan. 2010) (holding absence of psychiatric or medical treatment “weighs against a finding of extreme emotional distress,” and damages may not be awarded based merely on “[e]levated fright, continuing concern, embarrassment, worry, and nervousness”); *Harris v. Jones*, 380 A.2d 611, 616 (Md. 1977) (“[T]he distress inflicted [must be] so severe that no reasonable man could be expected to endure it.”).

215. *Washington v. Cnty. of Onondaga*, No. 5:04-CV-0997 (GTS/GJD), 2009 WL 3171787 (N.D.N.Y. Sept. 29, 2009) (reasoning that plaintiff had not alleged facts plausibly suggesting that she was exposed to extreme and outrageous conduct; instead, plaintiff alleged, at most, that she was exposed to derogatory, racist remarks and activities, and such allegation is not enough to make out IIED claim); *see also* *State v. Carpenter*, 171 P.3d 41, 58 (Alaska 2007) (confirming harmful conduct “characterized by ‘malice’” as insufficient for IIED unless the conduct is “extreme and outrageous”); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) (explaining malice inherent in strict standard of outrageous behavior); *Leibowitz v. Bank Leumi Trust Co.*, 548 N.Y.S.2d 513, 514 (N.Y. App. Div. 1989) (affirming dismissal of IIED claim even where plaintiff alleged she was frequently subject of derogatory, racist remarks).

216. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); *see also* *Miraliakbari v. Pennicooke*, 561 S.E.2d 483, 486 (Ga. Ct. App. 2002); *Northside Hosp. v. Ruotanen*, 541 S.E.2d 66, 69 (Ga. Ct. App. 2000); *Valadez*, 229 P.3d at 394.

217. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965); *see also* *Owen v. Leventritt*, 571 N.Y.S.2d 25, 25 (N.Y. App. Div. 1991) (holding recovery for IIED available “only ‘where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation’” (quoting *Nader v. Gen. Motors Corp.*, 25 N.Y.2d 560, 569 (N.Y. 1970))); *Downs*, *supra* note 1, at 156 (arguing act of targeting “provides *prima facie* evidence of the *intent* to harm”). Although the Westboro Church and the Nazis may have targeted their vulnerable victims with the intent of increasing publicity for their “message,” they knew and anticipated the harm their words would cause and thus their conduct satisfied the scienter requirement of this tort.

218. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

219. During oral argument in *Snyder*, Justice Scalia questioned whether “outrageousness” is any more

ultimately the availability of de novo review provides the same protection against excessive, abusive jury awards that the Court affords libelous speech. In fact, the *Restatement of Torts* already significantly reins in the role of the jury. It provides:

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the *control of the court*, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.<sup>220</sup>

Additionally, as argued in Snyder's brief, a ruling that outrageous and extreme speech must always be viewed as protected "rhetorical hyperbole" impermissibly turns a "threshold element of the tort into an affirmative defense."<sup>221</sup>

In short, under current law, damages for IIED are only available when defendants engage in outrageous targeted hate speech with the appropriate scienter, intentionally or recklessly causing severe emotional distress to the most sensitive and vulnerable members of our society.<sup>222</sup> Because of the restricted nature of IIED, the burden imposed on expression by subjecting speakers to tort liability for targeted hate speech is minimal. Significantly, this modest proposal avoids most of the arguments raised against prohibiting specific group-based hate speech.<sup>223</sup> In addition to removing the content neutrality problem,<sup>224</sup> it eliminates the contention that hate speech must be

---

subjective than "fighting words." Snyder v. Phelps Transcript, *supra* note 179, at 43-44; *see also* Love, *supra* note 212, at 147-49 (describing difficulty for plaintiffs to meet threshold requirement for tort).

220. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965) (emphasis added).

221. Brief for Petitioner, *supra* note 8, at 20.

222. Snyder, 131 S. Ct. at 1222-23 (Alito, J., dissenting); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 62 (5th ed. 1984) (tort applies where the defendant has knowledge that "the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress"); Jeffrey Shulman, *Free Speech at What Cost? Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 336 (2010) ("The speech-based emotional distress suit does not operate to restrict public discourse; it restricts only the use of speech to inflict injury, the use of words as weapons.").

223. *See, e.g.*, Delgado, *supra* note 138, at 179-81 (arguing that because available tort remedies like IIED and invasion of privacy inadequately redress special problem of hate speech, new tort tailored to distinctive psychological injury produced by racist speech should be created); *Legal Storytelling*, *supra* note 138, at 2357-58 (arguing that hate speech directed at members of subordinate group should be punishable, whereas hate speech directed at members of dominant group should not).

224. R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992). There, the Supreme Court ruled that an ordinance making it an offense to display symbols that one knows would arouse hatred "on the basis of race, color, creed, religion, or gender" was unconstitutional, even if it was limited to proscribing unprotected fighting words because the regulation violated the content neutrality requirement. *Id.* at 397 n.1. Professor Matsuda's approach makes the criminality of speech hinge on the race of the speaker and the victim, and it raises difficult questions as to which groups are historically subordinated and marginalized in an American society that is

protected because it serves as a pressure valve—a way for racists, anti-Semites, misogynists, homophobes, and other haters to blow off steam harmlessly. This proposal allows these groups to continue to spew their hatred; they will only be held accountable when they target marginalized groups or particularly vulnerable individuals with the intent to cause severe emotional distress through outrageous conduct.

In addition, First Amendment advocates argue that hate speech should be protected because it mobilizes social change and societal awareness.<sup>225</sup> They contend that allowing the expression of hate speech in the marketplace has the double positive effect of exposing poisonous ideas to the light of day and serving to transform an inert public into one mobilized for action.<sup>226</sup> They assert that restricting hate speech will not stop hatred; it simply drives the expression underground where it becomes more dangerous.<sup>227</sup> In contrast, permitting targeted victims to sue for IIED does not stifle or chill speech, nor is that the goal; it merely holds speakers liable when they purposefully target and exploit particularly vulnerable individuals with what are arguably unprotected “fighting words” that cause severe emotional distress.<sup>228</sup>

To minimize any adverse effect on protected speech, this article proposes that the procedural safeguards the Supreme Court has imposed on state libel laws should extend to IIED. This means the plaintiff must prove the elements of the cause of action by clear and convincing evidence, and the defendant has

---

becoming more culturally diverse. It may also inflate the alleged distinctiveness of the harm imposed by racist speech, as opposed to other types of speech that attack people on the basis of religion, age, sexual orientation, or disability. In short, the law should not attempt to rank human suffering.

225. Peter R. Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 682 (2006). For example, Professor Teachout writes that the Skokie incident mobilized the public to react to Frank Collin’s anti-Semitism, and eventually the counter-protesters scared off the Nazis who cancelled their protest. According to this theory, the system worked as it was supposed to—“the noxious ideas were publicly ventilated, a previously inert public was roused to action, there was vital public discussion of the issues . . . and in the end the whole affair proved a public relations disaster for the march promoters.” *Id.*

226. *Id.* at 676, 679–82 (arguing that allowing hate speech “is much more likely to promote the development of an alert and responsible citizenry”); *cf.* DOWNS, *supra* note 1, at 122 (carefully assessing all substantial benefits to free speech triggered by Skokie incident, but ultimately concluding that harm to survivors outweighed these benefits).

227. Teachout, *supra* note 225, at 675 (cautioning that punishing hate speech “will only serve to drive the ideas underground where the poison will fester and spread”). *But see* Waldron, *supra* note 141, at 1631 (arguing that driving hate speech underground “convey[s] the sense that the bigots are isolated, embittered individuals” and denies them the ability “to contact and coordinate with one another in the enterprise of undermining society’s most fundamental principles,” and thus hate speech regulation in form of criminal group-libel statutes should be upheld).

228. Notably, even in countries that have criminalized hate speech, including Canada and many European countries, none of the posited adverse effects, such as making repressed speakers more dangerous, has occurred. *See Four Observations, supra* note 105, at 365; *see also* Massaro, *supra* note 137, at 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.”).

the right to de novo review of a jury determination.<sup>229</sup> Although most states already impose these limitations,<sup>230</sup> this article recommends that these safeguards be recognized as First Amendment constitutionally mandated limits on the state tort, just as the Court did with regard to libel law.<sup>231</sup>

Finally, as Justice Breyer suggested during oral argument, punitive damages should never be available when the targeted hate speech addresses a matter of public concern.<sup>232</sup> This would be contrary to current state tort law,<sup>233</sup> but it should be imposed as a constitutional rule in order to protect the First Amendment from jurors who might be inclined to punish speakers because they disagree with the ideas being expressed. Mandatory jury instructions on this core First Amendment principle, together with judicial oversight, would further mitigate any harm to protected speech values.

Taking into account the restricted nature of IIED, together with these proposed constitutional limitations on the state tort, the burden on speech would not be “disproportionate” to the harm inflicted on victims of targeted speech.<sup>234</sup> In each case, judges would be asked to balance the burden on speech against the harm caused, and as is reflected in the tort itself, only the most egregious harm would justify the imposition of damages.

Finally, although the burden on freedom of speech arguably increases when the targeted hate speech addresses a matter of public concern, content should not be decisive. The harm caused by targeting innocent, vulnerable individuals is not modified by the fact that the words are part of political discourse, nor can the psychological assault be remedied by “more speech.” Factors such as the purpose of the targeted hate speech, its effect on equality, privacy, religious

---

229. See *supra* note 14 and accompanying text. The district court in *Snyder* permitted the jury to determine whether the speech was so offensive and shocking as not to be entitled to First Amendment protection. See *supra* note 14 and accompanying text. The Westboro Church asserted that the district court thereby erroneously permitted the jury to decide legal issues that should be reserved to the court. See *supra* note 14 and accompanying text. Because the Fourth Circuit, and ultimately the Supreme Court, determined that defendants were entitled to prevail under the First Amendment, there was no need to address the issue. See *supra* note 14 and accompanying text.

230. See, e.g., *Guthrie v. Conroy*, 567 S.E.2d 403, 408 (N.C. Ct. App. 2002) (“‘The determination of whether the conduct alleged was intentional and was extreme and outrageous enough to support such an action is a question of law for the trial judge,’ and, thus, our review is conducted *de novo*.” (quoting *Lenins v. K-Mart Corp.*, 391 S.E.2d 843, 848 (N.C. Ct. App. 1990))); see also *supra* note 220 and accompanying text.

231. See *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984) (citations omitted) (recognizing that where First Amendment implicated by state tort claims arising from speech, courts must “‘make an independent examination of the whole record’ to ensure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression’” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964))); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964) (explaining that “‘effective judicial administration’ necessary to ensure that First Amendment values preserved).

232. See *Snyder v. Phelps* Transcript, *supra* note 179, at 47.

233. See 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) (“IIED is a tort in which punitive damages are available—as an intentional tort, proof of the underlying tort creates a set of circumstances where the predicate of punitive damages would be proven as well.”).

234. See *supra* note 192.

---

---

freedom, and First Amendment autonomy, as well as its psychological impact on the specific targeted victims, must also be evaluated in determining when speakers may be subject to civil liability for the injury caused by their words. A more nuanced, contextual balancing approach is more likely to achieve a just result. As Justice Alito poignantly remarked: “In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like [Mr. Snyder].”<sup>235</sup>

---

235. *Snyder v. Phelps*, 131 S. Ct. 1207, 1229 (2011) (Alito, J., dissenting).