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Brief of the John Marshall Law School Veterans
Legal Support Center & Clinic and The Chicago
School of Professional Psychology as Amici Curiae
in Support of Petitioner, Snyder v. Phelps, 131 S.Ct.
1207 (Supreme Court of the United States 2011)
(No. 09–751)

John Marshall Law School Veterans Legal Support Center & Clinic

The Chicago School of Professional Psychology

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No. 09-751

In The
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR. *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

**BRIEF OF THE JOHN MARSHALL LAW SCHOOL
VETERANS LEGAL SUPPORT CENTER & CLINIC
AND THE CHICAGO SCHOOL OF PROFESSIONAL
PSYCHOLOGY AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Does *Hustler Magazine, Inc., v. Falwell*, apply to a private person versus another private person concerning a private matter?
2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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Anthony Pappa, et al., Traumatic bereavement in war veterans. <i>Psychiatric Annals</i> , 38(10), at 687	21, 23
DREW GILPIN FAUST, THIS REPUBLIC OF SUF- FERING: DEATH AND THE AMERICAN CIVIL WAR 90 (2008)	11, 12, 13, 19
ELIZABETH KÜBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS (Scribner ed., Simon & Schuster 2005) (1969)	22

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37 the undersigned submit this brief as *amicus curiae* in support of Petitioner Albert Snyder (No. 09-751).¹ *Amici curiae* are attorneys from The John Marshall Law School Veterans Legal Support Center & Clinic and The Chicago School of Professional Psychology, who have extensive experience working with veterans, servicemembers and their families. *Amici* have an interest in presenting to the Court the history of military funerals and the psychological importance of these funerals for the families of servicemembers killed in action. To present the court with this research, *amici* have prepared a Brandeis Brief highlighting our key findings.

Established in 1899, The John Marshall Law School has upheld a tradition of diversity, innovation, access, and opportunity. Since its founding, John Marshall has set forth important principles of providing open legal education in an atmosphere free of discrimination. This dedication to equality and justice for all continues today with the Veterans Legal Support Center & Clinic.

¹ All parties to this case have consented to the filing of this brief, and written indication of consent has been submitted. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

In 2008, The John Marshall Law School opened the Veterans Legal Support Center & Clinic ("VLSC"), one of the first law school clinics in the nation dedicated to serving the needs of veterans. The VLSC was established by three law students, including a two-tour Operation Iraqi Freedom United States Marine. Although the initial focus of the VLSC was assisting veterans with appeals before the United States Department of Veterans Affairs, the VLSC has recognized the needs of Gold Star families, who have lost a loved one to war. The VLSC considers the protection of military funerals for servicemembers killed in action to be of vital importance, both historically and constitutionally. This position has been expressed since the Peloponnesian wars, is codified in Federal Regulations, and should be supported by the United States Supreme Court.

The Chicago School is the nation's oldest and largest graduate school focused exclusively on psychology and related behavioral sciences. The Chicago School is accredited by the Higher Learning Commission and an active member of the National Council of Schools and Programs of Professional Psychology, which has recognized The Chicago School for its distinguished service and outstanding contributions to cultural diversity and advocacy.

Dr. Paul Larson is a Clinical Professor of Psychology. Dr. Larson is the coordinator of the Health Psychology and Forensic Psychology

concentrations at The Chicago School and works with both in-patient, residential, and out-patient veterans.

SUMMARY OF ARGUMENT

Throughout history civilizations have placed reverent significance on the recovery and burial of their soldiers killed in a war zone. In the United States, traditions dating back to the Civil War frame the solemnization and meaning of the military funeral that is today governed by statute. This important ceremony both honors the ultimate sacrifice of the deceased and functions as the apex of the grieving process for the mourning family. Military funerals provide closure and comfort to families dealing oftentimes with the untimely and violent deaths of loved ones. The grief is simply immeasurable.

The interruption of these solemn and significant ceremonies has noteworthy psychological consequences that can negatively impact the family's grieving process. In the present case, the Petitioner's immeasurable grief was compounded by the infliction of emotional distress and intrusion into familial privacy intentionally undertaken by the Respondents. The Petitioner, like all family members saddled with the testing burden of burying a loved one killed in combat, is left captive at the funeral with no avenue of escape from unwanted intrusion. Objectionable and offensive conduct intentionally directed at this

captive audience at such a significant stage in the grieving process causes injury actionable under the law.

ARGUMENT

I. FAMILY MEMBERS OF SERVICEMEMBERS KILLED IN ACTION CAN SEEK REDRESS AGAINST PROTESTERS INTENTIONALLY TARGETING THE MILITARY FUNERAL IN AN OFFENSIVE MANNER

The burial of a loved one is as central to the concept of family as is birth, education, and the care and support of family members.² There can be no higher duty of the state than to protect the privacy of familial seclusion at the time where the family gathers to return a loved one to the earth. The ceremonies of burial, interment, and entombment are deeply rooted in the human experience, from the most ancient civilizations to our modern society, as symbols of respect for life lost and reverence of a spiritual journey not yet complete. Yet these ceremonies not only honor the deceased; they also serve as the central grieving mechanism for the family members

² *Cf.*, *Meyer v. Nebraska*, 262 U.S. 510 (1923) (right to raise and educate children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (same); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right of family members to live together and care for each other).

left behind. Military funerals are thus particularly important, as they often provide comfort and closure in the wake of sudden, tragic, or premature deaths, namely when the deceased is a servicemember killed in combat. The military funeral serves as the emblematic final valediction for a mournful family too often robbed of the chance to say goodbye.

The right and responsibility to bury those killed in combat has been engrained in civilizations since the beginning of recorded history. Thucydides, the ancient Greek historian, provided future generations an indelible accounting of the Athenian custom of staging elaborate funerals for fallen soldiers during the Peloponnesian War (344-404 B.C.). These funerals served as a testament to the character of Athenian democracy as described by Pericles, the Athenian general, during his famous funeral oration.³

And when this power of the city shall seem great to you, consider then that the same was purchased by valiant men, and by men that knew their duty, and by men that were sensible of dishonour when they were in fight, and by such men as, though they failed of their attempt, yet would not be wanting to the city with their virtue but made unto it a most honourable contribution. For having everyone given his body to the commonwealth, they receive in place thereof an

³ Thucydides, (Richard Crawley trans., Modern Library 1951) (411 B.C.E.).

undecaying commendation and a most remarkable sepulchre not wherein they are buried so much as wherein their glory is laid up upon all occasions both of speech and action to be remembered forever.⁴

These themes of honor and respect are reflected in this Court's recent decision in *National Archives & Records Admin. v. Favish*.⁵ Justice Kennedy, writing for the unanimous Court, stated that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwanted 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."⁶ The Favish Court unambiguously reinforced the personal privacy rights of surviving family members to be free of "public intrusions long deemed impermissible at common law and in our cultural traditions."⁷ This Court found direction in the significance of burial traditions stemming throughout history as evidenced by the Court's citation to the ancient Greek story of the bereaved Antigone.⁸

⁴ *Id.* at 2.43.3-4.

⁵ *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

⁶ *Id.* at 169.

⁷ *Id.* at 167.

⁸ *See id.* at 168 (describing the universal cultural significance funerals have occupied from the beginning of civilization). This Court further noted the significance of

(Continued on following page)

It is this right of privacy, possessed by the mourning and not the mourned, which the Respondents intrude upon with their targeted protests. Moreover, disturbance of this personal right at such an essential and singular event creates a captive audience in the family members present to mourn. The state has an undeniable interest in protecting the seclusion and tranquility of these ceremonies because the family is at their most vulnerable; more vulnerable, even, than the captive audience recognized in this Court's holding in *Frisby v. Schultz*.⁹

In *Frisby*, the constitutionality of a city ordinance banning all picketing "before or about" any residence was challenged on First Amendment grounds by a group of anti-abortion protestors with a history of picketing directly in front of the residences of abortion doctors.¹⁰ Justice O'Connor, writing for the majority, framed the analysis by drawing a distinction between general protesting and protesting targeted at the household.¹¹ The categorization of the household picketing as targeted provided the foundation for the introduction of the captive

Sophocles' story of Antigone as a representation of the widespread recognition of respect for the internment of one's relatives.

⁹ 487 U.S. 474 (1988).

¹⁰ *Id.* at 476.

¹¹ *Id.* at 486.

audience analysis and is best summarized in this Court's own language:

[t]he type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.¹²

Continuing, Justice O'Connor stressed that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech."¹³ Thus, this Court found that an inhabitant of one's home is "figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."¹⁴ The targeted picketing of a grieving family mourning a loved one lost on the battlefield is even more devastating and intrusive than the picketing in *Frisby*. In the home one is able to close the blinds and

¹² *Id.*

¹³ *Id.* at 487.

¹⁴ *Id.* at 487.

turn up the television; at a funeral there are no blinds to pull. The home remains a home long after the protestors have gone, whereas a funeral is the singular moment in place and time in which family members may say a final farewell.

Targeting the funeral ceremonies of a member of the United States Armed Forces killed in battle creates the same privacy infringements protected against by this Court when the protest is targeted directly at the home. The family present to mourn the sacrifice of their loved one is captive in so far as they have no measure by which to simply ignore or avoid the intrusive conduct. In the present case, the inflictions of emotional distress are obvious. The Snyder family, in order to fulfill their duty and desire to bury their dead, was forced to endure malicious and self-serving political picketing related to issues neither linked to nor relevant to the death of their son. Unlike this Court's holding in *Cohen v. California*, the Snyder family could not "effectively avoid further bombardment of their sensibilities simply by averting their eyes."¹⁵ The funeral, the experience of which is central to a healthy grieving process, can only happen once. As such, the Snyder family was literally trapped within the confines of the funeral service; their only possible recourse in the face of protesting being to abandon the ceremony, thereby abandoning Matthew. The Respondents'

¹⁵ 403 U.S. 15, 21 (1971).

intrusion into the Snyder's familial privacy severely and permanently interrupted the process of mourning, grieving, and healing. As Justice Douglas noted in his famous captive audience dissent in *Public Utilities Commission of District of Columbia v. Pollak*, "[o]nce privacy is invaded, privacy is gone."¹⁶

II. SINCE THE CIVIL WAR, THE UNITED STATES GOVERNMENT AND MILITARY HAVE DEVELOPED PROCEDURES AND PROTOCOL TO GOVERN THE RECOVERY, RETURN, AND BURIAL OF SOLDIERS KILLED IN ACTION THAT HAVE BECOME A PART OF OUR NATION'S CULTURE AND TRADITION

Nothing in the First or Fourteenth Amendment prohibits a state from protecting the funerals of active duty servicemembers and the sensitivity and well-being of military families. To provide such protection would merely continue a pattern of responsiveness that the United States government and military have demonstrated in response to, and out of respect for, the wishes and welfare of military families.

The complex and highly ritualized system that the United States Government provides for the recovery, return, and burial of fallen servicemembers has evolved over nearly 150 years, and it has done so

¹⁶ 343 U.S. 451, 469 (1952).

because family members like Albert Snyder have demanded that this nation treat its soldiers with the care and respect they deserve, in life and in death. In fact, it was one such father, anguished by the loss of his son in Virginia in March 1863, whose efforts resulted in the establishment of the first comprehensive ambulance system in the Civil War.¹⁷ Henry Bowditch, himself a physician, heard news of his son Nat's wounds and immediately boarded a train to Virginia from Boston; upon arrival, he discovered that Nat had lain unattended on the battlefield and subsequently died. After using personal resources to recover his son's body and provide his family the opportunity to say goodbye in a deeply personal and solemn funeral, Bowditch then channeled his grief so that he could, "[transform] Nat's suffering into the salvation of others."¹⁸ In the fall of 1863 Bowditch published a pamphlet persuasively arguing the state's obligation to its soldiers: "If any government under heaven ought to be paternal, the United States authority, deriving, as it does, all its powers from the people, should surely be such, and should dispense that power, in full streams of benignant mercy upon its soldiers."¹⁹ These arguments spurred the establishment of an ambulance system by the next year, and, in the words of historian Drew Faust,

¹⁷ DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 90 (Knopf 2008).

¹⁸ *Id.* at 170.

¹⁹ *Id.* at 90.

“articulated a logic of obligation that applied not just to the wounded but also to the dead.”²⁰

This “logic of obligation” represents a broader legacy of the Civil War; the war that transformed “these” united states into The United States did not do so just by uniting North and South, but by imbuing the federal government with new, defining powers and responsibilities – to the war-wounded, the war dead, and equally to their families. The testimony of expert witness Chaplain Challis reveals that two of the central elements of a modern military funeral – the firing of volleys and the playing of “Taps” – emerged during the Civil War as a means of honoring the dead in a theater where scarce resources and overwhelming casualties rendered impossible the ability to provide a proper burial, much less funeral, for each fallen soldier and his family.²¹ These traditions are representative of a broad range of efforts undertaken to give meaning to the enormous loss of life in the Civil War – for the nation and individuals alike – but they also suggest a growing recognition of the simple axiom that if a man dies in service of the state, the state then has a duty – logistical, financial, and even spiritual – to provide the fallen’s family with a body and a burial; to, in

²⁰ *Id.*

²¹ Callis Test. 501:22-505:11.

Chaplain Callis's words, "honor the deceased and also bring comfort to the living."²²

In the 1860s, after finally prevailing over Lee's army, the Union undertook an enormous effort to exhume bodies from battlefields and mass graves and rebury them, with ceremony, in a new network of national cemeteries:

The engagement of the Union government in these matters, first made highly visible in the Gettysburg dedication ceremonies, acknowledged a new public importance for the dead. No longer simply the responsibility of their families, they, and their loss, now belonged to the nation. These men had given their lives that the nation might live; their bodies, repositories of their "selfhood" and "surviving identity," as Harper's had put it, deserved the nation's recognition and care. The dead, as well as the living, had claims upon a government "deriving," as Henry Bowditch proclaimed in his plea for ambulances, "all its powers from the people."²³

The government did not take this new responsibility lightly. As Michael Sledge points out, "the amount of dirt excavated to bury, often several times, the dead from the Civil War forward has been enough to fill the Great Pyramid of Cheops almost three times over. This figure is even more significant when it is

²² *Id.* at 507:24, 25.

²³ See Faust, *supra* note 17 at 101.

realized that not only was three pyramids' worth of dirt dug out of graves, the same amount had to be put back in."²⁴ The enormous scope of this project reflects how highly the survivors of war had come to value the proper treatment of war dead, as well as the opportunity a respectful reburial could offer families devastated by loss.

Since the Civil War, the practices and procedures surrounding the recovery, return and permanent burial of fallen servicemembers have evolved and adjusted to meet the practical limitations – financial, technological, and psychological – of different theaters of war. These procedures, as they have become institutionalized over the last 150 years, reflect a strong national consensus that the way we treat those who die in service to our nation matters deeply. The fact that this nation supports a policy of combat recovery, which entails endangering the lives of living soldiers in order to recover the bodies of the soldier dead, is a simple and profound statement of the value that is placed on the opportunity for fellow soldiers, families, and loved ones to say thank you and to say goodbye.²⁵

A detailed account of the evolution of these recovery procedures is beyond the scope of this brief,

²⁴ MICHAEL SLEDGE, *SOLDIER DEAD: HOW WE RECOVER, IDENTIFY, BURY & HONOR OUR MILITARY FALLEN* 223 (Columbia University Press 2005).

²⁵ *See id.* at 44-61.

but current military practice, wherein the recovery of remains of all armed service branches is the primary responsibility of the Army's U.S. Quartermaster Corps, trained in Mortuary Affairs and stationed at Fort Lee, Virginia, employs the most advanced and enlightened set of practices to emerge since the Civil War.²⁶ More relevant to this case is the highly ritualized military funeral that has evolved alongside recovery practices.

Today, the military provides specialized funerals for its fallen active duty servicemembers and veterans. These unique funerals serve many purposes. The obvious goal is to honor the fallen servicemember. To do this appropriately, Congress and the Department of Defense ("DoD") have created special rules and procedures for military funerals, making them unique in both custom and symbolism.²⁷ While these rules were recently codified in legislation and DoD policies, they are the result of long-standing traditions rooted in both United States and international custom. Adhering to these traditions and guidelines creates the necessary uniformity in military funerals, performed either on Government property or in a public space, vital to ensuring a

²⁶ *See id.* at 32-44.

²⁷ Department of Defense Instruction 1300.15 (Oct. 22, 2007); Armed Forces – Funeral Honors Functions at Funerals for Veterans, 10 U.S.C. § 1491 (2009).

proper burial for the fallen servicemember.²⁸ More importantly, “[r]endering military funeral honors reflects the high regard and respect accorded to Military Service and demonstrates military professionalism to the Nation and the world.”²⁹

Military honors, as used today, were first recognized by Congress in the National Defense Act of 2000.³⁰ However, the formal elements of an honors detail date back to the 18th century in the United States, and earlier in Europe. A funeral honors detail performs many important functions at a servicemember’s funeral, some required by statute, others by tradition. Section 1491 requires, at a minimum, folding of the National flag, the presentation of the flag to the next of kin, and the playing of “Taps.”³¹

To properly perform these tasks, strict procedure must be followed. For example, “when the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.”³² When presented to the next of kin, the issuing marine states: “On behalf of the

²⁸ Department of Defense Instruction 1300.15, § 4.1 (Oct. 22, 2007).

²⁹ 10 U.S.C. § 1491(c) (2009).

³⁰ National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 578, 113 Stat. 512, 625-31 (2000) (codified as amended at 10 U.S.C. § 1491 (2009)).

³¹ 10 U.S.C. § 1491(c) (2009).

³² United States Flag Code, 4 U.S.C. § 7(n) (2008).

President of the United States, the Commandant of the Marine Corps, and a grateful nation, please accept this flag as a symbol of our appreciation for your loved one's service to Country and Corps."³³ Additionally, "Taps," unique to the United States military, may only be performed by an official military bugler, or if none is available, through a recording with adequate sound amplification.³⁴

To supplement Section 1491, the military follows time-honored European traditions dating back to the 18th century. The three-rifle volley, performed over the casket of the fallen, has the most striking beginnings. Historically, gun salutes were a sign of respect and trust. Viewed today "as a great honor,"³⁵ the rifle volley stems from the European dynastic wars, commonly referred to as the French and Indian Wars, where both sides would cease fighting to clear the battlefield of the dead. A three-rifle volley was then used to signal that the field was cleared and fighting could resume.³⁶ It is apparent, even amidst battle, that the fallen were afforded the utmost

³³ Military Salute Project, United States Flag Manual 28 (2008), <http://militarysalute.proboards.com/index.cgi?board=flag&action=display&thread=737> (follow "View or download in Adobe PDF format for printing on one side of a page . . ." hyperlink).

³⁴ 10 U.S.C. § 1491(c) (2009).

³⁵ UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, CELEBRATING AMERICA'S FREEDOMS – GUN SALUTES 1, <http://www1.va.gov/opa/publications/celebrate/gunsalute.pdf>.

³⁶ *Id.*

dignity and respect. Today, the three-rifle volley is performed by seven servicemembers each firing in unison.³⁷

Despite customs and statutes, the United States has always provided the family of the fallen servicemember control over how the funeral is performed.³⁸ This recognition and respect for the family is a reflection of the Government's strong interest in honoring both the fallen and their families. Furthermore, traditions such as the three-rifle volley, the playing of "Taps," and the use of active military personnel as pallbearers, brings order, discipline, and meaning to the grieving family in a time of despair.

In Matthew Snyder's case, the Snyder family chose to have Marine pallbearers, the American flag over the casket, a three-rifle volley, and the playing of "Taps."³⁹ Setting the scene of the funeral, Albert Snyder testified that while his son was being carried to his grave for the last time, he stood and saluted.⁴⁰ Had Matthew's funeral not adhered to military regulation, Mr. Snyder would not have had the chance to give his son the final salute he deserved.

³⁷ Military Funeral Customs, <http://www.arlingtoncemetery.net/customs/htm>.

³⁸ Department of Defense Instruction 1300.15, § 4.5 (Oct. 22, 2007).

³⁹ Albert Snyder Test. 189:15, 199:5, 6, 9.

⁴⁰ *Id.* at line 14.

More importantly, allowing protestors at military funerals will deny future Gold Star families this solemn opportunity.⁴¹

The dominant theme in the evolution of the United States military's recovery, return and burial practices is the growing recognition, through experience and education, that the treatment of combat casualties is vital to an effective military. Sometimes, it takes a victim of such a casualty – a father or family member such as Henry Bowditch or Albert Snyder, or those who “undertake the work not just of burial but also of consolation and mourning,”⁴² – to remind the government of its right and responsibility to ensure that all servicemembers and families who sacrifice on its behalf receive, or are able to bid, a peaceful and solemn goodbye. This right and responsibility strongly supports a finding by this Court that there is a compelling government interest in protecting military funerals from protest.

⁴¹ Gold Star Family is one who is entitled to a gold star lapel issued by the Military. This lapel identifies widows, parents and next of kin of members of the Armed Forces of the United States who lost their lives. 10 U.S.C. § 1126 (2009).

⁴² See Faust, *supra* note 17 at 143.

III. FAILURE TO PROTECT THE PRIVACY INTERESTS OF MILITARY FAMILIES CAN SEVERELY DISRUPT AND EXACERBATE THE GRIEVING PROCESS

Military funerals serve to honor the life and sacrifice of a fallen servicemember, while also providing a private and solemn ceremony for the surviving family. Funerals concerning a sudden death, like Matthew Snyder's, have greater significance because there is no time to say goodbye.⁴³ The military funeral provides this chance. At a time when the grieving family gathers to mourn and come to terms with a loved one's death, the targeted disruption of a military funeral can act to aggravate the emotional trauma of the deceased's family and desecrate the identity of the soldier killed in combat.

A. The Circumstances Surrounding a Servicemember's Deployment and Combat Related Death are Unique

Military personnel have the uniquely honorable, yet emotionally tolling, responsibility of serving the country during times of both peace and war. Decades of research show that deployments undoubtedly take an emotional and psychological toll on servicemembers.⁴⁴ Often overlooked is the extreme emotional

⁴³ Vol. XI at 2730.

⁴⁴ R.A. Kulka, et al., *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam*
(Continued on following page)

hardship faced by the families of the deployed. Though the patriotism and confidence of the American people provides support to those deployed, it does very little, if anything, for the immense stress and personal angst felt by the families left behind. Families are forced to endure goodbyes with their loved ones, fully immersed in the knowledge that this may be the final goodbye. This fear and uncertainty is transformed into shock and grief when there is a knock at the door with the message that their loved one has been killed.

Unlike civilian deaths, military deaths are almost always the result of unspeakably violent events.⁴⁵ This reality is difficult for both the service-members who face it every day, and their loved ones left to deal with the aftermath. The fact that a loved one is deceased is difficult to comprehend in and of itself, but when this is coupled with the knowledge that the death was painful and violent, the survivors often suffer additional emotional harm.⁴⁶

Veterans Readjustment Study (1990); Anthony Pappa, et al., Traumatic bereavement in war veterans. *Psychiatric Annals*, 38(10), at 687.

⁴⁵ Kathleen M. Wright, et al., *Military spouses: Coping with the fear and the reality of servicemember injury and death*. In *Military Life: The psychology of servicing in peace and war*, Vol. 3, The military family, Carl A. Castro, et al., eds., 2006.

⁴⁶ *Id.*

B. The Grieving Process Related to the Death of a Servicemember is Distinct from Other Deaths

The uncertain finality of the goodbye, the horrendous nature of the death, the unwanted attention the family receives from third parties, and the tremendous upheaval that a military family experiences creates trauma that can have long-lasting impacts on an individual's ability to properly grieve.⁴⁷ Psychologists have long recognized five basic stages of grieving: (1) denial, (2) anger, (3) bargaining, (4) depression, and (5) acceptance.⁴⁸ These stages do not necessarily occur in a linear manner, and this analysis is not fully representative of the complex grief experienced by military families.⁴⁹

Research has shown that disruption of an individual's grieving process can result in more serious psychological consequences. Complicated grieving ("CG"), "which is also referred to as 'traumatic grief,' or 'prolonged grief disorder,' is associated with significant suffering, functional impairment, and

⁴⁷ Jacqueline Melissa Swank & E.H. Mike Robinson, *Addressing Grief and Loss Issues With Children and Adolescents of Military Families*, paper based on program presented at the American Counseling Association Annual Conference and Exposition, Charlotte, NC (March 19-23, 2009), available at www.counselingoutfitters.com/vistas/vistas09/Swank-Robinson.doc.

⁴⁸ ELIZABETH KÜBLER-ROSS & DAVID KESSLER, *ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS* (Scribner ed., Simon & Schuster 2005) (1969).

⁴⁹ See Swank, *supra* note 28.

morbidity, with indications that once individuals develop CG, they are at substantial risk for chronic problems that are resistant to treatment.”⁵⁰ During the grieving process it is crucial for the bereaved to be free from harmful external intervening forces. When the grieving process is interrupted, or where the meaning of the death is insulted or reviled, the grief becomes more complicated as there is additional aggravation of emotional burdens.⁵¹ When that interruption is intended to “place a little bug” in the head of a grieving family member, such interruption is tantamount to “pouring salt into the wound.”⁵²

In addition to the cause of death, other external factors contribute to the grief associated with the death of servicemembers killed in action. The Respondents’ expert explained the consequences of the Phelps’ action with regard to Mr. Snyder’s depression: “[I]t interfered with the process that we go through of honoring our soldiers who die for their country and also could have surely interfered with the grieving process and allowing him to be a hero without any tarnish on his casket.”⁵³

⁵⁰ See Pappa, *supra* note 42.

⁵¹ *Id.*

⁵² Vol. VIII at 2111-2112, 2206, and 2237.

⁵³ Vol. X at 2578.

C. Protests at a Military Funeral Have Injurious Effects on the Grieving Process

The funeral affords the grieving family an opportunity to preserve the fallen hero's social identity beyond death. Every person has two identities when alive, a social self and a physical self, both controlled by the individual.⁵⁴ The physical self is the corporeal aspects of a person – how tall they are, how much they weigh, and their style of dress.⁵⁵ On the other hand, the social self is how one acts in society – whether they are a charitable person, adventurous, or introvert.⁵⁶ During one's life, these two identities travel on identical paths.⁵⁷ However, at death, these two identities move in opposite directions. While one's physical self begins to deteriorate through the normal decomposition process, the social self, or social identity, continues to evolve.⁵⁸ This new social identity is how the deceased will be remembered forever.

For obvious reasons, the deceased can no longer control their social identity. Rather, the surviving family and friends have the responsibility of creating a new social identity for the deceased – an identity

⁵⁴ SLEDGE, *supra* note 24 at 23.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 22.

⁵⁸ *Id.*

that will continue beyond death.⁵⁹ Pericles explained this great responsibility at a funeral during the Peloponnesian War:

Turning to the sons or brothers of the dead, I see an arduous struggle before you. When a man is gone, all are wont to praise him, and should your merit be ever so transcendent, you will find it difficult not merely to overtake, but to even approach their renown.⁶⁰

Creating a new social identity serves two purposes: providing closure for the family and honoring and preserving the positive memory of the deceased.⁶¹ During the family's process of creating an identity for the deceased, the bereaved work through their grief and attempt to give meaning to the death.⁶² The funeral ceremony is the first chance the family has to establish the new identity. While creating a new identity, the family of the bereaved honors the dead and preserves the positive memories of the deceased's life.⁶³ When this new social identity is contradicted or questioned, the deceased's legacy tarnishes in a way inconsistent with the family's wishes. In Matthew Snyder's case, his family wanted him to be remembered as a loving son and a hero who died for his

⁵⁹ *Id.* at 23.

⁶⁰ *Id.*

⁶¹ *Id.* at 22.

⁶² *Id.*

⁶³ *Id.*

Country as a United States Marine. Unfortunately, the Respondents created a different identity – one by which Matthew will be infinitely remembered. To the media and the world, Matthew Snyder will forever be remembered for signs that read “God Hates Fags,” and “Thank God for Dead Soldiers.”⁶⁴

The military funeral is much more than mere show; it is a means to honor and recognize the fallen’s sacrifice. This ceremony, with the draped flag and its subsequent folding, the playing of “Taps,” the three-rifle volley, and the honor guard, are all ways of recognizing what the individual sacrificed in service for his Country. To have that meaning shattered by protestors creates additional trauma for the family. It is the necessity for outward recognition of the worthiness of the sacrifice that makes military funerals, like those of fallen police or fire personnel, so unique and encouraging for a new generation to follow in their brave footsteps.⁶⁵

CONCLUSION

The family members present at the funeral of a soldier killed in service to their Country are truly a

⁶⁴ Vol. VIII at 2119, 2121.

⁶⁵ Mary Beth Williams, *Impact of Duty-Related Death on Officer’s Children: Concepts of Death, Trauma Reactions and Treatment*, in *Police Trauma: Psychological Aftermath of Civilian Combat*. (J. M. Violanti & D. Paton eds., 1999).

captive audience. To suggest that a grieving family could turn away from the protestors and ignore their visible presence is to deny the emotional and psychological significance of the burial ceremony. The important position the military funeral occupies in the grieving process is severely undermined when disturbed by malicious targeted protesting. A disturbance in this formal procedure, recognized throughout history as a way to provide comfort and closure to the bereaved family, can lead to the formation or exacerbation of considerable psychological dysfunction and even act to lengthen the mourning period.

Respectfully submitted,

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