Funeral Protests, Privacy, and the Constitution: What Is Next after Phelps?

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I. Introduction

In Snyder v. Phelps, the United States Supreme Court issued a much anticipated decision, striking down a damages award against Reverend Fred Phelps Sr. and the Westboro Baptist Church for picketing a funeral. In a relatively short opinion, the Court suggested that the legal issues were straightforward—the First Amendment precludes the imposition of tort damages when the comments at issue involve matters of public concern. Yet, the Court failed to explain whether those comments that were not of public concern were somehow immunized by those that were, and also failed to explain how the holding fits into the current defamation and privacy jurisprudence. The opinion raises more questions than it answers, and is sufficiently opaque that one cannot tell whether it marks a sea-change in the jurisprudence or, instead, is a straightforward application of it.

Part II of this article offers a brief discussion of the background behind Phelps and of the torts asserted by Albert Snyder against Phelps and the Westboro Baptist Church. Part III discusses the constitutional limitations imposed on torts involving defamation, invasion of privacy, and intentional infliction of emotional distress that had been recognized prior to Phelps, explaining why these limitations might have cast light upon but could not determine the correct resolution of a case involving the imposition of damages for funeral picketing. The article concludes by explaining both how little Phelps actually resolved and how the opinion nonetheless almost guarantees increased confusion in First Amendment jurisprudence.

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1 131 S. Ct. 1207 (U.S. 2011).
I. The Funeral and the Possible Torts Implicated

Matthew Snyder’s funeral was picketed by a group protesting among other things Catholicism and United States equality policies.\(^2\) That same group posted various hurtful comments about Snyder on their website, and the father of the deceased sued the group, asserting various theories in tort. While some of these claims were found to be without merit as a matter of law, others were left to the jury to decide, resulting in a substantial verdict.\(^3\) This section includes a brief discussion of the background of the case and the various tort theories asserted.

A. Background Information

Matthew Snyder died fighting for his country in Iraq on March 3, 2006.\(^4\) A notice regarding the time and place of the funeral was placed in local papers in Westminster, Maryland.\(^5\) Fred Phelps Sr., the pastor of the Westboro Baptist Church,\(^6\) became aware of the funeral and issued a news release on March 8, 2006, announcing that he and his family would picket the funeral.\(^7\)

Both the plaintiff and the defendants agreed about the purpose behind the picketing, although they characterized that purpose somewhat differently. The defendants admitted that they “traveled to Matthew Snyder’s funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality,”\(^8\) admitting that “their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years.”\(^9\) The

\(^2\) See id. at 1226 (Alito, J., dissenting) (noting that the Phelps had discussed among other issues, “homosexuality, the Catholic Church, and the United States military”).
\(^3\) Id. at 1214 (“A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages.”) The district court reduced the punitive damages award. See id. (“The District Court remitted the punitive damages award to $2.1 million, but left the jury verdict otherwise intact.”).
\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id. at 571-72.
\(^9\) Id. at 571.
plaintiff, Albert Snyder, father of Matthew Snyder, argued that the defendant had transformed the “funeral for his son into a ‘media circus for their benefit.’”\(^\text{10}\)

The defendants chose a location for picketing the funeral that was in accord with local law and the instructions given to them by the police.\(^\text{11}\) Phelps and his family held up several signs, some of which expressed general points of view, such as “‘God Hates the USA,’ ‘America is doomed,’ ‘Pope in hell,’ and ‘Fag troops.’”\(^\text{12}\) However, some of the other signs could have been construed as having been directed at Matthew Snyder and his parents,\(^\text{13}\) such as “‘You are going to hell’”\(^\text{14}\) and “‘God hates you.’”\(^\text{15}\) By the same token, while some of the comments on the Westboro Baptist Church website might have been characterized as more generalized opinions about the United States,\(^\text{16}\) others might have been thought to have been directed at the family in particular,\(^\text{17}\) e.g., that “Matthew Snyder was raised for the devil and was taught to defy God.”\(^\text{18}\)

Albert Snyder only became aware of the signs that had been near his son’s funeral after the funeral had taken place.\(^\text{19}\) Later still, Snyder became aware of the comments that the Westboro Church had published on their website in an “epic” about Matthew.\(^\text{20}\)

Snyder testified that he had suffered great harm as a result of the picketing and of reading the epic on the Church website. Snyder’s testimony about the long-lasting and detrimental effects

\(^{10}\) Id. at 572.

\(^{11}\) See id.

\(^ {12}\) See id.

\(^{13}\) Id. at 578.

\(^ {14}\) Id.

\(^ {15}\) Id.

\(^{16}\) For example, a later posting on their site makes the more general claim that God is killing our soldiers out of wrath. See http://godhatesfags.com/fliers/20110512_Dead-Soldiers-MI-Friese-OR-Lara.pdf (“GOD HATES AMERICA & IS KILLING OUR TROOPS IN HIS WRATH.”).

\(^ {17}\) Phelps, 533 F.Supp.2d at 578.

\(^ {18}\) Id.

\(^ {19}\) Id. at 572 (“Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son’s funeral.”).

\(^ {20}\) Id.
caused by the church members’ actions was corroborated by expert testimony. The issue at hand was whether the Phelpses could be held liable in tort for the injury that their speech had caused.

B. Tort Law

The comments on the signs and the website might be thought to implicate a number of issues, for example, whether Matthew Snyder and his parents had been defamed. Yet, there are a number of reasons that a defamation action under these circumstances was unlikely to be successful. First, in many states, a defamation action cannot be brought on behalf of an individual who is deceased, so such an action could not be maintained on behalf of Matthew Snyder, himself. If the claim was that Matthew’s parents had been defamed, it would then be necessary to determine the content of the allegedly defamatory statements. Suppose, for example, that the defendants’ comments were construed as merely suggesting in an admittedly offensive way that the Sneiders had raised their son as a Catholic. In that event, the comments would not be defamatory.

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21 Id.
22 See Johnson v. KTBS, Inc., 889 So.2d 329, 332 (La. App. 2004) (“Once a person is dead, there is no extant reputation to injure or for the law to protect.”); Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 940 n.1 (Tex. 1988) (“one cannot bring a cause of action for the defamation of a person already dead”). See also Gruschus v. Curtis Pub. Co., 342 F.2d 775, 776 (10th Cir. 1965) (“But the common law did not recognize a right to reflect in the reputation of another and the action did not survive the death of the defamed party.”); Fitch v. Voit, 1993 WL 141588, *5 (Ala. Cir. Ct. 1993) (“Alabama’s ‘survival statute’ makes no provision for a libel claim to be brought by the surviving relative of a defamation victim who is dead.”).
23 The signs included “Pope in Hell,” “You’re Going to Hell,” and “God Hates You.” See Phelps, 580 F.3d at 224. The epic included the comment, “They [the Sneiders] also, in supporting satanic Catholicism, taught Matthew to be an idolator.” See id. at 225. These all might be understood to be condemning the Sneiders for having raised Matthew as a Catholic.
24 Cf. Phelps, 533 F.Supp.2d at 572-73 (“This Court held that the first element, a defamatory communication, was not satisfied because the content of the ‘epic’ posted on the church's website was essentially Phelps-Roper's religious opinion.”).
Another tort claim was also asserted unsuccessfully, namely, that Phelps had wrongfully made private facts public. The district court rejected this claim, at least in part, because the information revealed was already a matter of public record.

While the trial court granted defendants’ motions for summary judgment with respect to the defamation and publication of private facts claims, the court permitted the jury to decide the intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy claims. The jury found for the plaintiff on all three, although it was not at all clear that Albert Snyder had met his burden of proof on any of those claims under existing state law.

Consider the damages for intentional infliction of emotional distress. In order to successfully bring an intentional infliction of emotional distress claim, “a plaintiff must demonstrate that the defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.”

Extreme and outrageous conduct involves a standard that is by no means easy to meet. There are numerous cases in which individuals have engaged in objectionable conduct that nonetheless did not meet the relevant standard. That said, however, there are a number of cases

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25 See id. at 573 (“to prove that Defendants gave publicity to a matter concerning his private life and that the matter publicized was of a kind which (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public”).
26 Id. (“any publication of this information would not be highly offensive to a reasonable person as it was already a matter of public record”).
27 See id.
28 Phelps, 580 F.3d at 227 (Shedd, J., concurring in the judgment) (“I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims.”).
31 See Stahl v. Health Alliance Plan, 1996 WL 33323984, *2 (Mich. App. 1996) (“We agree with the trial court that the conduct alleged by plaintiff, while, in general, crass and insensitive, does not rise to the level of extreme and outrageous. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities.”) (citing Tope v. Howe, 445 N.W.2d 452 (Mich. App. 1989); Crockett v. Essex, 19 S.W.3d 585, 590 (Ark. 2000) (“While the conduct of the funeral home and Essex as its director may have been rude and
recognizing that individuals are particularly vulnerable when there has been a death in the family, and may be even more vulnerable when attending a funeral, so behavior that might normally not be thought extreme and outrageous might be so found in the special circumstances surrounding the death of a loved one.

Even in instances in which the behavior at issue is beyond all possible bounds of decency, a separate question is whether the injury itself is sufficiently severe to meet the requirements of the tort. Further, even if the degree of severity can be established, the plaintiff must show that it was defendant’s action, rather than something else, that caused the harm. For example, it might be argued that Albert Snyder’s harm was more aptly attributed to the loss of his son than to the

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illustrative of a lack of professionalism, we cannot say that the conduct was so extreme and outrageous as to be beyond all possible bounds of decency, and to be utterly intolerable in a civilized society.”. See also Phelps, 580 F.3d at 232 (Shedd, J., concurring in the judgment) (“Although reasonable people may disagree about the appropriateness of the Phelps’ protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law.”).

32 See, for example, Thomas v. Hospital Bd. of Directors of Lee County, 41 So.3d 246, 256 (Fla. App. 2010) (“We believe that in a situation where a person's loved one has died, it would be apparent to anyone that the person would be susceptible to emotional distress and, therefore, that the action of providing false information concerning the loved one's cause of death meets the standard for a claim of outrage (intentional infliction of emotional distress).”)

33 Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008) (discussing “[whose] purpose is not simply to protect funeral attendees from physical acts, but from the harmful psychological effects of unwanted communication when they are most captive and vulnerable.”); Thomas, 41 So.3d at 256 (“the appellees' conduct in making false statements—which led to the interruption of Mildred Thomas's funeral and the return of her body for a second, more thorough autopsy—rises to the level of atrocious and utterly intolerable behavior which cannot be condoned in a civilized community”). See also 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, 370 (2010) (discussing “the unique vulnerability of funeral attendees in special locations and times such as funerals, and the uniquely demeaning way in which these funeral hecklers were trying to use the mourners as stage props rather than an audience”).

34 Cf. Brownstein & Amar, supra note 33, at 377-78 (“To many courts, the emotional toll of the death of a family member is commonly understood and imposes a duty of common decency on the living. The vulnerability of mourners is as acute as the deliberate interference with funerals is despicable. There are few lines of authority where the tort of intentional infliction of emotional distress is so frequently recognized and upheld.”).

35 See, for example, Dale v. Thomas Funeral Home, Inc., 466 N.W.2d 805, 808 (Neb. 1991) Although Dale was understandably and unquestionably perturbed, worried, and upset, the only reasonable conclusion deductible from the evidence is that Dale failed to establish that her emotional distress was so severe that no reasonable person could be expected to endure that severe emotional distress. Hence, Dale failed to prove a prima facie case based on intentional infliction of emotional distress
Phelps' actions, although there had been testimony to establish that the defendants’ actions had “had a significant impact,” causing the plaintiff to suffer “severe and specific injuries.”

The 4th Circuit did not address whether the plaintiff had carried his burden under state law, because the defendants had not addressed that issue on appeal, and were held to have waived that basis for challenging the award. The appellate court instead examined whether the First Amendment precluded the imposition of liability under any of the tort theories asserted, ultimately concluding that the imposition of tort damages in this case was precluded by constitutional guarantees. That holding was appealed, and the United States Supreme Court addressed whether the “First Amendment shields the church members from tort liability for their speech in this case.”

III. Tort Damages and the First Amendment

One issue involves whether a particular plaintiff has carried his burden with respect to establishing all of the elements of the various tort claims asserted. A different issue is whether the United States Constitution permits a particular plaintiff to recover, even if the requirements of state law have been met. The constitutional jurisprudence in this area is far from clear, which was one of the reasons that the Phelps decision was greatly anticipated.

36 See Volokh, supra note 30, at 309 (“It seems unlikely that it [the speech at issue] would much exacerbate the father's grief—a grief that stems from his son's death, not from the speech of a small minority of hateful, anti-American kooks and publicity hounds.”).
37 Phelps, 533 F.Supp.2d. at 580.
38 Id. at 581.
39 Phelps, 580 F.3d at 216 (“the Defendants do not challenge the sufficiency of the evidence”).
40 Id. (“the evidentiary issue has plainly been waived by the only party entitled to pursue it”).
41 Id. at 218 (“regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech”).
42 Id. at 226 (“Because the judgment attaches tort liability to constitutionally protected speech, the district court erred in declining to award judgment as a matter of law.”).
43 Phelps, 131 S. Ct. at 1212.
A. The Developing Defamation Jurisprudence

When attempting to determine whether the speech at issue in Phelps is constitutionally protected, it is helpful to review the jurisprudence in the area. That jurisprudence is best understood by first examining defamation jurisprudence, both because that area is more developed, and because it has been used to inform the constitutional limitations that have been imposed on other related areas in tort.

The Court established in New York Times v. Sullivan that a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." An important purpose of the opinion was to preclude "the possibility that a good-faith critic of government will be penalized for his criticism." In Garrison v. Louisiana, the Court explained why the actual malice standard should be employed in cases involving an alleged defamation of a public official. Where the "criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." Even where false claims had indeed been made, the Constitution prohibits "attaching adverse consequences to any except the knowing or reckless falsehood." Were a different standard used, e.g., common law actual malice, then a speaker who honestly believed that a

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44 Howard C. Nielson, Jr., Comment, Recklessly False Statements in the Public-Employment Context, 63 U. Chi. L. Rev. 1277, 1297 (1996) (discussing "the Supreme Court's well developed body of defamation jurisprudence").
46 Id. at 279-80.
47 Id. at 292.
49 Id. at 72-73.
50 Id. at 73.
public official had engaged in wrongdoing might be deterred from speaking out, because she might be afraid that her dislike of the official might be established in court and somehow used to make her liable for expressing her sincerely held (but possibly mistaken) beliefs. Use of the common law malice standard might thus undermine the free exchange of ideas and the discovery of truth.\(^{51}\)

An individual who asserts her sincerely held but mistaken belief about a public official might spur an investigation, which might lead to the discovery of the truth about the official or, perhaps, about the wrongdoing incorrectly attributed to the official. Yet, the same point might be made about an individual who makes statements that she knows to be false—they, too, might spur an investigation and discovery of the truth. Nonetheless, the Court rejected that the free exchange of ideas and the discovery of truth rationales should also justify immunizing assertions of known falsehoods. “Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.”\(^{52}\) Instead, the Court believed that the knowing falsehood was of such little value that it did not enjoy constitutional protection.\(^{53}\)

The Court later expanded \textit{New York Times} protections beyond public officials to include public figures, explaining that public figures command “sufficient continuing public interest and

\(^{51}\) See id. (“Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”).

\(^{52}\) Id. at 75.

\(^{53}\) Id. ("Calculated falsehood falls into that class of utterances which ‘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.’") (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
ha[ve] sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.” Thus, public figures, like public officials, have access to the media and will be afforded the opportunity to rebut false statements made about them. Because public figures will themselves be afforded a forum where they can deny false accusations and attempt to undo the damage resulting from false assertions, there is less need to afford them the opportunity to receive tort damages to compensate them for the wrong associated with false accusations that damage reputation. Because that is so, tort damages can be reserved for the most egregious kinds of defamatory statements, e.g., those that are asserted notwithstanding the speaker’s knowledge or strong suspicion that the statements are false.

The actual malice standard is a daunting one. To show that the defendant published false statements with actual malice, there “must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” The Court offered some examples in which a jury might reasonably conclude that the defendant had not believed the truth of her allegation. “Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [and] is the product of his imagination.” Of course, matters may not be so clear-cut even in an extreme case in which a story is fabricated. For example, her inability to uncover the relevant evidence notwithstanding, an individual might be certain that a public official has committed wrongdoing. That individual might express her sincerely held suspicions, both because she believes them and because she hopes that others will step forward to help substantiate the accusations.

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56 Id. at 732.
Suppose that an individual publicly expresses her suspicions about an official’s wrongdoing, lack of hard evidence to substantiate those allegations notwithstanding. Suppose further that the official has in fact been falsely accused and has thereby suffered harm. One might say that anyone who publishes an accusation without substantiation should be potentially liable for any harm that might thereby be caused. While that would be a possible position, it does not reflect the current system in place in the United States, at least in part, because such a system would likely have the undesirable effect of greatly chilling speech.\(^{57}\) The Court has cautioned that a rule that “compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”\(^{58}\)

Use of the actual malice standard is intended to limit the degree to which publishers or broadcasters engage in voluntary self-censorship. As long as the publisher neither knows that the statement at issue is false nor has a reckless disregard for its truth, the publisher will not be held liable for false and possibly defamatory statements about a public figure.

The recklessness prong requires further explication. The St. Amant Court explained that “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”\(^{59}\) Yet, the Court was not thereby suggesting that recklessness will be established whenever there is good reason to believe that the official has been wrongly accused. To the contrary, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained


\(^{58}\) Id.

\(^{59}\) St. Amant, 390 U.S. at 732.
serious doubts as to the truth of his publication.”

Thus, the recklessness prong of the actual malice standard will not be met merely by showing that a reasonable person would not have been confident that the claims at issue were accurate. Even the recklessness prong of the actual malice standard is quite difficult to meet.

In both New York Times Company v. Sullivan\textsuperscript{61} and Curtis Publishing Company v. Butts,\textsuperscript{62} the Court emphasized that the actual malice standard should be used when allegedly defamatory comments have been made about a public figure. However, the actual malice standard was also used in a case in which a private figure was allegedly defamed while matters of public concern were being addressed. In Rosenbloom v. Metromedia, Incorporated,\textsuperscript{63} the Court considered “whether the New York Times' knowing-or-reckless-falsity standard applies in a state civil libel action brought not by a ‘public official’ or a ‘public figure’ but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest.”\textsuperscript{64} George Rosenbloom argued that a broadcast in which it was claimed that he had been arrested for selling obscene materials was false and defamatory, as was established by his subsequently having been acquitted of selling such materials.\textsuperscript{65}

While “the police campaign to enforce the obscenity laws was an issue of public interest,” an important issue was whether Rosenbloom’s status as a private citizen would lower the threshold that would have to be met before damages could be imposed for the broadcast of libelous comments. The Rosenbloom plurality reasoned that if a “matter is a subject of public or

\textsuperscript{60} Id. at 731.
\textsuperscript{61} 376 U.S. 254 (1964).
\textsuperscript{62} 388 U.S. 130 (1967).
\textsuperscript{63} 403 U.S. 29 (1971).
\textsuperscript{64} Id. at 31-32.
\textsuperscript{65} Id. at 36.
\textsuperscript{66} Id. at 40.
general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.” 67 Because that is so, the plaintiff’s “prior anonymity or notoriety” 68 is of secondary importance.

Yet, the justifications for applying the actual malice standard in cases involving public figures do not seem as applicable in cases involving private figures. A private figure might not have the same kind of access to the media as would a public figure, which would mean both that it might be harder for the plaintiff to counter the allegedly false and defamatory claims 69 and that it would be less accurate to say that the individual had assumed the risk that others might publish negative and possibly defamatory things about him. 70

The Rosenbloom plurality offered a somewhat surprising response to the claim that public and private figures were distinguishable—basically, the plurality pointed out that some public figures also do not have access to the media, because such access might depend upon the “media’s continuing interest in the story.” 71 Further, even in those instances in which access to the media were accorded, the public figure still might not be able to undo the damage. “Denials, retractions, and corrections are not ‘hot’ news, and rarely receive the prominence of the original story.” 72 Rather than permit tort damages to be awarded when defamatory statements had negligently been made about a private figure, the plurality suggested that states instead should simply assure that such individuals would have access to the media to correct the inaccurate

67 Id. at 43.
68 Id.
69 Id. at 45.
70 Id.
71 Id. at 46.
72 Id.
assertions, its own point that such access might well prove unavailing in any event notwithstanding.

The suggestion that access to the media should be afforded to private figures as well does not address one of the other rationales for making it more difficult for public figures to receive tort damages for defamatory statements made about them, namely, that the public figures voluntarily stepped into the limelight. The plurality offered two observations with respect to such a claim. First, it characterized as a legal fiction the “idea that certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view.” Further, the plurality feared that emphasizing the distinction between public and private figures might have the “paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of ‘public figures’ that are not in the area of public or general concern.”

At least one difficulty with the Rosenbloom rationale was that the plurality seemed to be undercutting the justification for using the actual malice standard even in cases involving public figures. Suppose that the Rosenbloom plurality is correct that public figures are not accurately thought to have assumed the risk that they would be publicly subjected to possibly false and unfair criticism. Suppose further that the plurality is correct to doubt both that public figures have enhanced access to the media and that they will be able to repair reputational damage even when they are accorded that access. In that event, it would seem inaccurate to claim that public

73 Id. at 47 (“If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.”).
74 Id. at 48.
75 Id.
figures as a general matter can adequately defend themselves and thus do not need the tort system for compensation for injury to their reputations.

In any event, as the Court subsequently made clear, the Rosenbloom plurality position was rejected in Gertz v. Robert Welch, Incorporated. At issue in Gertz was an article published in American Opinion that contained serious and defamatory inaccuracies about plaintiff, Elmer Gertz. However, the magazine editor had denied any knowledge that the allegations in the article were false and, further, claimed to have relied on the author’s reputation and on the author’s having submitted accurate articles in the past. Reliance on reputation had been part of the justification for refusing to hold the New York Times liable in New York Times, and one of the issues at hand was whether the New York Times standard was applicable in a defamation suit brought by a plaintiff who was a private figure. While a libel award to a private figure had been struck down in Rosenbloom, there had been no controlling rationale in that opinion.

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76 Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (“Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that ‘extension of the New York Times test proposed by the Rosenbloom plurality would abridge (a) legitimate state interest to a degree that we find unacceptable.’”) (citing Gertz, 418 U.S. at 346). See also W. Wat Hopkins, Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right, 9 First Amend. L. Rev. 149, 162 (2010) (“The proposition that the First Amendment requires a heightened burden of proof in tort actions related to matters of public concern despite the public or private status of a plaintiff is contrary to the holdings of the Supreme Court.”).


78 Id. at 326 (“These statements contained serious inaccuracies.”).

79 Id. at 328 (“The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to American Opinion.”).

80 Id. at 332 (“The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”).

81 Id. at 333 (“This Court affirmed the decision below, but no majority could agree on a controlling rationale.”) See also Leslie C. Griffin, Snyder v. Phelps: Searching for a Legal Standard, 2010 Cardozo L. Rev. de novo 353, 357 (2010) (“The full Court, however, never adopted the Rosenbloom plurality's standard. Instead, defamation law became linked to some mixture of public and private figures with public and private concerns.”).
The Gertz Court explained that under the First Amendment “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”82 While opinion is protected, “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”83 Not only are such statements viewed as lacking in value themselves, but they are not even viewed as instrumentally likely to lead to the discovery or reinforcement of truth. Such statements “belong to that category of utterances which ‘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.’”84

Rejecting the Rosenbloom emphasis on whether the issue at hand was a matter of public concern, the Gertz Court instead reaffirmed the importance of considering the type of figure who had allegedly been defamed. “Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”85 The Court believed that such a “standard administers an extremely powerful antidote to the inducement to media self-censorship.”86 However, affording robust protections of free expression concerning public figures has a downside,

82 Gertz, 418 U.S. at 339-40.
83 Id. at 340 (citing New York Times, 376 U.S. at 270).
84 Id. at 339-40 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
85 Id. at 342.
86 Id.
namely, “it exacts a correspondingly high price from the victims of defamatory falsehood,” 87 because “many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test.” 88 The Court viewed the constitutional guarantees of free expression as involving a balancing on the one hand of the “interest of the press and broadcast media in immunity from liability” 89 and on the other of the “limited state interest present in the context of libel actions brought by public persons.” 90 The Court then suggested that “the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.” 91

It might seem surprising that the state’s interests would differ, depending upon whether the figure was public or private. 92 However, the Court reaffirmed the pre-Rosenbloom rationale that “public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” 93 Precisely because public and private figures are dissimilar with respect to their ability to engage in self-help, private figures are “more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” 94

The Court reasoned that there were additional reasons to distinguish between these two types of classes in addition to their differing abilities to have access to the media to counter defamatory claims. “An individual who decides to seek governmental office must accept certain necessary

87 Id.
88 Id.
89 Id. at 343.
90 Id. (emphasis added)
91 Id.
92 Cf. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”); id. at 92 (Stewart, J., concurring) (“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”).
93 Gertz, 418 U.S. at 344.
94 Id.
consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.”95 In contrast, the private figure “has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”96 The Court concluded its discussion by noting that “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.” 97

Because the Court concluded that public and private figures occupied different legal positions, the Court rejected the Rosenbloom analysis, concluding that “the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”98 If the Court were instead to have held that any defamatory assertions involving a matter of public interest had to be subject to the actual malice standard, then “a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times.”99 But this would not permit the state to offer adequate protection for the reputations of private figures. The Gertz Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”100

At least with respect to defamation, the current jurisprudence does not solely focus on whether the matter at issue is of public or merely private concern. Instead, other factors are also

95 Id.
96 Id. at 345.
97 Id.
98 Id. at 345-46.
99 Id. at 346.
100 Id. at 347.
taken into account including the type of figure who was allegedly victimized. It was thus surprising that the Phelps Court concluded that whether the “First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern,” and that liability could not be imposed because we as a Nation have chosen to “protect even hurtful speech on public issues to ensure that we do not stifle public debate.” Such an oversimplified view neither reflects the defamation jurisprudence nor First Amendment jurisprudence more generally.

B. Constitutional Limitations on Other Torts

One of the reasons that Phelps is somewhat difficult to analyze is that there is no case on point. While there is a developing defamation jurisprudence, the damages award in Phelps was not based on an injury to reputation. There have been a number of other cases in which the Court has attempted to establish the constitutional limits imposed on recovery for related kinds of torts, although the issues in each of these sets of cases are distinguishable in some important way from what was at issue in Phelps.

Consider one of the Court’s classic cases involving intentional infliction of emotional distress, Hustler Magazine v. Falwell, which involved a suit by Jerry Falwell against Hustler Magazine. At issue was a parody of a Campari ad in which Falwell was depicted as describing his “first time” with his mother in an outhouse. The ad was labeled in the magazine as a

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101 Phelps, 131 S. Ct. at 1215.
102 Id. at 1220.
103 See note 27 and accompanying text supra (noting that the trial court had held that there was no defamation as a matter of law).
104 485 U.S. 46 (1988)
105 Id. at 48.
parody, and was not thought to be making any factual claims. Nonetheless, the parody was offensive to Falwell, and was “doubtless gross and repugnant in the eyes of most.”

The Falwell Court noted that “the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently ‘outrageous.’” However, the Court noted that “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.” Some commentators suggest that Falwell should be understood to immunize discussions about public affairs from tort immunity even if about a private figure, as long as actual malice cannot be established. However, when the Court’s comments are considered in context, a less robust interpretation seems more plausible.

One of the worries militating in favor of striking down the intentional infliction of emotional distress award against Hustler Magazine was the malleability of the outrageousness standard. “‘Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.” The Falwell Court concluded that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in

106 Id.
107 Id. at 50 (noting that the “speech could not reasonably have been interpreted as stating actual facts about the public figure involved”).
108 Id.
109 Id. at 53.
110 Id.
111 See Volokh, supra note 30, at 304-05.
112 See Benjamin Z. Zipursky, Snyder v. Phelps, Outrageousness and the Open Texture of Tort Law, 60 DePaul L. Rev. 483, 491 (2011) (“there is a serious problem with this Falwell-based defense of the Phelps’ position: it is not a tenable reading of what Chief Justice Rehnquist said in Falwell”).
113 Falwell, 485 U.S. at 55.
addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.”

It is simply unclear whether as a constitutional matter the Court’s refusal to permit an award on the basis of outrageous political or social discourse should be understood to be limited to contexts involving public figures or whether, instead, that concern has a much broader reach.

Like Phelps, Falwell was argued in the 4th Circuit. When the 4th Circuit analyzed whether the intentional infliction award against Hustler Magazine should be upheld, the court recognized that Falwell was a public figure and that the New York Times standard would have to play some role. Indeed, the 4th Circuit attempted to apply the actual malice standard in the intentional infliction of emotional distress context. However, the court rejected that “the literal application of the actual malice standard” was appropriate, i.e., that for liability to attach, the parody had to have been published notwithstanding the publisher’s knowledge that the parody was false or reckless disregard for its truth. Were that the standard, Hustler Magazine would of course not have been liable, because there had been no assertions of fact, much less assertions of fact that were tortious in light of the actual malice standard.

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114 Id. at 56.
115 See Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009).
117 See id. at 1274 (“Falwell is a public figure.”).
118 Id. (“The defendants are, therefore, entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell’s claim for libel.”).
119 Id.
120 Id. (“The defendants argue that Falwell must prove that the parody was published with knowing falsity or reckless disregard for the truth.”).
121 See id. at 1273-74 (“the defendants contend that since the jury found that the parody was not reasonably believable, the statements contained therein cannot be statements of fact but must be opinion and are, therefore, completely shielded by the first amendment”).
The 4th Circuit reasoned that to require a plaintiff to “prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature.”\(^{122}\) The court instead took account of actual malice in the intentional infliction context by requiring that the defendant’s misconduct be intentional or reckless,\(^{123}\) reasoning that the “first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress.”\(^{124}\) Because Larry Flynt had intentionally published the parody and had testified that he had intended to cause Falwell emotional distress,\(^{125}\) the 4th Circuit suggested that the jury might have found that the first element of the tort had been satisfied.\(^{126}\)

The Falwell Court rejected that “a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved.”\(^{127}\) In effect, the Court was preventing public figures from doing an end run around First Amendment protections.\(^{128}\)

There are several ways to read Falwell. Insofar as one emphasizes the limitations on when public figures can recover damages for intentional infliction of emotional distress, the case

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\(^{122}\) Id. at 1275.

\(^{123}\) Id. (“The first of the four elements of intentional infliction of emotional distress under Virginia law requires that the defendant's misconduct be intentional or reckless.”).

\(^{124}\) Id.

\(^{125}\) See id. at 1276 (“In his deposition, Flynt testified that he intended to cause Falwell emotional distress.”).

\(^{126}\) Id. (“If the jury found his testimony on this point to be credible, then it could have found that Falwell satisfied the first element.”).

\(^{127}\) Falwell, 485 U.S. at 50.


[The Court drastically limited, if not eliminated, public officials' and public figures' ability to employ the emotional distress option to evade the obstacles imposed by defamation law. After Falwell, the intentional infliction of emotional distress theory is not a viable back-door means through which public plaintiffs may acquire defamation-like relief for statements that would not give rise to a valid defamation claim.]
would seem to have little import for whether Albert Snyder could collect such damages, since he did not qualify as a public figure. Insofar as one instead focuses on the Court’s distrust of the outrageousness standard and in addition on its suggestion that the First Amendment provides robust protection for discussions of public affairs, then Falwell might be thought to support protection of at least some of the Phelpses’ statements.

While Falwell can be distinguished from Phelps in that the former but not the latter involved a public figure, there are a series of other cases that may have bearing on how Phelps should have been decided. Several cases involved the publication of private information. Consider Cox Broadcasting Corporation v. Cohn, which involved the publication of the name of a seventeen-year-old victim who had been raped and murdered. Georgia law made it a misdemeanor to publish the name or identity of a rape victim. A reporter, Thomas Wassell, learned the name of the victim from an indictment that had been made available for his inspection. That night, he included the victim’s name in a television news report about the proceedings, which was aired again the following day. The victim’s father sued the station for invasion of privacy—the tort of public disclosure, recognized in Georgia, protects the plaintiff’s “right to be free from

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129 But see Volokh, supra note 30, at 304-05 (“the underlying rationale of Hustler … applies to all speech on matters of public concern--whether the plaintiff is a public figure or a private figure, and whether the speech is about a public figure, a private figure, or no particular person at all”).
130 Phelps, 131 S. Ct. at 1222 (Alito, J., dissenting) (“Petitioner Albert Snyder is not a public figure.”). See also Richard Weisberg, Two Wrongs Almost Make a “Right”: The 4th Circuit’s Bizarre Use of the Already Bizarre “Milkovich” Case in Snyder v. Phelps, 2010 Cardozo L. Rev. de novo 345, 347 (2010) (suggesting that the Snyders were private figures).
131 But see notes 182-85 and accompanying text infra (suggesting that the Court’s comment about public affairs was intended to refer to contexts involving public figures).
132 Compare Falwell, 485 U.S. at 57 (“Here it is clear that respondent Falwell is a ‘public figure’ for purposes of First Amendment law”) with Phelps, 131 S. Ct. at 1222 (Alito, J., dissenting) (“Petitioner Albert Snyder is not a public figure.”).
133 420 U.S. 469 (1975).
134 Id. at 471.
135 Id. at 471-72.
136 Id. at 472.
137 Id. at 473-74.
138 Id. at 474-75.
unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities.\textsuperscript{139}

The Cohn Court recognized that powerful arguments can be and have been made that “there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.”\textsuperscript{140} However, the Court also recognized that important interests were served by protecting the press when accurately reporting about matters of public concern. Because there were important and competing interests at stake,\textsuperscript{141} the Court framed the issue before it somewhat narrowly—“whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.”\textsuperscript{142} The Court answered that question in the negative.\textsuperscript{143} Several other cases established that the state must bear a very high burden before it can prevent publication of truthful information,\textsuperscript{144} and an additional case bears examination here if only because the publication of the information at issue both foreseeably and actually caused great harm.

At issue in The Florida Star v. B.J.F.\textsuperscript{145} was a Florida statute prohibiting the publication of the name of a victim of a sexual offense.\textsuperscript{146} The Florida Star published a rape victim’s name

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\item[139] Id. at 489.
\item[140] Id. at 487.
\item[141] See id. at 491 (“In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.”).
\item[142] Id.
\item[143] Id. (“We are convinced that the State may not do so.”).
\item[144] See also Oklahoma Pub. Co. v. District Court, 430 U.S. 308, 310 (1977) (holding that “the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information [the name and photo of a minor charged in a shooting] obtained at court proceedings which were in fact open to the public.”); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 105-06 (1979) (“At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.”).
\item[145] 491 U.S. 524 (1989).
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obtained from a police report.\textsuperscript{147} The victim testified that she had suffered greatly from the publication of her name—she had been forced to “change her phone number and residence, to seek police protection, and to obtain mental health counseling.”\textsuperscript{148} Presumably, one of the reasons that Florida had statutorily precluded divulging the name of the victim of a sexual assault was that it was foreseeable that the individual who committed the assault might threaten the victim further or, perhaps, that others reading about the assault would make such threats, either as a prank or with the intent of perpetrating additional harm.\textsuperscript{149}

The B.J.F. Court explained that “the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”\textsuperscript{150} Nonetheless, the First Amendment precluded the imposition of liability in this case—“where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability … to appellant under the facts of this case.”\textsuperscript{151}

There are numerous ways to read the cases mentioned above. For example, it might be thought that the First Amendment offers special protection to the publishing and broadcast media.\textsuperscript{152} The Court has often discussed the importance of preventing voluntary self-censorship

\textsuperscript{146} See id. at 526.
\textsuperscript{147} See id.
\textsuperscript{148} Id. at 528.
\textsuperscript{149} Id. at 542-43 (White, J., dissenting) (“As a result, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again.”).
\textsuperscript{150} Id. at 533.
\textsuperscript{151} Id. at 541. See also Bartnicki v. Vopper 532 U.S. 514, 517-18 (2001) (holding that the First Amendment protected the disclosure of an illegally intercepted cellphone conversation where those disclosing the information played no role in illegally intercepting it).
\textsuperscript{152} But cf. Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.”)
by the press and, further, has suggested that the press sometimes functions as the public’s eyes and ears. Were this the correct reading of the cases protecting the right to publish accurate information, it would not seem to help the Phelpses very much, both because they were not acting as the press reporting on events and because what they said, while perhaps not false, would be more likely construed as not asserting facts about the Snyders at all rather than as making accurate assertions about them.

Even if the First Amendment were thought to give the press and media special protection, it would be inaccurate to believe that the First Amendment gives the news media carte blanche. A few important cases involving protection of the media are relevant for purposes of the discussion here.

a. Zacchini

At first blush, Zacchini v. Scripps-Howard Broadcasting Company would seem unlikely to be of much help in determining the constitutional limitations on tort liability for funeral protests, since Zacchini involved a broadcast of an individual’s entire circus act during a news program. The accompanying commentary was favorable, so it was not as if the individual or his act had been unfairly maligned. The Zacchini Court discussed the applicable Ohio law specifying that “one may not use for his own benefit the name or likeness of another, whether or not the use or

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153 Gertz, 418 U.S. at 340.
154 See, for example, Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (“the role of the media is important; acting as the ‘eyes and ears’ of the public”).
155 The 4th Circuit, for example, construed the statements as simply not making factual assertions about the Snyders at all. See Phelps, 580 F.3d at 223 (“no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son”).
158 See id. at 564.
159 Id.
benefit is a commercial one," 160 and that “respondent would be liable for the appropriation over petitioner’s objection and in the absence of license or privilege, of petitioner's right to the publicity value of his performance.” 161 The issue before the United States Supreme Court was whether “the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state law ‘right of publicity.’” 162

The case would have been very different if the television station “had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television.” 163 But the station had done more than that, because it had televised the entire act.

The Ohio Supreme Court had held that the station was “constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose.” 164 The Ohio court had wrongly assumed that the Constitution required use of the actual malice standard in a case involving publication on a matter of public interest. 165 But the United States Supreme Court had never envisioned that the actual malice standard would have to be used in all tort action in which compensation was sought for harms allegedly resulting from a wrongful publication concerning the plaintiff, as Gertz makes clear. 166

The Ohio Supreme Court had been misled by Time Incorporated v. Hill, 167 which had established that in false light cases, the actual malice standard should be employed on matters of

160 Id., at 565.
161 Id., at 565.
162 Id.
163 Id., at 569.
164 Id.
165 See id., at 571-72.
166 For a discussion of Gertz, see notes 76-100 and accompanying text supra.
public interest even if the plaintiff is a private figure. But false light cases implicate a reputational interest, whereas the interest at issue in a right of publicity case involves “the right of the individual to reap the reward of his endeavors.” Because the interests implicated are different in these distinct kinds of torts, there is no constitutional requirement that the actual malice standard be used in both kinds of cases.

The Zacchini Court noted that in “false light’ cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in ‘right of publicity’ cases the only question is who gets to do the publishing.” Basically, the Court implied that the damages in false light cases serve the function of chilling reputation-harming speech, whereas the damages in right of publicity cases serve the function of redistributing monies from the undeserving defendant to the deserving plaintiff. In the right of publicity cases, communication of ideas is not chilled, although misappropriation of others’ work is disincentivized.

Neither the false light nor the right of publicity case is directly on point in a funeral-picketing case. Reputational interests were not at issue in Phelps, and the whole point in the funeral protest case is not to minimize publication per se but, instead, to limit where the protest occurs, so that

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168 See Zacchini, 433 U.S. at 571 (noting that the Hill Court had held that “the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth.”). See also Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (“the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”).

169 See Zacchini, 433 U.S. at 573 (“The interest protected’ in permitting recovery for placing the plaintiff in a false light ‘is clearly that of reputation, with the same overtones of mental distress as in defamation.’”) (citing William L. Prosser, Privacy, 48 Cal. L. Rev., 383, 400 (1960)). Even if one limits one’s focus to cases involving a reputational interest, Gertz makes clear that it is inaccurate to believe that the actual malice standard must be met whenever matters of public concern are at issue.

170 Zacchini, 433 U.S. at 573.

171 Id.
the funeral is not disrupted and so that participants in the funeral are not subjected to an attack at a time and in a place where the individuals are most vulnerable.

Arguably, Zacchini and funeral protest cases are both about control of the conditions under which certain contents are communicated, although there are important respects in which the analogy between the two cases breaks down. For example, the Zacchini Court suggested that an “entertainer such as petitioner usually has no objection to the widespread publication of his act as long as the gets the commercial benefit of such publication.”\textsuperscript{172} However, Snyder was not merely seeking the commercial rewards of the funeral protest and would have preferred, instead, that the funeral protest had never taken place.

The Zacchini Court’s analysis of the harm done to the plaintiff is interesting to note. The Court reasoned that the “effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee,”\textsuperscript{173} believing that “if the public can see the act free on television, it will be less willing to pay to see it at the fair.”\textsuperscript{174} Of course, seeing such an act on television might not be as enjoyable as seeing it in person, and the favorable publicity from the news broadcast might have increased circus attendance. Be that as it may, the Zacchini Court accepted the legitimacy of the goal of “preventing unjust enrichment,”\textsuperscript{175} and the Court implied that the television station had been unjustly enriched by broadcasting the entire act.\textsuperscript{176} Arguably, individuals who protest at funerals to get free publicity might be viewed as being unjustly enriched, and Zacchini provides not only a rationale for imposing liability under such circumstances but also a method of computing damages—one might have experts testify in light

\textsuperscript{172} Id.
\textsuperscript{173} Id. at 576.
\textsuperscript{174} Id. at 575.
\textsuperscript{175} See id. at 576 (quoting Harry Kalven, Jr., \textit{Privacy in Tort Law: Were Warren and Brandeis Wrong?} 31 L. & Contemp. Prob. 326, 331 (1966)).
\textsuperscript{176} See id. at 575-76.
of industry standards about how much the free publicity would have cost had it been purchased. Indeed, Justice Alito noted that on other occasions the Phelpses had agreed not to protest in exchange for free air time, which suggests that the Church is gaining a benefit (exposure that would presumably be very costly to purchase) at the expense of others when they are most vulnerable.

States differ about what must be shown in order for an unjust enrichment claim to be brought successfully. For example, suppose that under state law a plaintiff cannot prevail on an unjust enrichment claim unless she can show that the defendant received a benefit for which the plaintiff expected to receive compensation or would have expected to receive compensation had plaintiff known the facts. In such a state, an unjust enrichment action brought by a funeral protest victim would likely be unsuccessful, because the plaintiff would not have expected to be paid for the free publicity accorded to the funeral protesters.

Yet, some state courts have described the elements of unjust enrichment rather broadly. The Iowa Supreme Court offered the basic elements of an unjust enrichment case: “defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances.” So, too, the Colorado Supreme Court described unjust enrichment as involving the following three elements: “(1) at plaintiff’s expense (2) defendant received a benefit (3) under circumstances that would

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177 Cf Lisa Greene, Sand sculpture cost still grinds on some, St. Petersburg Times 1, 3/27/01, 2001 WLNR 11028810 (discussing how much certain free publicity would have cost if purchased).
178 See Phelps, 131 S. Ct. at 1224 -25 (Alito, J., dissenting) (“Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson-proclaiming that she was ‘better off dead’ -their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.”).
make it unjust for defendant to retain the benefit without paying.” ¹⁸¹ Perhaps a family victimized by a funeral protest could successfully bring an unjust enrichment claim in light of these elements if the enrichment enjoyed by the defendant (free publicity) was understood to be at the family’s “expense” in the relevant legal sense.

Jerry Falwell had argued that Zacchini supported his intentional infliction of emotional distress claim, because “the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication.” ¹⁸² Falwell’s argument was rejected, because “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.” ¹⁸³ There, however, when discussing debates about public affairs, the Court made clear that it had discussions about public officials in mind, citing Garrison in support. ¹⁸⁴ This is why the Falwell Court concluded that “while such 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.” ¹⁸⁵

Basically, Falwell was not helped by the Zacchini rejection of the actual malice standard in a non-defamation tort context, because Falwell was a public figure. But Zacchini distinguishing among torts might be very important in an intentional infliction of emotional distress action involving a private figure, especially given Gertz’s recognition that the state has different interests implicated when protected private rather than public figures. ¹⁸⁶

b. Pacifica Foundation

¹⁸² Falwell, 485 U.S. at 52 (citing Zacchini).
¹⁸³ Id. at 53.
¹⁸⁵ Falwell, 485 U.S at 53 (emphasis added).
¹⁸⁶ See Gertz, 418 U.S. at 347.
A much different case involving the media that would seem to have relevance here is F.C.C. v. Pacifica Foundation.\textsuperscript{187} That case involved a complaint about the broadcast of a George Carlin “Filthy Words” monologue on the radio during the middle of the afternoon.\textsuperscript{188} The Court held that the “indecent” speech at issue,\textsuperscript{189} although afforded constitutional protection,\textsuperscript{190} nonetheless could be restricted so that it would only be broadcast at a time when children would be less likely to be listening.\textsuperscript{191} The Court employed a “nuisance rationale,”\textsuperscript{192} explaining, “Words that are commonplace in one setting are shocking in another …—one occasion's lyric is another's vulgarity.”\textsuperscript{193}

The Pacifica Foundation Court understood that its holding might seem to fly in the face\textsuperscript{194} of Cohen v. California.\textsuperscript{195} At issue in Cohen was the conviction of an individual who had been in a courthouse wearing a jacket with the words “Fuck the Draft” written on it. The Cohen Court had suggested that those objecting to the message could simply avert their eyes.\textsuperscript{196} Analogously, a parent who did not want her child to hear the monologue might either change the station or turn

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\textsuperscript{187} 438 U.S. 726 (1978).
\textsuperscript{188} See id. at 729.
\textsuperscript{189} See id. at 741 (“there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast”).
\textsuperscript{190} Id. at 744 (“The words of the Carlin monologue are unquestionably “speech” within the meaning of the First Amendment.”).
\textsuperscript{191} See id. at 750 (“The time of day was emphasized by the Commission.”) and id. (“Pacifica's broadcast could have enlarged a child's vocabulary in an instant.”) See also id. at 757 (Powell, J., concurring in part and concurring in the judgment) (“The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour.”).
\textsuperscript{192} Id. at 750.
\textsuperscript{193} Id. at 747.
\textsuperscript{194} See id. at 747 and n.25 and id. at 749 and n.27.
\textsuperscript{195} 403 U.S. 15 (1971).
\textsuperscript{196} See id. at 21 (“Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”) See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (“Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, … the burden normally falls upon the viewer to ‘avoid further bombardment of (his) sensibilities simply by averting (his) eyes.’”) (citing Cohen, 403 U.S. at 21.).
off the radio.\textsuperscript{197} The \textbf{Pacifica Foundation} Court rejected that the ease with which one might turn off the radio either negated the harm or provided an adequate remedy. “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”\textsuperscript{198}

\textbf{Pacifica Foundation} suggests that some kinds of expression, while protected, may nonetheless be channeled, so that the communication can still take place at certain times and in certain places, but will not have the undesirable effects that might have occurred absent the channeling. Thus, for example, the Court upheld in \textit{Grayned v. City of Rockford} an ordinance that prohibited disruptive demonstrations during public school hours.\textsuperscript{199} Under the ordinance, individuals were permitted to engage in protests—their speech was not chilled. However, they were not permitted to hold such protests during school hours because doing so might disrupt the classes in session. At least one question raised by \textbf{Phelps} involves the permissible steps that might be taken to prevent funeral picketing, so that the peace and tranquility of the mourners would not be disturbed while at the same time there would be ample alternatives provided so that the desired messages could still be communicated.

\textbf{C. The Phelps decision}

The existing case law prior to \textbf{Phelps} did not clearly dictate a particular result in a funeral-picketing case where defamation was not at issue. Where there has been no injury to reputation, that line of cases is not clearly on point, although the jurisprudence might nonetheless cast light on how such a case should be decided. Although \textbf{Falwell} also involved an intentional infliction

\textsuperscript{197} \textbf{Pacifica Foundation}, 438 U.S. at 765-66 (Brennan, J., dissenting).(discussing “the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the ‘off’ button.”).

\textsuperscript{198} Id. at 748-49. See also Njeri Mathis Rutledge, \textit{A Time to Mourn: Balancing the Right of Free Speech against the Right of Privacy in Funeral Picketing}, 67 \textbf{Md. L. Rev.} 295, 330 (2008) (“\textbf{Cohen} is distinguishable from the funeral picketing scenario.”).

\textsuperscript{199} 408 U.S. 104, 119 (1972).
of emotional distress claim, it, too, is not clearly on point, because it was brought by a public figure and the holding seemed designed to preclude an end-run around First Amendment protections. Precisely because Snyder was a private rather than a public figure and because damages would be imposed because of the outrageousness of where the protest took place rather than solely because of what was said, *Falwell* would seem distinguishable.

Some cases have spoken to the great importance of protecting free expression. For example, the *Cohen* Court cautioned that one “cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”¹²⁰ Precisely because it is “often true that one man's vulgarity is another's lyric”¹²¹ and because one cannot “forbid particular words without also running a substantial risk of suppressing ideas in the process … [and providing] a convenient guise for banning the expression of unpopular views,”¹²² the Court must keep a watchful eye on those who would countenance the imposition of burdens on expression. Yet, *Pacifica Foundation* seemed to view *Cohen* with a jaundiced eye,¹²³ and funeral picketing might be understood to involve a kind of *Pacifica Foundation* case in which speech should be prohibited in one place at a particular time on a kind of nuisance theory. Basically, the claim would be that funeral picketing should be precluded regardless of the content of the speech. Indeed, many of the statutes aimed at prohibiting funeral picketing are written in content-neutral terms¹²⁴ that restrict all speech at a particular place during particular times.¹²⁵

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¹²⁰ *Cohen*, 403 U.S. at 25.
¹²¹ *Id.*
¹²² *Id.* at 26.
¹²³ See notes 194-98 and accompanying text supra.
¹²⁴ *McQueary v. Stumbo*, 453 F.Supp.2d 975, 985 (E.D. Ky. 2006) (“To the extent that the provisions at issue were predominately motivated by the need to prevent all interferences with all funerals regardless of the content or creator of the interference, the provisions are content neutral. Likewise, to the extent that the provisions are justified by the
The Phelps Court emphasized that the “church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged.”206 Further, much of what they said involved “matters of public import,”207 notwithstanding that some of their comments might be thought to have involved matters of purely private concern.208

Regrettably, the Court was too reticent with respect to why it mattered that the Phelps had followed the police directions. It is almost as if the Court was estopping the state from punishing the Phelps, who had followed police direction.209 Yet, at issue here was not the violation of a criminal statute but, instead, the potential liability of the defendants for the intentional infliction of emotional distress. By telling the Phelps where they should stage their demonstration, the police were not even implicitly promising immunity from civil suit. If the Phelps had made defamatory statements from that location, they would not have been immunized by virtue of their having followed police directions.210 So, too, if the protest had been very loud, e.g., because the message had been amplified so that those participating in the funeral could not help but hear the

205 See Christina E. Wells, Privacy and Funeral Protests, 87 N.C. L. Rev. 151, 173 (2008) (“Courts will likely treat laws regulating peaceful protests as facially content-neutral because, by their terms, they do not regulate content.”); Stephen R. McAllister, Funeral Picketing Laws and Free Speech, 55 U. Kan. L. Rev. 575, 580 (2007) (“most of the state laws restrict the locations available for protesting and the time period during which such locations are restricted. In other words, the laws create buffer zones around funerals and memorial services, generally during a specified time period, such as an hour before to an hour following such services.”).
206 Phelps, 131 S. Ct. at 1218-19.
207 Id. at 1217.
208 Id. at 1226 (Alito, J., dissenting) (“this attack [on the Snyders] was not speech on a matter of public concern”).
209 See Cox v. Louisiana, 379 U.S. 559, 571 (1965) (“Thus, the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse. In effect, appellant was advised that a demonstration at the place it was held would not be one ‘near’ the courthouse within the terms of the statute.”). Cf. Comm. v. Twitchell, 617 N.E.2d 609, 618 (Mass. 1993) (affording the defendants an affirmative defense against a manslaughter charge because the Attorney General had issued a potentially misleading opinion regarding the legal obligations of Christian Science parents with respect to the refusal of medical treatment for their children).
210 Cf. Phelps, 131 S. Ct. at 1214 (noting that the necessary elements of defamation could not be established).
protests, the Phelps would not have been immunized simply by virtue of their having located their protest in accord with police instructions.

The Phelps Court understood that “Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father.” Indeed, the Court had recently recognized that 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.” Yet, the Court seemed to belie its appreciation of the harm done to Matthew’s father with respect to the comments that might have been interpreted as being directed specifically at the Snyder family.

Many of the comments on the Phelps’ signs involved matters of public concern. However, some did not, as the Court seemed to recognize when noting that “even if a few of the signs—such as ‘You're Going to Hell’ and ‘God Hates You’—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public

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211 The Phelps Court specifically noted that the Phelps “did not yell.” See id. at 1213. See also id. at 1218 (“Westboro conducted the picketing peacefully”); id. at 1220 (“there is no indication that the picketing in any way interfered with the funeral service itself”).
212 See id. at 1220 (noting that the speech “did not itself disrupt the funeral”). See also Zachary P. Augustine, Comment, Speech Shouldn't Be “Free” at Funerals: An Analysis of the Respect for America's Fallen Heroes Act, 28 N. Ill. U. L. Rev. 375, 397 (2008) (“Funeral protesters have repeatedly used sound amplification devices at these funerals.”) Cf. Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (“We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.”).
213 Phelps, 131 S. Ct. at 1217.
215 See Phelps, 131 S. Ct. at 1212 (listing some of the signs including: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell”).
issues.” However, as Justice Alito points out in dissent, it was utterly unclear why those comments discussing matters of purely private concern were not considered actionable.217

One might contrast the Phelps Court’s discussion of the signs “You're Going to Hell” and “God Hates You” with the analysis offered by the 4th Circuit of those same signs. The latter court examined them and concluded that “these two signs cannot reasonably be interpreted as stating actual facts about any individual.”218

Certainly, courts will sometimes construe statements in a particular way as a matter of law, jury construction to the contrary notwithstanding. For example, consider the comments made about a particular individual, Charles Bresler, at a public meeting. Bresler was seeking a zoning variance from a City Council.219 He also was the owner of land that the city wished to purchase for a new high school.220 Bresler was apparently driving a hard bargain, and was accused during the meeting of engaging in blackmail.

That accusation was later published in a local newspaper. The question before the Court was whether the charge against Bresler could reasonably be construed as a claim that he had committed a felony.221 The Court held that the charge could not reasonably have been so construed,222 notwithstanding that the term “blackmail” can of course refer to a criminal act depending upon the context.

216 Id. at 1217.
217 Id. at 1227 (Alito, J., dissenting) (“I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents’ attack on Matthew Snyder and his family should be treated differently.”)
218 Phelps, 580 F.3d at 224.
220 Id.
221 Id. at 13.
222 Id. at 14 (“It is simply impossible to believe that a reader who reached the word ‘blackmail’ in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized.”) See also Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers v. Austin, 418
Yet, the Bresler Court was on firmer ground when construing the blackmail charge as not involving a claim about the commission of a felony than was the 4th Circuit when denying that any matters of purely private concern had been addressed. As Justice Alito suggested in his dissent, some of the signs at the funeral and some of the comments on the website seemed to be directed at the Snyders in particular and might quite reasonably have been construed as not involving any matters of public concern. 223 Those comments might instead have been interpreted to be a brutal attack upon Matthew Snyder “almost certain to inflict injury.” 224 Indeed, the 4th Circuit at one point admitted that a “reasonable reader could interpret these signs … as referring to Snyder or his son only.” 225

The United States Supreme Court should be commended for admitting that some of the material might have been construed not to involve a matter of public concern, 226 but should have taken up Justice Alito’s challenge 227 and addressed the possible tort ramifications of saying to the deceased’s family that the deceased was going to hell. The Court might have argued that the jury had been and would be presented with an impossible task. Not only would they have been asked to determine whether the Phelps’s actions, rather than Matthew Snyder’s death, had caused Albert Snyder’s severe harm, but they would also have been asked to determine which

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223 See Phelps, 131 S. Ct. at 1225-26 (Alito, J., dissenting). See also Jason M. Dorsky, A New Battleground for Free Speech: The Impact of Snyder v. Phelps, 7 Pierce L. Rev. 235, 240-41 (2009) (“One particularly egregious miscalculation on the part of Phelps’s followers was the decision to include signs and chants aimed directly at the family of Matthew Snyder.”).


225 Phelps, 580 F.3d at 224.

226 It is not always easy to tell whether something is a matter of public concern. Cf. Florida Star, 491 U.S. at 553 (White, J., dissenting) (“There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime.”).

227 Phelps, 131 S. Ct. at 1228 (Alito, J., dissenting) (“I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.”).
statements—protected versus unprotected—had caused that harm. That kind of delimitation might have been thought an impossible task.

Suppose that the jury could somehow decide how much of the harm was caused by unprotected expression that had targeted the family versus protected expression that had been focused on matters of public concern. Yet, another difficulty is raised by the Phelps fact pattern, namely, some of the expressions on the signs were also included in the epic on the website. But even if it was permissible to make certain kinds of speech at the funeral site subject to tort liability, that would not establish that it was also permissible to make the expressions included on the website subject to liability. If, indeed, the Court were to hold that the statements made on the website were protected, then the jury’s job would be that much harder, because particular contents on the website would be protected even though those very same statements made on the day of the funeral would not be protected. The jury would then have the very difficult if not impossible task of determining which of the distasteful, personally directed statements had caused the father’s continuing anguish—the protected, distasteful comments on the website or the unprotected statements at the funeral.

There is precedent for the Court’s striking down a damages award because of the insuperably difficult damages questions presented. For example, in N. A. A. C. P. v. Claiborne Hardware Company, the Court considered “the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the

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228 The Phelps Court did not discuss the additional difficulties created by the website. “The epic is not properly before us and does not factor in our analysis.” See id. at 1214 n.1.
229 But see id. at 1222 (Alito, J., dissenting) (“It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”).
boycott that were not so protected." The Claiborne Hardware Court explained that “the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.” The Court cautioned that only those damages caused by conduct outside of the ambit of protection of the First Amendment could be awarded, and explained that because “respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.” Basically, because it could not be shown that an unprotected part of Charles Evers’s “[s]trong and effective extemporaneous rhetoric” had proximately caused the illegal acts at issue, the Court rejected that liability could be imposed against him. Perhaps the Phelps Court was similarly concerned about limiting the ways that public rhetoric was used.

The Phelps Court did address some of ramifications and non-ramifications of its opinion. For example, the Court explained that the decision did not address “speech on public matters [that] was in any way contrived to insulate speech on a private matter from liability.” Suppose, for example, that an individual was speaking to a group that happened to include a divorced parent of a child who had recently committed suicide. Knowing of the parent’s vulnerable state, the individual started talking about how society should make divorce more difficult to obtain, because no-fault divorce imposes untold harms on children, sometimes even causing them to

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231 Id. at 916.
232 Id. at 916-17.
233 See id. at 918 (“Only those losses proximately caused by unlawful conduct may be recovered.”)
234 Id. at 926-27.
235 Id. at 928.
236 See id.
237 See id. at 929 (“The findings are constitutionally inadequate to support the damages judgment against him.”).
238 Phelps, 131 S. Ct. at 1217.
commit suicide. Further assume that the reason that this discussion was put forward was not to discuss a matter of public concern but, instead, to impose great harm on the mourning parent by causing the parent to blame herself for her child’s suicide. The Phelps Court implies that an intentional infliction of emotional distress award based on such a scenario might pass constitutional muster, assuming that all of the elements of the tort had been met in light of local law.

There was ample evidence that Phelps was not targeting the Snyders in particular as opposed to other families of soldiers who had died in war or other individuals whose funerals could be picketed to gain public exposure. The Court was quite clear about why the funerals were being picketed, namely, as a method by which Phelps and the Church would get increased public exposure.

Snyder had argued that it was important to consider the context in which the picketing occurred—his son’s funeral. The Court rejected that the context changed the character of the speech from a matter of public concern to one of private concern. But a different way to understand the context point is to consider the Pacifica Foundation analogy to nuisance law—even speech protected by the First Amendment may be restricted in where or when it is delivered.

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239 Id. (“There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter.”).
240 See id. at 1224 (Alito, J., dissenting) (“[C]hurch members have protested at nearly 600 military funerals. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes.”).
241 Id. at 1217 (“There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views.”). See also Dorsky, supra note 223, at 243 (“the Westboro Baptist Church has acknowledged that its choice of venue was not driven by religious purposes, but rather by the desire to be noticed”). The 8th Circuit has characterized why the Phelpses picket funerals somewhat differently. See Phelps-Roper v. Nixon, 509 F.3d 480, 483 (8th Cir. 2007) (“Phelps believes funerals are the only place where her religious message can be delivered in a timely and relevant manner.”).
242 Phelps, 131 S. Ct. at 1217 (“Snyder contends that the “context” of the speech-its connection with his son's funeral-makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech.”).
Traditional time, place, manner restrictions impose some limitations on where speech can be delivered and such restrictions are valid, provided that “they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”\textsuperscript{243} Indeed, the Court was careful to note that it was not discussing the constitutionality of the various state statutes imposing content-neutral restrictions on funeral picketing.\textsuperscript{244}

Consider a state law that prohibits demonstrations near funerals. The Phelps might challenge the constitutionality of such a law, arguing that the Church would not have adequate alternative channels of communication, since the Church would not get the same media attention if prevented from spreading their message at funerals.\textsuperscript{245} However, as the Court has pointed out elsewhere, “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”\textsuperscript{246} For example, in Heffron v. International Society for Krishna Consciousness, Incorporated,\textsuperscript{247} the Court upheld a restriction that prevented Krishnas from walking around a state fair asking for donations,\textsuperscript{248} notwithstanding

\begin{footnotesize}
\textsuperscript{244} Phelps, 131 S. Ct. at 1218 (“Maryland now has a law imposing restrictions on funeral picketing, … as do 43 other States and the Federal Government. … To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. … [W]e have no occasion to consider whether it or other similar regulations are constitutional.”). See also Rutledge, supra note 198, at 318 (“The funeral picketing statutes will probably be considered content neutral.”)
\textsuperscript{245} Nixon, 509 F.3d at 488 (“Phelps-Roper presents a viable argument that those who protest or picket at or near a military funeral wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message. She has a fair chance of proving section 578.501 fails to afford open, ample and adequate alternative channels for the dissemination of her particular message.”).
\textsuperscript{247} 452 U.S. 640 (1981).
\textsuperscript{248} See id. at 654 (“we hold that the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial
testimony that the group would be severely impaired in its mission were it so constricted and notwithstanding that the implicated speech was of course protected by the First Amendment. But if preventing the Krishnas from utilizing the most effective form of communication did not violate constitutional guarantees, then preventing the Phelps from utilizing the most effective method might also pass constitutional muster. It seems likely that a content-neutral funeral-picketing law would be upheld as a valid time, place, manner restriction.

Snyder, who was awarded damages for intrusion upon seclusion, argued that he was a member of a captive audience at his son’s funeral. However, the Court rejected that captive audience doctrine was applicable in a case where “Snyder could see no more than the tops of the signs when driving to the funeral [a]nd there is no indication that the picketing in any way interfered with the funeral service itself.” The Court has explained that the captive audience doctrine has been applied “only sparingly to protect unwilling listeners from protected speech.” For example, in Rowan v. United States Post Office Department, the Court noted

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249 Id. at 653 (“ISKCON desires to proselytize at the fair because it believes it can successfully communicate and raise funds. In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature.”).
250 Id. at 647 (“The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment.”).
251 See Edwards v. City of Santa Barbara, 150 F.3d 1213, 1215 (9th Cir. 1998) (upholding an ordinance that “prohibits all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed”).
252 See notes 27-28 supra.
253 See Phelps, 131 S. Ct. at 1219-20.
254 Id. at 1220 (“As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. … We decline to expand the captive audience doctrine to the circumstances presented here.”).
255 Id. See also Wells, supra note 205, at 155 (“Peaceful protests do not invade funerals in the sense that this term is traditionally understood. They are neither noisy nor disruptive. They do not necessarily impede funeral services. Nor do they involve harassment causing attendees to avoid the service. In other words, peaceful protests do not invade funeral-goers' seclusion.”).
256 Phelps, 131 S. Ct. at 1220.
that individuals in their own homes are free to refuse to receive unwanted information,\textsuperscript{258} but explained that merely because we are sometimes a captive audience within the home does not entail that individuals can be made a captive audience outside the home as well. For example, individuals do not have a constitutional right to be free from an unwanted radio broadcast on a public streetcar,\textsuperscript{259} although Justice Douglas suggested in his Pollak dissent that individuals who take streetcars are a “captive audience” and should not be forced to be subjected to unwanted messages.\textsuperscript{260} He offered a similar analysis in a concurrence over twenty years later when discussing some of the protections that should be accorded to commuters using public transportation.\textsuperscript{261}

It is simply unclear whether the Court would have been willing to apply captive audience doctrine had the funeral been interrupted or, perhaps, had the signs been visible.\textsuperscript{262} Ironically, when upholding the Ohio funeral-picketing law, the 6th Circuit included within its justification that the picketers had not been prevented from communicating with the mourners, e.g., by making use of very large signs.\textsuperscript{263}

\textsuperscript{258} Id. at 738 (“We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient.”).


\textsuperscript{260} Id. at 468 (Douglas, J., dissenting).

\textsuperscript{261} See Lehman v. City of Shaker Heights 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (“In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.”).

\textsuperscript{262} See Phelps, 131 S. Ct. at 1220 (“Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself.”) Cf. Action v. Gannon, 450 F.2d 1227, 1233 (8th Cir. 1971) (“The defendants, however, do not have a right to enter the cathedral and disrupt the church services of the plaintiffs. Such disruption is an intolerable violation of the rights of those engaged in worship.”).

\textsuperscript{263} Strickland, 539 F.3d at 370 (“[T]he Funeral Protest Provision does not place ‘limitations on the number, size, text, or images’ of placards, and places ‘no limitation on the number of speakers or the noise level, including the use of amplification equipment.’ Thus, it is conceivable that picketers outside of the 300-foot buffer zone can still communicate their message to funeral attendees.”).
Suppose, then, that Snyder had seen the content of some very large signs along the way to the funeral. It would still be true that the funeral would not have been disrupted, at least in the sense that there might have been no delay and that the service would not have been in competition with loud protesters. However, it might well have been true that the funeral would have been disrupted for Albert Snyder in particular, who might have been so disturbed by the signs that his grieving process would have been completed undermined.

In the envisioned scenario, Snyder might have been disturbed by the very fact that there were signs at his son’s funeral at all and by the contents of the signs in particular. The Phelps Court implicitly rejected that Snyder had found the very fact of a demonstration disturbing—the Court noted that a “group of parishioners standing at the very spot where Westboro stood, holding signs that said ‘God Bless America’ and ‘God Loves You,’ would not have been subjected to liability,”264 implying that liability would only have been imposed because of disagreement with the message. Yet, suppose instead that there had been signs advocating the consumption of a particular cereal for breakfast. Such signs might be disturbing, even if Snyder liked that cereal and agreed with the message, precisely because those holding the signs were attempting to take advantage of the funeral to get free publicity.265

Certainly, one might point out that advertising a commercial product at a funeral might be unwise, because one might thereby promote consumer ill will rather than good will.266 But the

264 Phelps, 131 S. Ct. at 1219.
265 Zipursky suggests that liability might have been imposed had a publicity seeking group held signs saying: “Love and Hot Sex, Not War!” See Zipursky, supra note 112, at 518. But these signs might also be viewed as political, and one might infer from Phelps that the First Amendment would have precluded liability in that case too. The point here is that even those agreeing with a message, whether political or commercial, might nonetheless believe the messages inappropriate at a funeral.
266 Cf. Julie Anderson & David Fish, Casenote, Sotelo v. Directrevenue, LLC: Paving the Way for a Spyware-Free Internet, 22 Santa Clara Computer & High Tech. L.J. 841, 841 (.2006) (discussing a “form of advertising [that] has gained popularity with advertisers, but has generated much ill-will with consumers”).
same point might have been made about the wisdom of the Westboro Church funeral-picketing policies and that has not dissuaded them from engaging in that behavior.

It is worth considering how a Phelps-like case would be decided if protesters picketed a funeral in violation of local law. One of the ironic aspects of the Phelps opinion is that it leaves open whether there would be tort liability in the hypothesized case and even whether the content-neutral law would be more likely to pass muster if targeting funerals or, instead, more generally applicable.

While some courts and commentators have suggested that funerals should be treated differently for purposes of captive audience doctrine, the Phelps Court did not focus on aspects that were unique to funerals. For example, the Court noted that the protest was orderly and staged where the police had instructed, and that no evidence was presented to establish that the protest had interrupted the service. But if these are the relevant factors, then protesters who interfere with a religious service in violation of law might also be punished, even if that service does not involve a funeral.

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267 See Strickland, 539 F.3d at 365 (“Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility.”); McQueary, 453 F.Supp.2d at 992 (“A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.”). See also Brownstein & Amar, supra note 33, at 373 (“While the issue is certainly not free from doubt and argument, we believe, as we elaborate below, that funerals present a similarly or more compelling case of audience captivity and vulnerability as the circumstances discussed in [other cases where the captive audience doctrine was applied].”); Jeffrey Shulman, The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy, 113 Penn St. L. Rev. 381, 406 (2008) (“funeral attendees are captive in a way that deserves the same recognition afforded the resident in his or her home, or the patient in a medical facility”). But see Wells, supra note 205, at 231 (“Extending the Frisby rationale to funeral services because they are particularly unique and deserving of broader privacy protection is also a mistake.”)

268 Phelps, 131 S. Ct. at 1213.

269 Id. at 1220

270 Cf. Edwards, 150 F.3d at 1215 (upholding an ordinance that “prohibits all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed”); Gannon, 450 F.2d at 1232-33 (noting that the defendants do not have a right to “disrupt the church services of the plaintiffs”).
The Pacifica Foundation nuisance rationale was offered in the context of an individual’s receiving an unwelcome radio transmission while he was driving in his car rather than while he was in his house, so captive-audience doctrine might not require that funerals in particular be targeted. Further, the Phelps Court did not seem receptive to carving out a special exception for funerals. For example, when Snyder claimed that the funeral setting presented unique circumstances, the Court noted that “Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views,” as if the staged protests at each of these locations should be analyzed in the same way and the fact that one of these involved a funeral did not alter the analysis.

That the Court seems to be treating funerals no differently from other kinds of events might decrease the likelihood that the Court would recognize a captive audience exception for funerals. Certainly, the Phelps Court made clear that it was not addressing the constitutionality of a content-neutral picketing law and suggested that such a law might pass muster. Nonetheless, the Court went out of its way to note that there have been “a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral.” Such a comment suggests that a content-neutral statute limiting funeral picketing might not pass muster after all, because there have been only a few limited situations in which content-neutral statutes limiting targeting picketing have been upheld.

271 See Pacifica Foundation, 438 U.S. at 730.
272 Phelps, 131 S. Ct. at 1217 (“Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection ‘not only because of the words’ but also because the church members exploited the funeral”).
273 Id.
274 Cf. Wells, supra note 205, at 231 (arguing that funerals should not be singled out for special treatment).
275 Phelps, 131 S. Ct. at 1218 (“To the extent these [funeral-picketing] laws are content neutral, they raise very different questions from the tort verdict at issue in this case.”).
276 Id. (emphasis added).
The Phelps Court seems to be going out of its way to provide no direction to lower courts. While the Court made clear that the damage award at issue could not stand, one cannot tell from the opinion whether content-neutral funeral protest restrictions pass muster as a time, place, manner restriction or, perhaps, on a captive audience rationale. Further, those legislators wishing to draft or amend legislation in this area might well feel frustrated—one cannot tell whether such legislation would be more likely to pass muster if protecting funerals in particular, because more narrowly tailored, or whether, instead, legislation that protected religious or solemn services from interruption as a general matter would be more likely to pass muster, because it would be less plausible to believe that the legislation was targeting unpopular speech.

Suppose that a state statute restricting funeral protests in particular is held to pass constitutional muster. A separate question is whether the Court would permit the imposition of damages for intentional inflictions of emotional distress under such circumstances.

Certainly, the picketing at issue would not be protected by the First Amendment in that ex hypothesi the protesters would have violated a constitutionally valid law. But that would not settle the question at hand. Presumably, when upholding the validity of the content-neutral statute, the Court would say that “an incidental burden on speech is no greater than is essential, … so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” However, the Court would presumably fear

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277 Cf Phelps-Roper v. Taft, 523 F.Supp.2d 612, 619 (N.D. Ohio 2007) (“As to the fixed buffer zone, the Court finds that the statute is not substantially broader than necessary to achieve the State of Ohio's legitimate interest in protecting its citizens from unwanted communications while they attend a funeral or burial service.”)


280 See Brownstein & Amar, supra note 33, at 386-87 (advocating that such damages be potentially awarded when the defendant had violated a constitutionally permissible law prohibiting funeral picketing).

that any intentional infliction damages would turn “on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.” While the Court has not always rejected imposing a penalty on speech that was at least in part motivated by the content of the speech, the Court has struck down a law penalizing speech on the basis of content, even though that speech could have been punished under a content-neutral statute. As the R.A.V. Court noted, “the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element.” Thus, merely because funeral protesting might be subject to sanction because violating a content-neutral time, place, manner statute would not also mean that the Court would uphold tort damages for intentional infliction of emotional distress based on the outrageous content of the comments made at the funeral, assuming that the comments involved matters of public concern. But this means that even those violating the statute might not in addition be subject to tort liability for the content of their speech.

At least two issues would be implicated in such a case. First, merely because a neutral time, place, manner restriction had been violated would not mean that local law also permitted a tort action to be brought based on that violation. However, suppose that local law did permit such an action to be brought. It is not clear after Phelps whether any tort award based on that violation would be upheld.

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282 Phelps, 131 S. Ct. at 1219.
283 See Pacifica Foundation, 438 U.S. at 744 (“It is equally clear that the Commission's objections to the broadcast were based in part on its content.”).
285 See, for example, Chelsea Brown, Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations, 112 W. Va. L. Rev. 207, 234 (2009) (“Mississippi enacted legislation, in addition to its criminal penalties, allowing any surviving member of the deceased's family who is damaged or threatened with loss or injury by reason of a violation to sue for damages, so long as there is credible evidence that a person violated or is likely to violate the state's prohibition against disruptive protest at a funeral service within one hour before, during, or after the service.”).
The Phelps Court emphasized that it “was what Westboro said that exposed it to tort damages,” and that “any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.” But even had there in addition been an interference with the funeral, there would still have been the potential difficulty that the damages would have been imposed because the jury disagreed with the speech and not merely because they believed it outrageous to stage a protest at a funeral. So, too, merely because local law afforded a tort remedy under these circumstances might not allay the Court’s worry that any award might be based on the jury’s disagreement with the message rather than on its belief that funerals should not be disturbed.

IV. Conclusion

Phelps raises more questions than it answers. The Court explained that tort damages for nondefamatory speech on matters of public concern could not be awarded in that case without offending constitutional guarantees. But the Court did not make clear which if any factors were dispositive in that case, so it is quite difficult to determine whether or to what extent the case has import for either tort or First Amendment law.

One understanding of the opinion is that the case is not particularly noteworthy. At issue was quiet and orderly speech on a matter of public concern. The protest, which had not interrupted the funeral, took place where the police had directed. When characterized this way, the case seems to involve political speech that took place in accord with local law and so should of course not be subject to tort damages. Many political statements are taken to heart and may cause real

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286 Phelps, 131 S. Ct. at 1219.
287 Id.
emotional harm,\textsuperscript{288} and the Court does not want to permit tort law to chill speech on important matters.

Yet, there are other ways to understand the decision that may make it a watershed opinion. While the \textit{Phelps} Court suggested that its holding was “narrow,”\textsuperscript{289} the Court did not do a particularly good job in limiting the applicability of the decision. The Court noted, for example, that Snyder had not seen the signs on the way to the funeral. But suppose that he had, and the content of the signs was so distracting that his mind was reeling both during and after the funeral. Would that be enough to change the holding even though the speech would have occurred in a public place on matters of public concern? After all, as the Court pointed out, speech can “inflict great pain.”\textsuperscript{290} By the same token, one cannot tell whether the Court would uphold content-neutral funeral protest limitations and, even if so, whether the Court would uphold tort liability for the violation of such a statute by protesters discussing matters of public concern.

An additional question is whether \textit{Phelps} has implications for the intersection of tort and First Amendment law more generally. The \textit{Phelps} Court implied that liability could not be imposed because the speech at issue involved matters of public concern. But if speech on matters of public concern can be immunized in the funeral protest context, then one must wonder whether matters of public concern will now be trumpeted in other contexts as well. For example, this could be a signal that the Court wishes to resurrect \textit{Rosenbloom}, overruling by \textit{Gertz} notwithstanding, and require actual malice in all defamation cases involving matters of public concern, whether or not the plaintiff is a public figure.

\textsuperscript{288} See id. at 1220 (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and-as it did here-inflict great pain.”)
\textsuperscript{289} Id.
\textsuperscript{290} Id.
The Court’s suggestion that some of the matters not of public concern were nonetheless not actionable because “the overall thrust and dominant theme … spoke to broader public issues” cannot help but confuse the current jurisprudence. One cannot tell, for example, whether the Court is signaling that speech on a matter of public concern, if predominating, will immunize actionable speech on matters of purely private concern, as long as the former speech is not offered to insulate the latter. This would be a significant change in the current jurisprudence—as Justice Alito suggests, the “First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern.” If, indeed, the Phelps’ comments on matters of purely private concern would have been actionable but for their comments on matters of public concern, it is not at all clear jurisprudentially why their comments on matters of public concern should have had an immunizing effect.

One must also wonder whether Phelps has implications for the constitutional limitations on awards in non-defamation cases. In the past, the Court has refused to preclude liability merely because the speech at issue involved a matter of public concern. One cannot tell, however, whether the Phelps holding has implications for a case like Zacchini—perhaps even a case involving unjust enrichment would be barred if involving a publication on a matter of public concern. Or, perhaps, Phelps is not intended to apply to tort damages where defamation was never at issue. Indeed, one cannot tell whether an unjust enrichment action against funeral protesters would pass constitutional muster, assuming that the elements of the tort had been met under local law.

291 Id. at 1217.
292 Cf. id. ("We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability.").
293 See id. at 1227 (Alito, J. dissenting).
294 Defamation was at issue in Phelps at the trial level, where the trial court held that there was no defamation as a matter of law. See note 27 supra.
Some may celebrate the open-ended nature of *Phelps*, because it can be read as either quite consistent with the pre-existing jurisprudence or as effecting a sea-change in the jurisprudence. But lower courts seeking guidance from the Court cannot help but feel frustrated. Not only has the Court failed to tell them which factors are important in funeral protest cases in particular, but the Court has virtually extended an invitation to lower courts to modify the existing jurisprudence, which means that a relatively clear area of the law is now likely to become more rather than less confused. While the result in *Phelps* may have been correct, the opinion itself has the potential to be a source of much regret.