SNYDER V. PHELPS & THE SUPREME COURT'S SPEECH-TORT JURISPRUDENCE: A PREDICTION

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The Supreme Court’s forthcoming decision in *Snyder v. Phelps* will address the clash between two fundamental and longstanding American values: freedom of speech and “the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.” The Phelps’ family-owned and operated Westboro Baptist Church capitalized on former marine Matthew A. Snyder’s untimely death in Iraq to expound their “religious” belief that “God hates fags” and kills American soldiers to punish the United States for tolerating homosexuality. Their messages, which mixed political and religious viewpoints with personal attacks on the Snyders, produced a jury verdict in the amount of $10.9 million in favor of Matthew’s father for invasion of privacy and intentional infliction of emotional distress. The Fourth Circuit reversed on First Amendment grounds, finding the political speech and personal attacks categorically exempt from tort liability. The Supreme Court granted certiorari and heard oral arguments on October 6, 2010, with an opinion expected this spring. This essay analyzes the Supreme Court’s speech-tort precedent and the questions posed by the Members of the Court during oral argument, and concludes that the Supreme Court will likely reject the Fourth Circuit’s categorical approach and instead engage a balancing test to reconcile Mr. Snyder’s claims with the First Amendment consistent with its existing speech-tort jurisprudence.

Historically, harmful speech has been subject to tort liability. In 1964, the Court first recognized that state tort law constitutes state action, and therefore, the First Amendment operates as a partial or complete bar to tort liability arising from speech. Beginning with *New York Times v. Sullivan*, the Supreme Court began “constitutionalizing” state tort claims to actualize First Amendment protection of speech subject to tort liability. The Court specifically rejected a categorical approach and instead balanced the interests involved in recognition that, as venerable and fundamental as free speech is, it is not the only societal interest at stake when one person’s speech violates another’s personal rights protected by tort law. In *New York Times v. Sullivan*, the Court “reconciled” defamation liability with the First Amendment by tailoring the elements of plaintiff’s prima facie case in an attempt to find the optimal balance of rights to protect both personal interests and freedom of speech.

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4 *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring) (“*New York Times v. Sullivan* was the first major step in what seemed to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.”).
In a series of subsequent cases over the past half-century, the Court has identified a number of relevant factors to analyze and balance to determine the level of heightened evidentiary burdens to plaintiffs’ prima facie tort claims necessary to reconcile the interests protected by tort law with the First Amendment. If the Court engages the same methodology in *Snyder v. Phelps* that it has in other speech-tort cases, it will reject the Fourth Circuit’s categorical approach and replace it with a balancing test, then raise the evidentiary burdens for Mr. Snyder to establish prima facie cases of invasion of privacy and intentional infliction of emotional distress to meet constitutional demands.

This essay proceeds in three parts. Part I reviews the facts of *Snyder v. Phelps*. Part II identifies the balancing factors that the Court has engaged in analyzing speech-tort liability and explains the Court’s method of evidentiary tailoring to reconcile tort liability with the First Amendment. Part III applies the balancing factors to the facts of *Snyder v. Phelps*, then suggests ways in which the Court could tailor Mr. Snyder’s evidentiary burdens of proof to render his claims constitutional.

I. THE FACTS OF SNYDER V. PHLEPS

Fred W. Phelps founded the Westboro Baptist Church in Topeka, Kansas in 1955 and has been the only pastor of the church since its inception. The church membership consists of approximately sixty or seventy members, fifty of whom are related to Phelps. The church members practice a “fire and brimstone” fundamentalist religious faith. They believe that God hates homosexuals and punishes America for its tolerance of homosexuality by killing American soldiers, and established the website [www.godhatesfags.com](http://www.godhatesfags.com) to publicize their views.\(^5\) Church members began picketing funerals of fallen soldiers to draw attention to their religious beliefs several years ago and have increasingly picketed funerals to attract media attention.\(^6\)

Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty on March 3, 2006 and his parents chose to have a funeral for him in their home town of Westminster, Maryland at the St. John’s Catholic Church. His father, Albert Snyder, spoke to the media immediately after his son’s death\(^7\) and obituary notices were placed in the local newspapers concerning the time and place of his son’s funeral.\(^8\)

Two days before the funeral, the Phelpses sent out an “announcement” of their intent to protest the funeral of Matthew Snyder.\(^9\) Fred Phelps and other Westboro Baptist Church family members traveled from Topeka to Westminster to picket the funeral of Matthew Snyder. The church members carried large signs near the funeral containing the following general content: “God Hates the USA,” “America is doomed,” “Pope in hell,”

\(^5\) *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010).

\(^6\) *Snyder v. Phelps*, 580 F.3d 206, 212, n. 1 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010). Antics such as this resulted in funeral picketing legislation in forty states and the federal government by 2007. *Id.*


\(^8\) *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010).

“Fag troops,” “Thank God for 9/11” and “Semper fi fags.” There were also signs that appeared to target Matthew Snyder personally, such as “You’re going to hell,” “God hates you,” and “Thank God for dead soldiers.”

In addition, the Phelpses published an “epic” on their website that clearly targeted Matthew Snyder personally, entitled “The Burden of Marine Lance Cpl. Matthew Snyder.” In the epic, the Phelpses accuse Albert Snyder and his ex-wife Julie Snyder of teaching Matthew to “defy his creator” and to “divorce and commit adultery,” of raising him “for the devil,” and of teaching him that “God is a liar.” The epic went on to state that God rose up Matthew in order to kill him and that Matthew “fulfilled his calling” to create an opportunity for others to preach God’s word.

Albert Snyder did not actually see the content of the signs at the funeral, but saw them later on television. Mr. Snyder viewed the epic after running a Google search on his son. Mr. Snyder spoke with the media after he became aware of the Phelpses’ conduct near his son’s funeral and reviewed the “epic” concerning his son. Mr. Snyder sued the Phelpses on a variety of tort claims, and his claims for invasion of privacy, intentional infliction of emotional distress, and civil conspiracy survived pretrial motions and proceeded to trial. At trial, Mr. Snyder presented evidence of extreme and severe emotional distress leading to physical illness, worsening of his diabetes, severe depression, and an inability to have positive memories about his son, as the Phelpses’ messages – and particularly the sign “Thank God for dead soldiers” – was irreversibly

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10 Snyder v. Phelps, 580 F.3d 206, 222 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
11 As stated by Albert Snyder’s attorney Sean E. Summers at oral argument, “Matthew Snyder was the only deceased marine/soldier at the funeral.” Transcript of Oral Argument at 9, lines 23-24, Snyder v. Phelps, No. 09-751 (S. Ct. argued Oct. 6, 2010) (Alderson Reporting Company). The Fourth Circuit recognized that these personalized statements presented a “closer question” concerning free speech protection. Snyder v. Phelps, 580 F.3d 206, 224 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
12 Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
13 Snyder v. Phelps, 580 F.3d 206, 225 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
14 Snyder v. Phelps, 580 F.3d 206, 225 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010). The epic also attacked the Snyder’s church of choice, calling it “the whorehouse called St. John Catholic Church.” Id.
15 The fact that Mr. Snyder did not see the content of the signs at the funeral is irrelevant to his claims, as a person need not know that a tort was committed against him at the time of the tort’s commission, since a dignitary “affront is as keenly felt by one who only knows after the event that an indignity has been perpetrated upon him as by one who is conscious of it while it is being perpetrated.” RESTATEMENT (SECOND) OF TORTS, Sec. 18, Com. (d) (1977). Although this section relates to battery and knowledge of contact, it clarifies that the wrongful conduct consists of the intentional invasion of another’s dignitary interests, and logically applies equally to dignitary torts such as invasion of privacy.
16 Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
17 Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).
18 Brief for Respondents at 18, Snyder v. Phelps, No. 09-751 (Jul. 7, 2010), 2010 WL 2826988.
attached to his memories of Matthew. The jury returned a verdict for $2.9 million in compensatory damages and $8 million in punitive damages on Mr. Snyder’s claims for invasion of privacy and intentional infliction of emotional distress, and the trial court reduced the punitive damages award to $2.1 million, for a final judgment of $5 million.

The Fourth Circuit reversed the district court judgment and held that all of the Phelps’s speech was immune from tort liability. The Fourth Circuit articulated categories of speech that are absolutely protected by the First Amendment, to wit: 1) statements on matters of public concern that “fail to contain a provably false factual connotation”; and 2) “rhetorical hyperbole,” defined as statements employing “loose, figurative, or hyperbolic language,” and found that all of the Phelps’s speech fell within these categories. The Supreme Court granted certiorari and heard oral arguments on October 6, 2010.

II. THE SUPREME COURT’S METHODOLOGY FOR RECONCILING TORT LIABILITY WITH THE FIRST AMENDMENT

The Supreme Court has rendered numerous opinions analyzing the conflict between tort liability arising from injurious speech and First Amendment protection of speech. The Court’s various opinions, taken together, produced three primary analytical factors to determine the level of constitutional protection for tortious speech: 1) the plaintiff’s level of vulnerability and need for state law protection (the public figure/private person distinction); 2) the nature of the speech as public or private; and 3) the nature of the plaintiff’s injury. Depending on the outcome of the balance of interests, the Court has tailored the elements of plaintiff’s prima facie tort claims strictly or moderately, or has deferred to state tort law. This Section briefly explains the derivation of the Court’s analytical factors and the levels of evidentiary tailoring.


The Supreme Court first considered the extent to which the First Amendment limits a state’s police power to award tort damages in a defamation case brought by a public official against critics of his official conduct in New York Times v. Sullivan. The Court specifically rejected a categorical approach to defamation liability, focusing instead on

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Snyder v. Phelps, 580 F.3d 206, 213 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).

The operable Complaint alleged two forms of invasion of privacy, intrusion into seclusion and publicity given to private life, but the trial court granted defendants’ motion for summary judgment on the latter privacy claim as well as a claim for defamation. See Snyder v. Phelps, 533 F.Supp.2d 567, 572 (D. Md. 2008), rev’d, Snyder v. Phelps, 580 F.3d 206, 224 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).

Snyder v. Phelps, 580 F.3d 206, 211 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (Mar. 8, 2010).


the nature of the publication as an initial consideration for determining the constitutionality of its punishment.\textsuperscript{26}

The Court found that that a full page advertisement published by the New York Times seeking funds to defend Martin Luther King, Jr.’s allegedly wrongful and harassing criminal prosecution was political speech, and therefore the First Amendment required substantial evidentiary modifications to the common law prima facie case of defamation to avoid chilling robust debate concerning self-government.\textsuperscript{27} First, the court raised the level of fault necessary to establish the claim from negligence\textsuperscript{28} or strict liability\textsuperscript{29} to “actual malice,” meaning that the defendant actually knew that the speech was false or published it with reckless disregard as to its truth or falsity.\textsuperscript{30} Second, the actual malice standard shifted the burden of proof that the speech was false onto the plaintiff, instead of the common law rule that truth is a defense.\textsuperscript{31} Third, the Court raised the level of proof required to establish fault from the general tort burden of a preponderance of evidence to a heightened burden of clear and convincing evidence.\textsuperscript{32} The Court’s primary focus was the political nature of the speech, but Sullivan’s status as the Montgomery Public Safety Commissioner with control over the police officers who allegedly harassed Dr. King rendered him a public official and therefore subject to the “actual malice” standard, a point clarified a decade later in \textit{Gertz v. Welch}.\textsuperscript{33}

B. The Plaintiff’s Vulnerability Factor: The Public Figure/Private Person Distinction

In \textit{Gertz v. Welch},\textsuperscript{34} the Court clarified that the level of constitutional tailoring necessary to constitutionalize a claim for defamation turns primarily on the plaintiff’s status as a public figure or a private person, because private persons are “more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”\textsuperscript{35} Attorney Robert Gertz was defamed relative to his representation of wrongful death plaintiffs subsequent to a high-profile murder case. Despite Mr. Gertz’s substantial involvement in the community and the fact that he had written books, the Court found that he had not “thrust

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\item \textsuperscript{26} “[T]he rule is that ‘we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.’” New York Times v. Sullivan, 376 U.S. 254, 285-286 (1964), \textit{quoting} Pennekamp v. Florida, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L.Ed. 1295 (1946). The Court focused on the political nature of the speech, which it deemed core First Amendment speech. \textit{Id.} at 296-297.
\item \textsuperscript{28} The evidence proved mere negligence, a “constitutionally insufficient” level of fault to impose liability for political speech. New York Times v. Sullivan, 376 U.S. 254, 288 (1964). Justices Black, Douglas, and Goldberg would have recognized an “absolute, unconditional constitutional right” to criticize public officials. \textit{Id.} at 293 (Black, J., concurring).
\item \textsuperscript{29} The common law of England allowed strict liability for libel. \textit{See, e.g., Cassidy v. Daily Mirror Newspapers, Limited}, 2 K.B. 331, 69 A.L.R. 720 (1929) (wife established liability against newspaper based on its accurate report of her husband’s statements that implied that he was not married to wife, with whom he cohabited).
\item \textsuperscript{32} New York Times v. Sullivan, 376 U.S. 254, 285-286 (1964) (the constitutional standard demands “convincing clarity”). \textit{See also} Gertz v. Welch, 418 U.S. 323, 342 (1974) (Court clarified that the standard is “clear and convincing proof.”).
\item \textsuperscript{33} Gertz v. Welch, 418 U.S. 323 (1974).
\item \textsuperscript{34} Gertz v. Welch, 418 U.S. 323 (1974).
\item \textsuperscript{35} Gertz v. Welch, 418 U.S. 323, 344 (1974).
\end{itemize}
himself” into the public spotlight sufficiently or achieved the general fame necessary to be deemed a public figure, and was therefore entitled to greater state tort law protection. 36

The Court identified two reasons why public figures presumably have less need for, and are less deserving of, state protection from defamatory speech, warranting the higher New York Times v. Sullivan actual malice standard. First, if the plaintiff is a public figure, he presumably has access to the media for purposes of counter-speech, and can therefore engage in “self-help” to protect his reputation. 37 Second, with “exceedingly rare” exception, a public figure took affirmative action to inject himself into the public spotlight by pursuing an official position or general fame, and thereby assumed the risk of public criticism and even “sharp attacks” on his character and integrity. 38

Accordingly, the free speech-tort liability balance shifts toward more deference to state tort law where private persons are injured, in recognition of the state’s greater interest in protecting them. The Court therefore reduced Mr. Gertz’s burden of proof of fault from actual malice to negligence and allowed recovery of actual damages upon proof of fault by a mere preponderance of evidence. The Court also added the negligence element of “actual damages” to the private person/public concern prima facie case of defamation in an apparent attempt to create sufficient speech protection, considering the reduced burden of proof. 40

In Hustler Magazine v. Falwell, the Court extended the actual malice standard to public figures who claim intentional infliction of emotional distress arising from speech, based on the reasoning of Gertz v. Welch. Reverend Jerry Falwell had acquired general fame as a “nationally known minister who has been active as a commentator on politics and public affairs.” 41 Accordingly, his claims for libel and intentional infliction of emotional distress arising from a comical parody asserting that his first sexual experience was with his mother in an outhouse were both subjected to the actual malice standard. The Court emphasized Reverend Falwell’s public status and the value of derogatory parody and satire in political debate: “while . . . a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.” 42 The Court required factual falsity, an element not usually a part of an intentional infliction of emotional distress claim, to prevent Reverend Falwell from circumventing the First Amendment limits to tort liability for public figure defamation by re-casting his grievance as a claim for emotional distress. The Court required falsity to avoid the

38 Gertz v. Welch, 418 U.S. 323, 344-345 (1974) (a public official “runs the risk of closer public scrutiny” than a private defamation plaintiff). See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 756 (1985) (explaining that “private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements”). Assumption of the risk is a defense to negligence and strict liability that provides that if plaintiff voluntarily agreed to accept the consequences of a known risk, then defendant is relieved from liability for injury resulting from that risk. See DAN B. DOBBS, THE LAW OF TORTS 534, 962, 1175 (2000).
“inherent subjectiveness” of what constitutes “outrageous” speech,” but clearly limited its holding to political commentary concerning public figures, since political cartoons are common “weapons of attack” in need of “breathing space” to avoid chilling political debate.

C. The Nature of the Speech Factor: The Public Concern/Private Matter Distinction

Both *New York Times v. Sullivan* and *Gertz v. Welch* concerned speech of “public concern.” In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court distinguished private speech from speech of public concern and held that a negligently produced false and derogatory credit report concerning a private company was not of legitimate concern to the public, and therefore “less important” for First Amendment purposes and of “reduced constitutional value,” necessitating less tailoring of the prima facie case of defamation to meet First Amendment demands. The somewhat relaxed evidentiary tailoring of *Gertz v. Welch* was relaxed further, such that awards of presumed and even punitive damages for defamation are constitutional upon proof of ordinary negligence where speech that is not of public concern harms a private person. The levels of evidentiary tailoring based on the status of the plaintiff and whether the speech is of public concern presumably apply to torts other than defamation, as the Court implied in *Hustler Magazine v. Falwell.*

D. The Nature of the Injury Factor

The Court has essentially deferred to state tort regulation of speech where the plaintiff claims proprietary harm or actual damages as opposed to dignitary or emotional harm, regardless of whether the plaintiff is a public figure or the speech is of great public concern, based on the state’s heightened interest in protecting property rights. In *Zacchini v. Scripps-Howard Broadcasting Company,* plaintiff claimed invasion of privacy in the form of misappropriation of his professional creative property – a human cannonball stunt at a fair – after a television station played the entire event on the evening news without his consent. The Court held that the *New York Times v. Sullivan* actual

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49 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). The changes made to *Gertz v. Welch*’s intermediate level of scrutiny were: 1) the burden of proof was reduced to preponderance of evidence; 2) presumed damages were allowed without proving actual damages; and 3) punitive damages were allowed upon proof of negligence only.
50 See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that a broadcaster was privileged to publish illegally-obtained tape recording of private cell phone conversation where the broadcaster played no role in the illegal acquisition of the taped call, because the conversation concerned school district-union negotiations and was a matter of public concern); *Herring v. Adkins*, 150 Ohio Misc. 2d 13, 19 n. 3 (2008) (“Federal law states that when determining whether speech is protected, courts must apply the same standards to all torts that applied in defamation cases.”)
malice standard did not apply when the state seeks to protect the plaintiff’s property interests, as opposed to merely “feelings or reputation.” 53 The Zacchini v. Scripps-Howard Broadcasting Company majority found that the state’s interest in protecting plaintiff’s creative act was “analogous to the goals of patent and copyright law,” and the state has a heightened interest in preventing “unjust enrichment of good will.” 54 Indeed, protecting the fruits of one’s ideas through tort liability furthers the First Amendment policy of encouraging creative ingenuity. 55 Similarly, in Harper & Row v. Nation Enterprises, 56 the Court held that the First Amendment did not protect a political magazine from liability for publishing portions of a stolen copy of Gerald Ford’s “memoirs” concerning the Watergate crisis because First Amendment values are enhanced by protecting the right to create and own ideas, and the publication caused Ford to incur substantial actual damages. 57

III. APPLYING THE SUPREME COURT’S METHODOLOGY TO SNYDER V. PHELPS

A. The Balancing Factors Applied to Snyder v. Phelps

Assuming that the Supreme Court engages its established speech-tort methodology in Snyder v. Phelps, its first task will be to balance the interests in conflict by reference to the analytical factors identified herein. This Subsection analyzes the three factors relative to the facts of Snyder v. Phelps, and the next Subsection suggests evidentiary tailoring options to constitutionalize Mr. Snyder’s tort claims.

1. The Plaintiff’s Vulnerability Factor

It seems clear that, unlike Mr. Sullivan or Mr. Falwell, Mr. Snyder was not a public official or person of general fame before the events that gave rise to his tort claims. Even Mr. Gertz was deemed a private person, despite having written books, being active in the community, and being a well-respected and recognized local attorney. The Phelps have attempted to characterize Mr. Snyder as a “limited purpose public figure” in an attempt to engage the strict actual malice standard of New York Times v. Sullivan, pointing to the fact that Mr. Snyder spoke with the media and was “enjoying all of the benefits of a public figure.” 58 However, although Mr. Snyder had access to the media after the events giving rise to his claims, this should not establish public figure status, especially since Mr. Snyder did not assume the risk of personal attacks prior to the Phelps’ tortious conduct, and appears to have been dragged into the public spotlight against his will and best interests. Mr. Snyder was unknown to the public before the Phelps’ choice to use his family as an example of God’s vengeance and should be considered a private person.

At oral argument, the justices expressed concern about the Phelps’ attempt to characterize Mr. Snyder as a public figure for purposes of First Amendment analysis. Justice Breyer expressed concern about placing “the most private things about a private

58 Brief for Respondents at 18, Snyder v. Phelps, No. 09-751 (Jul. 7, 2010), 2010 WL 2826988.
individual” on television or the internet, and Justice Ginsburg pointed out that “Falwell was a public figure and the Snyder family is not.” Justice Alito asked Ms. Phelps whether “everybereaved family member who provides information to a local newspaper for an obituary thereby makes the [family member] a public figure,” to which Ms. Phelps replied that the “level of involvement” that Mr. Snyder had with the media made him a participant in public affairs. Justice Kennedy pointed out that in a pluralistic society, we all belong to numerous sub-groups – such as single versus married, Republican versus Democrat, and young versus old – and that a tort claim should be recognized where a private person is targeted for public interest speech, lest a private person be subject to being followed around and harassed just because he or she happens to be a part of a group subject to some public debate. The justices seemed to be leaning toward characterizing Mr. Snyder as a private person, not a public figure.

Indeed, First Amendment policy could be subverted if Mr. Snyder were to be characterized as a public figure based on the fact that he discussed his son’s death with the media, as this would likely chill his free speech rights and the rights of other grieving parents who have lost their children to war, with an attendant loss of newsworthy information that surely warrants as much First Amendment protection as the Phelps’ messages. Mr. Snyder should be deemed a private person under this factor because it is in line with Supreme Court precedent and it supports free speech among private citizens whose speech could be chilled if Mr. Snyder is deemed a public figure simply because he spoke to the media regarding a personal tragedy.

2. The Nature of the Speech Factor

The nature of the speech involved in Snyder v. Phelps is mixed. Speech expressing political or religious opinion of genuine public concern was mixed with speech that targeted a private family with highly inflammatory personal attacks for the apparent purpose of garnering media attention that the Phelps could not garner based on the content of their speech alone. Signs such as: “God Hates the USA,” “America is doomed,” “Fag troops,” “Thank God for 9/11” and “Semper f i fags” should be absolutely protected by the First Amendment as political speech, provided the manner of displaying the messages is otherwise legitimate.

However, the signs and epic that targeted the Snyder family personally, characterizing Matthew as having been “raised for the devil” by his parents and “going to hell,” inter

63 Mr. Snyder’s “captive audience” argument is not compelling relative to – and not necessary to establish – his invasion of privacy claim, due to the distance between the funeral and the public demonstration, and the fact that the Phelps broke no laws relative to the location of their demonstration. See Brief for Petitioner at 20, Snyder v. Phelps, No. 09-751 (May 24, 2010), 2010 WL 2145497; National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).
alia, do not concern the public. The Snyders’ child-rearing methods are not of public concern any more than a private company’s solvency was in *Dun & Bradstreet v. Green Moss Builders, Inc.* There is a difference between using the First Amendment as a shield to protect speech of legitimate public concern and using the First Amendment as a sword to publicize private persons’ personal tragedies, attack their morality, and disturb their emotional tranquility in a manner that contravenes minimal expectations of civility protected by emotional distress and privacy torts.

At oral argument, the justices appeared to recognize the distinction between the general versus personal signs involved in this case. For example, Chief Justice Roberts and Justice Scalia distinguished the signs with “personal attacks” from the general anti-war signs. Justice Sotomayor sought a “line” between the public speech and the private attacks on the Snyders: “What you [Phelps] have not explained to me is how your speech directed at the Snyders [personal attacks] constituted public speech or speech about a public matter.” Similarly, Justice Kennedy stated to Ms. Phelps “you should help us in finding some line there,” to protect private persons from being drawn unwillingly into public debate just because of his or her relationship to a public issue.

Justice Ginsburg questioned whether “exploiting a private family’s grief” was necessary to communicate the Phelps’ messages, indicating that the personal attacks on the Snyder family were distinct from the political, social, and religious messages the Phelps legitimately sought to disseminate. Justice Alito pointed out that the epic “shed light” on what “you” meant on the signs displayed near Matthew Snyder’s funeral such as, “You are going to hell,” and was able to get Ms. Phelps to agree that her argument that the Phelps’ speech was protected “depends on the proposition that this is speech on a matter of public concern.” Justice Alito pointed out that the logical extension of the Phelps’ argument and the Fourth Circuit’s reasoning would allow anyone to harass a grandmother visiting her military grandson’s grave, and Chief Justice Roberts followed up, asking Ms. Phelps whether speech concerning public issues could ever give rise to tort liability, such as in Justice Alito’s grandmother example, to which Phelps “reluctantly” replied that it could. The justices appeared inclined to decide that at least some of the Phelps’ signs, and at least certain aspects of the online epic, contained speech that was personal and private, as opposed to speech of public concern.

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3. The Nature of the Injury Factor

The nature of the state’s interest in providing a tort remedy in *Snyder v. Phelps* presents another mixed factor. Mr. Snyder claimed general damages for emotional distress and privacy infringement, which are probably governed by the lesser state interest in “feelings and reputation,” which are also general damages. Mr. Snyder also claimed physical injury in the form of exacerbated diabetes, which seems to warrant greater state protection and is amenable to objective verification, like property losses. Although the Court has not spoken on the relative state interest in protecting physical health over feelings or reputation, established tort doctrine values physical injury over competing property interests, at least where the physical injury is serious. In addition, tort law protects physical injury more than pure emotional distress similar to the way in which the Court protects property rights more than pure emotional distress, and the state presumably has a greater interest in protecting physical health over emotional upset.

The hierarchy of state interests should place physical injury above pure emotional distress based on established tort doctrine, at least where the physical injury is factually verifiable. Accordingly, Mr. Snyder’s injuries probably present a stronger case for recovery than a pure emotional distress claim, and the state’s interest should be considered correspondingly higher.

B. Reconciling Tort Liability With Free Speech: Evidentiary Tailoring

Assuming that the Court determines that Mr. Snyder is not a public figure, the Court will engage some form of moderate evidentiary tailoring of Mr. Snyder’s tort claims, even if the Phelps’ speech is deemed entirely of public concern and Mr. Snyder’s injuries are considered unimportant to the state, which seems unlikely. This Subsection suggests ways in which the Court might tailor Mr. Snyder’s claims for invasion of privacy and intentional infliction of emotional distress to reconcile these claims with the First Amendment.

1. Invasion of Privacy

The *Snyder v. Phelps* jury was instructed that the tort of invasion of privacy based on intrusion upon seclusion is established if the plaintiff proves each of the following elements by a preponderance: (1) an intentional; (2) intrusion or prying upon; (3) something which is and is entitled to be private; (4) in a manner which is highly offensive to a reasonable person. There are a number of ways that Mr. Snyder’s burden of proof to establish invasion of privacy could be raised to meet First Amendment demands.

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72 See, e.g., *Brown v. Martinez*, 361 P.2d 152 (N.M. 1961) (use of deadly force in attempt to scare watermelon thieves off of the defendant’s property held actionable because the value of life and limb trumps competing property rights).

73 *DAN B. DOBBS, THE LAW OF TORTS* 835-839 (2000) (pure emotional distress is insufficient to support a claim of negligence in most jurisdictions, but physical injury or physical manifestation of distress can).

First, a harm element similar to the general negligence harm element could be added, as in *Gertz v. Welch*. That is, requiring some form of verifiable personal injury or property damage would limit liability to those cases in which the state’s interest is greater than protecting against harm to feelings or reputation. Second, a subjective intent element could be added to require proof that defendant did not just intend the intrusion, but actually intended to cause personal injury or property damage or acted recklessly relative to such injury, which would mirror the intent aspect of the “actual malice” standard. Third, as suggested by Justice Breyer in “looking for a line,” intentionally inflicted emotional injury could raise the evidentiary burden of proof to constitutionalize the tort of privacy. Fourth, Justice Breyer suggested disallowing punitive damages as an option for reconciling free speech with tort liability. Finally, requiring proof of all elements of the claim by clear and convincing evidence offers enhanced protection of speech.

2. Intentional Infliction of Emotional Distress

The *Snyder v. Phelps* jury was instructed that the tort of intentional infliction of emotional distress is established if the plaintiff proves each of the following elements by a preponderance: (1) the defendants’ conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress to the plaintiff; and (4) the emotional distress was severe. To limit liability for speech that causes emotional distress, the proof of emotional distress could be raised to require proof of physical injury resulting from the emotional distress, as in most negligent infliction of emotional distress cases. Raising Mr. Snyder’s burden of proof to clear and convincing evidence and disallowing punitive damages also offer enhanced speech protection while allowing reasonable protection against intentional infringement of emotional tranquility.

CONCLUSION

The Supreme Court has consistently rejected the type of categorical approach to protecting speech from tort liability that was adopted by the Fourth Circuit in *Snyder v. Phelps*. Rather, the Court has repeatedly explained that the clash of interests created by tort liability for speech necessitates a careful analysis to determine the optimal balance of rights – to assure protection of personal interests to the greatest extent possible while protecting freedom of speech adequately. Established speech-tort precedent holds that the most speech protective evidentiary burdens are imposed where the plaintiff is a public figure, the speech is of public concern, and the injury is purely emotional or dignitary in nature. To the contrary, where the plaintiff is a private person, the speech is private in nature, or the injury involves more than mere “feelings or reputation,” the First

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75 Transcript of Oral Argument at 45, lines 18-22, Snyder v. Phelps, No. 09-751 (S. Ct. argued Oct. 6, 2010) (Alderson Reporting Company). Although Justice Breyer did not specifically state that intentional infliction of emotional distress would be required to constitutionalize the tort of invasion of privacy, as opposed to the tort of intentional infliction of emotional distress, this seems to be his point, since intentional infliction of emotional distress is already required for the latter tort claim.


77 Jury Instructions, Court’s Instructions 9 & 19, Snyder v. Phelps, No. 09-751 (Nov. 2, 2007), 2007 WL 3284272. This is consistent with both the Second and (proposed) Third Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS, Sec. 46 (1977); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, Sec. 45 (Tentative Draft No. 5, 2007).

Amendment presents less of an obstacle to tort liability, and the evidentiary barriers to state a claim are reduced accordingly.

If the Court stays true to its speech-tort methodology, it will consider Mr. Snyder’s status as a public figure or private person, the nature of the speech at issue, and the nature of Mr. Snyder’s injuries in determining where to draw the lines necessary to reconcile free speech and tort liability. Based on the Court’s questions and statements at oral argument, it appears that this is precisely what the Court has in mind, and it appears that the Court considers Mr. Snyder to be a private person and at least some of the Phelps’s speech to be private in nature. Therefore, the Supreme Court likely will find that the speech involved in *Snyder v. Phelps* is not absolutely protected by the First Amendment, reverse the Fourth Circuit’s opinion, and raise Mr. Snyder’s evidentiary burdens to reconcile his claims with the First Amendment.