Snyder v. Phelps and the Death of Intentional Infliction of Emotional Distress as a Speech-Based Tort

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In the opening sentence of his Opinion for the Court in Snyder v. Phelps, Chief
Justice John Roberts demonstrates that he’s missed the point. “A jury held
members of the Westboro Baptist Church liable for millions of dollars in
damages for picketing near a soldier’s funeral service,” the chief justice wrote.

He was clearly highlighting what he thought to be a grievous inequity—millions
of dollars for mere picketing. But he mischaracterized the jury’s holding and, by so
doing, trivialized the key issue in the case. A federal jury found, among other things,
that members of the church, through their outrageous conduct, had intentionally caused
severe emotional distress to Albert Snyder, the father of the Marine at whose funeral the

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1 131 S.Ct. 1207 (2011).
2 Scholar Deana Pollard Sacks has come to the same conclusion. See Deana Pollard Sacks, Snyder v. Phelps: A Slice of the Facts and Half an Opinion, 2011 CARDOZO L. REV. DE NOVO 64, 64. She writes
that the opening sentence “is a half-truth at best, and a harbinger to the half-opinion rendered;” it was a statement that could not be proved true or false. Id.
3 131 S.C. at 1213.
4 The chief justice’s was not the only mischaracterization of what the case was about. See, e.g., Editorial, Free Speech That’s Ugly, WASH. POST, Mar. 3, 2010, at A14 (writing that speech cannot be punished because it’s hateful or “expresses an aberrant point of view”); Adam Liptak, Justices Uphold Hateful Protest as Free Speech, N.Y. TIMES, Mar. 3, 2011, at A1 (reporting that the case was about picketing); Press Release, Reporters Committee for Freedom of the Press, Reporters Committee Applauds Supreme Court Ruling That Even Repugnant Speech Must be Protected (Mar. 2, 2011), available at http://www.rcfp.org (writing that the case was based on controversial speech about matters of public concern). See also infra notes 139-46 and accompanying text.
church members held a protest. To characterize the case as being about picketing would be akin to casting *Hustler Magazine v. Falwell*, the only other speech-based intentional infliction case decided by the Supreme Court of the United States, as being about magazine publishing. Picketing may have been one vehicle church members used to harass Snyder, but the jury did not award damages because of the picket; the award was because of an on-site verbal attack and an accompanying video that was posted on the church’s Web site — a video the Court chose to ignore. Chief Justice Roberts, however, diverted the issue from that of intentional infliction of emotional distress. He referred to tort law in the third sentence of the opinion, but he did not mention the tort of intentional infliction of emotional distress until two pages later. And though he delineated the burden of proof for the tort, he ignored that burden of proof through most of his opinion, as had the United States Court of Appeals for the Fourth Circuit, whose decision the Court affirmed.

This kind of skewing of the law characterized much of Justice Roberts’ opinion — an opinion that will make it difficult, if not impossible, for private persons to win

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5 Snyder v. Phelps, 533 F. Supp. 2d 567, 574 (D. Md. 2008). The jury also found for Snyder on claims of intrusion and conspiracy and awarded him $2.9 million in compensatory and $8 million in punitive damages. *Id.* The district court reduced the punitive damages to $2.1 million. *Id.* at 571.


7 The Court did not consider the video — called an “epic” by the church – even though it was a basis for the jury’s holding and, therefore, was part and parcel with the picketing. See 131 S.Ct. at 1214 n.1; *id.* at 1226 n.15 (Alito, J., dissenting). See also infra notes 198-203 and accompanying discussion.

8 131 S.Ct. at 1213.

9 *Id.* at 1215.

10 The tort is proved when, “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46 (1977). See also infra notes 14-17, 147-57.

11 Chief Justice Roberts admitted that Snyder proved severe emotional distress, 131 S.Ct. at 1217-18, but rejected outrageousness as an element of the burden of proof without deciding whether that element had been proved at trial. *Id.* at 1219. See also infra note 121 and accompanying text. He did not discuss the element of intent or recklessness.

12 Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009). On appeal, Phelps did not challenge the sufficiency of the evidence, so the Fourth Circuit did not consider the burden of proof. *Id.* at 216-17.
damages when they are targeted, through no action of their own and without provocation, by groups or individuals whose primary goal is to gain publicity for specific agenda by causing severe emotional harm.\textsuperscript{13} Albert Snyder clearly proved his case against the Westboro Baptist Church, but the Court paid scant attention to the tort, ignored its own precedent, and implemented a rule that does not benefit the cause of free speech, while doing genuine harm to the long-established balance between the necessity for debate on public issues and the rights of private, uninvolved people to be free from unwarranted verbal abuse. Under the rule established in \textit{Snyder}, intentional infliction of emotional distress, as a speech-based tort, is all but dead.

\textbf{\textit{Hustler and Intentional Infliction of Emotional Distress}}

The Supreme Court of the United States, prior to \textit{Snyder v. Phelps}, established guidelines demarcating the burden of proof for intentional infliction of emotional distress. Liability attached if a defendant’s conduct was intentional or reckless, was extreme and outrageous, and caused severe emotional distress.\textsuperscript{14} While the burden of proof generally refers to conduct,\textsuperscript{15} the tort has commonly been applied to speech-based offenses,\textsuperscript{16} as it was in \textit{Hustler v. Falwell}.\textsuperscript{17}

In \textit{Hustler}, the Court unanimously held that public officials and public figures must prove actual malice in order to win damages for intentional infliction of emotional

\textsuperscript{13} Westboro Baptist Church has admitted that its primary goal in protesting at military funerals is to gain publicity. \textit{See infra} notes 70-71 and accompanying discussion.
\textsuperscript{15} \textit{See RESTATEMENT (SECOND) OF TORTS § 46} (1977).
\textsuperscript{16} \textit{See id.} at illus. 1.
\textsuperscript{17} 485 U.S. 46 (1988).
distress.\textsuperscript{18} The Court overturned a $200,000 verdict against the magazine for the publication of an attack aimed at the Rev. Jerry Falwell. \textit{Hustler} had published a parody of the Campari Liquor advertising campaign in which it portrayed Falwell as having a drunken, incestuous encounter with his mother.\textsuperscript{19} At the close of the evidence, the United States Court for the Western District of Virginia granted a directed verdict for the magazine on the invasion of privacy action,\textsuperscript{20} and a jury held in favor of \textit{Hustler} on Falwell’s libel action, finding that the parody could not reasonably be understood as describing actual facts.\textsuperscript{21} The jury found in favor of Falwell, however, on intentional infliction of emotional distress,\textsuperscript{22} and the Fourth Circuit affirmed.\textsuperscript{23}

The Supreme Court reversed the holding, finding that the parody was protected by the First Amendment. Key to the Court’s finding was the political nature of the publication. Falwell and Flynt were embroiled in a political dispute; Falwell had targeted pornography as a societal evil, and Flynt, as one of its most vociferous purveyors, responded.\textsuperscript{24} Chief Justice William Rehnquist compared the parody to the works of political cartoonists and satirists who became involved in political debates throughout history.\textsuperscript{25} Though the parody “is at best a distant cousin. . . and a rather poor relation” to the works of Thomas Nast, whose cartoons helped bring down the Tweed Ring, and cartoonists who lampooned George Washington, Franklin Roosevelt and Teddy

\begin{footnotes}
\item[\textsuperscript{18}] \textit{Id.} at 56. Justice Anthony Kennedy took no part in the case, \textit{id.} at 57; Justice Byron White concurred in the judgment, but wrote that the actual malice rule did not apply, \textit{id.} For a discussion of actual malice, see infra notes 39-59 and accompanying discussion.
\item[\textsuperscript{19}] \textit{Id.} at 48.
\item[\textsuperscript{20}] \textit{Id.} at 49. Appropriation is the only of the four traditional invasion of privacy torts recognized in Virginia. \textit{See W. WAT HOPKINS, MASS COMMUNICATION LAW IN VIRGINIA} 100-14 (3d ed. 2001).
\item[\textsuperscript{21}] 485 U.S. at 49.
\item[\textsuperscript{22}] \textit{Id.}
\item[\textsuperscript{23}] \textit{Hustler Magazine v. Falwell}, 797 F.2d 1270 (4th Cir. 1986).
\item[\textsuperscript{24}] \textit{See RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT} 108 (1988).
\item[\textsuperscript{25}] 485 U.S. at 54-55.
\end{footnotes}
Roosevelt, it is, nonetheless, deserving of the same protection because of its political nature. In such political disputes, the Court held, “outrageousness” was insufficient for liability, because sufficient breathing space is required to encourage robust political debate. Therefore, in order to provide that breathing space, the Court held that public figures and public officials could not recover for the tort of intentional infliction of emotional distress without proving actual malice – that the material was published with knowing falsity or reckless disregard for the truth.

The application of the actual malice test to the parody in Hustler is problematic because a test of truth or falsity is being applied to rhetorical hyperbole that was not intended to assert actual facts. Indeed, a literal application of the actual malice test would clearly demonstrate that Hustler magazine had published the parody with knowledge of falsity. At the bottom of the page on which the parody appeared, Hustler printed the disclaimer, “ad parody – not to be taken seriously.” And the magazine’s table of contents listed the ad as “Fiction; Ad and Personality Parody.” Hustler magazine knew, therefore, that any facts that might have been communicated by the parody were false. The purpose of the parody was to attack – not to assert facts. That point was made during

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26 Id.
27 Id. at 55.
28 Id. at 52.
29 Id. at 56.
30 Justice White did not join the Opinion of the Court, he wrote, because the actual malice rule had little to do with the case: “[T]he ad contained no assertion of fact.” Id. at 57 (White, J., concurring in the judgment). In addition, the trial jury in the case found that no reasonable person would believe the parody to relate actual facts. Id. at 92.
31 485 U.S. at 48.
oral arguments when the attorney for *Hustler* admitted that the actual malice rule did not apply because the parody did not purport to state facts.  

A number of authorities have bemoaned the Court’s expansion of the actual malice standard to cases that focus on rhetorical hyperbole or other linguistic flourishes. First Amendment scholar Rodney Smolla wrote, for example, that the actual malice test might be appropriate for libel law, but intentional infliction of emotional distress is a different sort of beast – one for which truth or falsity is irrelevant.  

Applying actual malice to intentional infliction, he wrote, was like “forcing a square peg into a round hole.” The actual malice test requires a statement of fact rather than a statement of opinion. That is, there can be neither knowledge of falsity nor reckless disregard for the truth without the establishment of a statement that is, indeed, false, as the Court noted when it established in 1986 that libel plaintiffs involved in matters of public concern must prove falsity.  

Actual malice, therefore, would appear to be inappropriate for the statements expressed in the *Hustler* parody, which were not subject to a test of truth or falsity.  

As Smolla wrote:

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34 SMOLLA, supra note 24, at 171.  


36 See Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV DE NOVO 101, 103, *available at* http://ssrn.com/abstract=1588236 (writing that there is no justification for applying the actual malice standard to emotional distress claims outside the public arena). *But see* Brief of the American Center for Law and Justice as Amicus Curiae in Support of Neither Party at 8, Snyder v. Phelps, No. 09-751 (alleging that *Hustler* magazine had published “an extremely distressing lie.”)
One cannot speak meaningfully about the publisher’s subjective doubt as to truth or falsity when neither the initial decision-making process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication or with its capacity to inflict reputational damage.\textsuperscript{37}

\textit{Hustler} was a continuation of the Supreme Court’s application of a public/private-person test rather than a subject-matter test in tort actions. The Court did not specifically refer to private persons in \textit{Hustler}, but it clearly extended the actual malice rule only to public officials and public figures,\textsuperscript{38} and it did not extend any added protection to speech simply because that speech involved matters of public concern. The Court had an opportunity to apply a content-based test to intentional infliction of emotional distress, but had rejected such a test in libel law, clearly did not want to resurrect it for the intentional infliction tort, and opted instead for the public/private test, which it first enunciated in \textit{New York Times Co. v. Sullivan}.\textsuperscript{39}

In \textit{Sullivan}, the Court established the rule that in order to win their cases, public official libel plaintiffs must prove actual malice, that is, that a defamatory publication was made with knowledge of falsity or with reckless disregard for its truth.\textsuperscript{40} Three years later, in \textit{Curtis Publishing Co. v. Butts},\textsuperscript{41} the Court extended the rule to public figures, though it did not fully delineate public figure status. In the 1971 case of \textit{Rosenbloom v. Metromedia, Inc.},\textsuperscript{42} the actual malice rule was expanded again.\textsuperscript{43} Writing for a plurality,

\begin{itemize}
\item \textsuperscript{37} SMOLLA, \textit{supra} note 24, at 170. \textit{See also} Smolla, \textit{supra} note 33, at 427 (writing that the actual malice rule cannot simply be superimposed on intentional infliction).
\item \textsuperscript{38} 485 U.S. 46, 56 (1988).
\item \textsuperscript{39} 376 U.S. 254 (1964).
\item \textsuperscript{40} Id. at 279-80.
\item \textsuperscript{41} 388 U.S. 130 (1967).
\item \textsuperscript{42} 403 U.S. 29 (1971).
\end{itemize}
Justice William Brennan, who had written the Opinion of the Court in *Sullivan*, held that private persons involved in matters of public concern must also prove actual malice in libel cases that grow from those issues.\(^{44}\)

The Court overruled *Rosenbloom* in *Gertz v. Robert Welch, Inc.*,\(^{45}\) however. The *Gertz* Court reaffirmed that public debate is important and, therefore, some falsehood must be protected “in order to protect speech that matters.”\(^{46}\) It rejected the *Rosenbloom* rule, however, holding that the First Amendment does not require private people to prove actual malice, even when involved in matters of public concern. Each state, the Court held, so long as it does not impose liability without fault, should determine the private-person fault standard for libel plaintiffs.\(^{47}\)

In reaching its holding, the Court addressed the issue of public and private persons in two ways. First, filling a gap left open by *Curtis Publishing Co.*, the Court delineated three types of public figures for purposes of libel actions: public figures for all purposes, that is, persons who have widespread fame or notoriety; public figures for limited purposes, that is, persons who inject themselves into ongoing public controversies in an effort to affect the outcomes of those controversies; and involuntary public figures, an “extremely rare” category of persons who become public figures through no actions of their own.\(^{48}\)

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\(^{43}\) The actual malice rule also was expanded in *Garrison v. Louisiana*, 379 U.S. 64 (1964), in which the Court held that the rule applied to public officials involved in cases of criminal libel.

\(^{44}\) 403 U.S. at 43-44.


\(^{46}\) Id. at 341.

\(^{47}\) Id. at 347-48. The Court, however, left intact a rule established in 1967 requiring private persons to prove actual malice when bringing actions for false light invasion of privacy. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The Court, seeing the tort as an end run around libel law, required the heightened burden of proof, even though the publication by *Life* magazine involved entertainment rather than political expression, id. at 387-88, and even though the case involved privacy rather than defamation, id. at 390-91.

\(^{48}\) Id. at 345.
More importantly for purposes of intentional infliction of emotional distress, however, the Court also affirmed that the First Amendment does not require private persons to confront the same burden of proof that it requires of public persons — at least in defamation actions. Public figures and public officials, the Court held, have greater access to channels of effective communication, making it easier for them to take advantage of “[T]he first remedy” available to persons attacked by false defamations\(^\text{49}\) — rebutting speech with speech.\(^\text{50}\) Therefore, private persons are more vulnerable to injury, and the state interest in protecting them is correspondingly greater.\(^\text{51}\) In addition, public figures, like public officials, voluntarily expose themselves to a greater risk of criticism by entering the public specter; they invite public scrutiny and run the greater risk that accompanies such scrutiny.\(^\text{52}\) A private person, on the other hand, “[H]as 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.”\(^\text{53}\) Therefore, the “public or general interest” test was inadequate in serving the interests at stake.\(^\text{54}\)

The Court re-emphasized that holding two years after \textit{Gertz} in \textit{Time, Inc. v. Firestone},\(^\text{55}\) rejecting arguments that Mary Alice Firestone was a public figure because she was involved in a cause célèbre. “Were we to accept this reasoning,” the Court held, “we would reinstate the doctrine advanced [in \textit{Rosenbloom},]” which was repudiated in \textit{Gertz} because the rule would unacceptably abridge a legitimate state interest.\(^\text{56}\)

\(^{49}\) \textit{Id.} at 344.

\(^{50}\) \textit{See} Dennis v. United States, 341 U.S. 494, 503 (1951) (“[T]he basis of the First Amendment is the hypothesis that speech can rebut speech.”).

\(^{51}\) 418 U.S. at 344.

\(^{52}\) \textit{Id.} at 344-45. \textit{See also supra} note 47.

\(^{53}\) \textit{Id.} at 345.

\(^{54}\) \textit{Id.} at 346.

\(^{55}\) 424 U.S. 448 (1976).

\(^{56}\) \textit{Id.} at 454.
matter classifications, the Court held, often result in an improper balance. “It was our recognition and rejection of this weakness in the Rosenbloom test which led us in Gertz to eschew a subject-matter test.”57 And nine years later, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,58 the Court repeated the proposition: “In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times.”59

In Hustler the Court emphasized the importance of protecting speech on matters of public concern, but it’s clear that the parody constituted speech of public concern because of Falwell’s status as a public figure who was an active participant in a public debate.60 The confluence of a public figure embroiled in a public debate – not simply the existence of a matter of public concern— required the heightened protection. No one – other than members of Westboro Baptist Church – alleged that the Snyders were public figures or that they were involved in a public debate. By abandoning its approach of looking at the public-private distinction61 and establishing what one authority called a very broad “inquiring-minds-want-to-know” kind of standard,62 the Supreme Court ignored a large body of precedent and effected a significant shift.63

**Snyder v. Phelps**

57 Id. at 456.
59 Id. at 756. The Court also repeated the proposition that private persons have not voluntarily exposed themselves to increased risk and lack effective opportunities for rebuttal, so states still possess a strong interest in protecting them. Id.
60 See Posting of Howard Wasserman to http://www.prawfsblogs.com (Mar. 2, 2011, 8:31 a.m.).
61 See Sacks, supra note 2, at 65.
63 See Wasserman, supra note 60.
The lawsuit was filed by Albert Snyder against Fred W. Phelps Sr., the Westboro Baptist Church, and some of the church’s members, specifically Phelps’s daughters, Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. In 1991, church members began picketing funerals in order to assert the message that God hates homosexuality and is punishing America – particularly the military – for its tolerance of gays.

They claim to have protested at more than 400 military funerals, and at thousands of other venues, in opposition to “the fag lifestyle of soul-damning, nation-destroying filth.” Initially, the picketing took place at funerals of persons who may have been gay or who had beliefs with which the church members objected. Church members began picketing at military funerals in 2005. They readily admit that they choose military funerals because of the heightened publicity caused by the protests, a motive acknowledged by the Court. The church is listed by the Southern Poverty Law

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64 See Snyder v. Phelps, 533 F. Supp. 2d 567, 570 (D. Md. 2008). Phelps founded the church in 1955 and has been its only pastor. Fifty of the church’s sixty or seventy members are Phelps’ children, grandchildren or in-laws. See id.

65 See Phelps-Roper v. Strickland, 539 F.3d 356, 359 (6th Cir. 2008) ("Because God is omnipotent to cause or prevent tragedy, [church members] believe that when tragedy strikes it is indicative of God’s wrath," quoting the complaint).

66 Snyder, 131 S.Ct. 1207, 1213 (2011).

67 Westboro Baptist Church Web page, http://www.godhatesfags.com. The number of protests grows rapidly with multiple pickets often staged within a single community, each lasting less than an hour. See id. Church members have picketed organizations as diverse as the Southern Baptist Convention, the ACLU, and the Billy Graham Evangelistic Association, and persons as diverse as Coretta Scott King, Ronald Reagan, William Rehnquist, and Fred Rogers. See Njeri Mathis Rutledge, A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing, 67 MD. L. REV. 295, 332 (2008).

68 The church first gained national notoriety in 1998, for example, when members protested at the funeral of Matthew Shepard, a man who had been tortured and murdered after he made it know he was gay. See Christina E. Wells, Privacy and Funeral Protests, 87 N.C. L. REV. 151, 159 (2008); Westboro Baptist Church – World’s Most Famous Calvinists (1 of 8), http://youtube.com/watch?v=hmIr9P-vkSQ (last visited Apr. 1, 2011).

69 See Wells, supra note 68, at 160.

70 See Snyder, 533 F. Supp. 2d 567, 578 (D. Md. 2008). In its brief on the merits, the church reports that it pickets at funerals because they are highly publicized events with extensive media coverage. Brief for Respondent at 4, Snyder v. Phelps, 09-751 (U.S. July 7, 2010).

71 131 S.Ct. at 1217.
Center as one of six hate groups in Kansas, and by the Anti-Defamation League as one of seventeen extremist groups in the United States.

Almost entirely because of the activities of the church, Congress and a number of states have adopted statutes restricting or prohibiting the picketing of funerals. The church has challenged some of the statutes, with mixed results.

The lawsuit began when members of the Westboro church demonstrated at the funeral of Snyder’s son, Marine Lance Corporal Matthew A. Snyder, at St. John’s Catholic Church in Westminster, Maryland. Snyder had been killed in the line of duty in Iraq. Members of the church carried signs specifically chosen for the picket: “Semper Fi Fags,” “Pope in Hell” and “Maryland Taliban.” Members also brought a sign

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72 Southern Poverty Law Center Web page, http://www.splcenter.org (last visited Apr. 1, 2011). The six groups include one Ku Klux Klan group and three neo-Nazi groups.
74 See Stephen R. McAllister, Funeral Picketing Laws and Free Speech, 55 U. Kan. L. Rev. 575, 579, 614-19 (2007); Wells, supra note 68, at 153, 156. Since the Court’s ruling, there has been additional activity related to regulations on picketing at funerals. A bill, titled the “Safe Haven for Heros Act of 2011” has been introduced into Congress aimed at tightening the regulations governing the picketing of military funerals. H.B. 961, 112th Cong. (2011). In addition, Oklahoma has passed a bill prohibiting protests within two hours before and after a funeral and increasing from 500 feet to 1,000 feet the distance from a funeral a protest can occur. S.B. 406 (2011).
75 See, e.g., Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008), cert. denied 129 S.Ct. 2865 (2009) (reversing a district court’s denial of injunctive relief for the church on grounds of the likely success of the church’s First Amendment claim); Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008) (holding a funeral protest provision to be constitutional because it was content neutral and narrowly tailored, because the state had a significant interest in protecting funeral attendees, and because there were alternative channels for the church’s communication).
77 Brief of Petitioner for a Writ of Certiorari at 4, Snyder v. Phelps, No. 09-751 (4th Cir., Dec. 23, 2009). Petitioners alleged that the specific signs were added to the signage arsenal of the church because church members knew that a funeral service for a Marine was being held at a Roman Catholic Church in Maryland. Id. Other signs displayed during the protest were “America is doomed,” “God hates America,” “You are going to hell,” “God hates you,” and “Thank God for dead soldiers.” 533 F. Supp. 2d at 570. See also Brief for Respondent, supra note 70, at 8. There was dispute over whether church members also displayed a sign bearing the slogan “Matt in Hell.” Petitioners claim the sign was present. Brief of Petitioner for Writ of Certiorari, supra, at 4. Church members deny displaying that particular sign, but argue that, even if they did, the sign was not aimed at Matthew Snyder, but at Matthew Shepard, a gay man who was tortured and murdered apparently because of his sexual orientation. Brief in Opposition to Petition for Writ of Certiorari at 1-2, Snyder v. Phelps, No. 09-751 (4th Cir., Jan. 20, 2010); Brief for Respondent, supra note 70, at 8 n.3. The Court did not confront this dispute in its opinion.
displaying a stylized image of two males engaging in anal sexual intercourse. In addition, the church posted on its Web site a video, which it called an “epic,” titled “The Burden of Marine Lance Cpl. Matthew Snyder.” In the video, the church alleged that Snyder had been “raised for the devil” and taught by his parents to defy God. Church members had never met Snyder or his family.

Snyder filed suit in the federal court for the District of Maryland for intentional infliction of emotional distress, intrusion of seclusion, defamation, publicity given to private life, and conspiracy. The district court granted summary judgment for the defendants on the defamation and publicity claims. The statements made by the defendants consisted of religious opinion, the court held, and would not realistically tend to expose Snyder to public hatred or scorn. In addition, no private information had been made public. The jury found in favor of Snyder on the remaining three claims – intrusion, intentional infliction of emotional distress, and conspiracy – and awarded him $2.9 million in compensatory and $8 million punitive damages. On a post-verdict motion by the church, the district court reduced punitive damages to $2.1 million.


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78 See Brief of Petitioner for Writ of Certiorari, supra note 77, at 4.
79 533 F. Supp. 2d at 570. The video also reported:

God rose up Matthew for the very purpose of striking him down, so that God’s name might be declared throughout all the earth. He killed Matthew so that his servants would have an opportunity to preach his words to the U.S. Naval Academy at Annapolis, the Maryland legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

80 Id.
81 Id. at 572.
82 Id. at 573.
83 Id.
84 Id. at 571.
defendants had also asked the district court to overrule the verdict, but the court found the
evidence sufficient to support the jury’s verdict on each of the three claims. 85

The district court rejected the claim of Phelps and his church that the funeral was
a public event and that Matthew and Albert Snyder became public figures because the
father placed an obituary notice in newspapers. 86 Albert Snyder did not invite attention,
the court held, and the increased interest in the funeral was primarily the doing of Phelps
and his followers. They had contacted law enforcement officials, the court noted,
because of past problems caused by their protests and, indeed, their presence resulted in
increased police presence and media coverage. “Defendants cannot by their own actions
transform a private funeral into a public event and then bootstrap their position by
arguing that Matthew Snyder was a public figure,” the court held. 87

The court also found that Albert Snyder’s testimony provided the jury with
“sufficient evidence. . . to conclude that [he] had suffered ‘severe and specific’ injuries,” 88
and that those injuries were caused by the “extreme and outrageous” conduct of Phelps
and his followers. 89 In addition, the court found that there had been intrusion on Snyder’s
seclusion because of the protest and the posting on the Web site of the video about
Matthew Snyder: “[W]hen Snyder turned on the television to see if there was footage of
his son’s funeral, he did not ‘choose’ to see close-ups of Defendants’ signs and
interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his
seclusion.” 90 The video, the court held, invaded Snyder’s privacy during a time of

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85 Id. at 576.
86 Id. at 577.
87 Id.
88 Id. at 580-81. On the issue of severe emotional distress, see infra notes 166-69 and
accompanying discussion.
89 Id. at 581.
90 Id.
bereavement.91 Finally, because there was evidence that the members of the Phelps family joined to accomplish unlawful acts, there was evidence of conspiracy.92

The Fourth U.S. Circuit Court of Appeals reversed, finding that the speech of Westboro Baptist Church was protected by the First Amendment, primarily because it was opinion93 or rhetorical hyperbole94 about matters of public concern.95 In making its ruling, the court did not specifically address the torts alleged by Snyder, but lumped them together, finding that the First Amendment granted virtually absolute protection “when a plaintiff seeks damages for reputational, mental, or emotional injury.”96

The Fourth Circuit was critical of the district court for its focus on issues raised by Snyder that were addressed in Hustler Magazine v. Falwell97 and Gertz v. Robert Welch, Inc.98 The district court erred, the Fourth Circuit held, by determining whether Snyder was a public or private figure and whether the funeral was a public event.99 The district court “focused almost exclusively on the Supreme Court’s opinion in Gertz, which it read to limit the First Amendment’s protections for ‘speech directed by private individual against other private individuals.’” The court therefore assessed whether Snyder was a ‘public figure’ under Gertz and whether Matthew’s funeral was a ‘public

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91 Id.
92 Id. at 581-82.
94 Id. at 220.
95 Id. at 222-23.
96 Id. at 218.
99 580 F.3d at 222.
event.” The Fourth Circuit adopted the content-based analysis, and, though it was contrary to Supreme Court precedent, the Court adopted the same analysis.

**THE SUPREME COURT DECIDES SNYDER v. PHELPS**

When the Supreme Court granted *certiorari* in *Snyder v. Phelps* in March 2010, free speech advocates began lining up to explain that, while the activities of Westboro Baptist Church in picketing the funeral of a serviceman killed in Iraq were obnoxious, the First Amendment rights of the church should be protected. That protection is necessary, these advocates wrote, in order to protect discourse on matters of public concern and to avoid liability based on the fact that a target of obnoxious speech was merely offended. Indeed, some news organizations even contended that a finding against the church would harm free press rights, though purportedly few of the members of those organizations orchestrated targeted attacks designed to harm individuals.

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100 Id.
101 Jeffrey Shulman wrote that the Court did not follow the rationale of the Fourth Circuit completely. Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 35, 37. The Fourth Circuit, he wrote, found the personal nature of the signs irrelevant because no reasonable reader would interpret them as anything but rhetorical hyperbole, id. at 36. The Supreme Court, however, refused to follow that doctrinal path because to do so “would effectively leave victims of personally abusive speech without legal remedy,” id. at 36-37. See also infra notes 210-14.
102 130 S.Ct. 1737 (2010) (granting *certiorari*).
105 See Brief of Scholars of First Amendment Law as Amici Curiae in Support of Respondents at 7, Snyder v. Phelps, 09-751 (2010).
107 Joining the Reporters Committee, among others, were the Society of Professional Journalists, the New York Times Co., the American Society of News Editors, the Association of American Publishers, the Citizen Media Law Project, E.W. Scripps Co., and the Newspaper Association of America. Id. at ii.-iii.
These free speech advocates were wrong. While free speech is important, and while even obnoxious speech must be protected in order to preserve the freedom for “speech that matters,” much that has been written about the Snyder case is simply in error. The elements of the tort of intentional infliction of emotional distress have been misstated, the potential damage to freedom of expression on matters of public concern has been greatly exaggerated, and, inexplicably, damage to newsgathering has been trumpeted as a reason the Court should uphold a finding that Albert Snyder should not be awarded damages for the church’s attacks on him and his family. Though Chief Justice Roberts mischaracterized the case, former Justice John Paul Stevens recognized it for what it was. Speaking at an annual law day celebration sponsored by the Federal Bar Council, Justice Stevens said that he would have joined Justice Samuel Alito’s dissent “in the recent case holding that intentional infliction of severe emotional harm is constitutionally protected speech.” That is, Justice Stevens recognized that the case involved intentional infliction of emotional distress rather than simply controversial or unpopular speech.

Chief Justice Roberts found that the case “turns largely on whether. . . speech is of public or private concern, as determined by all the circumstances of the case.” The Free

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109 See Brief of the Reporters Committee, supra note 103, at 2. The fear that a finding for Snyder might harm newsgathering is apparently based on the concern that news organizations covering groups like the Westboro Baptist Church might become the targets of lawsuits by offended viewers. There is little support for the concern. Though Albert Snyder was alerted to the church’s activities by news reports, no media organization or reporter was ever a party to the suit, and could not be a party to an intentional infliction suit under such circumstances. Intentional infliction suits are designed to seek redress because of a targeted attack, rather than the dissemination of information. See infra notes 147-57 and accompanying discussion.
110 See supra notes 2-3 and accompanying discussion.
112 See infra notes 139-46 and accompanying discussion.
Speech Clause of the First Amendment, he wrote, “can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.”\(^{113}\)

The boundaries of the public concern test are not well defined, Chief Justice Roberts wrote, but the Court has established some guiding principles.\(^{114}\) The Court is obligated to make an independent examination of the whole record and consider the content, form and context of the speech. “No factor is dispositive and it is necessary to evaluate all the circumstances of the speech,” he wrote, “including what was said, where it was said, and how it was said.”\(^ {115}\)

The Court held that the content of the protest “plainly relates to broad issues of interest to society at large.” Though the Court found it of no significant import that church members spoke “in connection with a funeral,” it was important that the protest took place on public land.\(^ {116}\) Chief Justice Roberts noted that Albert Snyder had proved he had suffered severe emotional distress,\(^ {117}\) but found that public streets occupy “a special position” in terms of First Amendment protection, and a peaceful picket about matters of public concern in such a place is protected.\(^ {118}\) This, despite the fact that the church was using the funeral primarily to spark publicity for its views. “Simply put, the church members had the right to be where they were,” the chief justice wrote.\(^ {119}\) Similarly, Chief Justice Roberts found it irrelevant that Snyder was able to prove that he suffered severe emotional distress by means of a targeted attack. Even if a few of the signs were viewed

\(^{113}\) 131 S.Ct. 1207, 1215 (2011). Chief Justice Roberts cited Hustler v. Falwell, 485 U.S. 46, 50-51 (1988), but the cited material supports his recitation of the burden of proof and not the proposition that the First Amendment is a defense in state tort actions.
\(^{114}\) Id. at 1216.
\(^{115}\) Id.
\(^{116}\) Id. at 1217.
\(^{117}\) Id. at 1217-18.
\(^{118}\) Id. at 1218.
\(^{119}\) Id.
as containing messages related to Matthew Snyder or the Snyders specifically, he wrote, “[T]hat would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”

Chief Justice Roberts also rejected outrageousness as a test in private-person intentional infliction cases, calling it “a highly malleable standard” with “inherent subjectiveness.” Westboro was punished because of the content of its speech, he wrote, but the nature and location of the speech demanded special protection under the First Amendment.

Justice Stephen Breyer wrote a concurring opinion to emphasize that states are not powerless to provide private individuals with tort law protections, and that the Opinion of the Court does not touch on issues raised by Internet postings or broadcast television. A state can regulate picketing, even on matters of public concern, he wrote. As an example, he noted that a person who engaged in physical assault could be punished, even if the purpose of the assault was to gain publicity. Similarly, picketing that engaged in the use of certain words could be punished. Though Justice Breyer seemed to have some concern about possible limits on the tort of intentional infliction, he wrote that the

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120 Id. at 1217.
121 Id. at 12 (citing Hustler, 485 U.S. 46, 55 (1988)).
122 Id. at 1219. The Court also held that Albert Snyder was not part of a captive audience and, therefore, there was no intrusion. Id. at 1219-20. In addition, because there was no tort liability for either intentional infliction of emotional distress or intrusion, there could be no conspiracy. Id. at 1220. These holdings are not disputed in this article.
123 Id. at 1221 (Breyer, J., concurring).
124 Id. (Breyer, J., concurring).
125 See Shulman, supra note 101, at 39; Posting of Danielle Criton to http://www.concurringopinions.com (Mar. 6, 2011, 2:44 p.m.).

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holding was narrow. The Opinion of the Court, he wrote, “does not hold or imply that the State is always powerless to provide private individuals with necessary protection.”

Only Justice Samuel Alito objected to the rule insulating verbal attacks on private persons. “Our profound national commitment to free and open debate is not license for the vicious verbal assault that occurred in this case,” he wrote. The church planned and “launched a malevolent verbal attack... at a time of acute emotional vulnerability,” he wrote. “Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents’ right to brutalize Mr. Snyder.”

Justice Alito pointed out that a case for intentional infliction of emotional distress can be made based on speech, but that the burden of proof is very difficult. Nevertheless, he wrote, “[R]espondents long ago abandoned any effort to show that those tough standards were not satisfied here.”

The Snyders were targeted by outrageous conduct, Justice Alito wrote. The church’s strategy of getting attention by picketing funerals works “because it is expected that respondents’ verbal assaults will wound the family and friends of the deceased” and thereby draw media attention. The more outrageous the protest, the more the attention. In addition, the meaning of the signs used in the protest could not be missed. Because the

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126 Justices have been disappointed by interpretations of so-called “narrow” holdings. See, e.g., Justice John Paul Stevens’s reaction to the misinterpretation of FCC v. Pacifica Found., 438 U.S. 726 (1978), by the Court in FCC v. Fox Television Stations, 129 S.Ct. 1800, 1827 (2009) (Stevens, J., dissenting). Justice Lewis Powell concurred in Pacifica, specifically to note that the narrow holding in that case, 438 U.S. at 168 (Powell, J., concurring in part and in the judgment). The interpretation of the case, however, was not narrow. See W. Wat Hopkins, When Does F*** Not Mean F***: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech, 64 FED. COMM. L.J. ___ (forthcoming 2011).

127 131 S.Ct. at 1221 (Breyer, J., concurring).
128 Id. at 1222 (Alito, J., dissenting). See also Sacks, supra note 2, at 65 (writing that the Court has created “a category of absolutely protected speech” with virtually no guidance as to how “the speech-tort line will be drawn”).
129 Id. at 1223 (Alito, J., dissenting).
130 Id. (Alito, J., dissenting). See also supra note 12.
131 Id. at 1224 (Alito, J., dissenting).
church chose to protest a particular funeral rather than at countless other available venues, “[A] reasonable person would have assumed that there was a connection between the messages on the placards and the deceased.” And since a church funeral raises thoughts of the afterlife, messages like “God Hates You” would very likely have been “interpreted as referring to God’s judgment of the deceased.” Other signs would have been interpreted as falsely suggesting that Matthew Snyder was gay.\textsuperscript{132}

Justice Alito wrote that it is “abundantly clear” that church members went “far beyond commentary on matters of public concern” and “specifically attacked” the Snyders. Both Matthew and Albert Snyder were private figures, he wrote, and the speech was not on a matter of public concern.\textsuperscript{133} Indeed, adopting the analogy advanced by Justice Breyer, Justice Alito found the protest to be a verbal assault that could not be insulated by the act that it occurred on public property.\textsuperscript{134}

Justice Alito also criticized the majority for its failure to consider the video as part of the case:

The protest and epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress. The Court’s strange insistence the epic “is not properly before us”... means that the Court has not actually made “an independent examination of the whole record”... And the Court’s refusal to consider the epic contrasts sharply with its willingness to take notice of Westboro’s protest activities at other times and locations.\textsuperscript{135}

\textsuperscript{132} \textit{Id.} at 1225 (Alito, J., dissenting).
\textsuperscript{133} \textit{Id.} at 1226 (Alito, J., dissenting).
\textsuperscript{134} \textit{Id.} (Alito, J., dissenting).
\textsuperscript{135} \textit{Id.} at 1227 n.15 (Alito, J., dissenting).
The Court’s opinion was based on three reasons, Justice Alito wrote, none of which was sound. First, the Court found the speech to relate to matters of public concern, which Justice Alito disputed. This was a personal attack, he wrote, and “I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected.”\textsuperscript{136} Such a juxtaposition is not allowed in defamation law, and it shouldn’t be allowed here. Second, the Court found no personal grudge between the Snyders and the Westboro Church, a holding Justice Alito found irrelevant. Finally, the Court found significant the fact that the protest occurred on a public street. There is no reason, Justice Alito wrote, why a public street near a funeral “should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability.”\textsuperscript{137}

The church engaged in outrageous conduct that caused great injury, Justice Alito wrote: “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.”\textsuperscript{138}

**WESTBORO BAPTIST CHURCH AND INTENTIONAL INFLICTION**

*Snyder v. Phelps* is easy to mischaracterize. Free speech advocates contend, for example, that the tort of intentional infliction of emotional distress allows recovery for the publication of material that is merely offensive,\textsuperscript{139} that it would establish an

\textsuperscript{136} Id. (Alito, J., dissenting).
\textsuperscript{137} Id. (Alito, J., dissenting).
\textsuperscript{138} Id. at 1228 (Alito, J., dissenting).
offensiveness exception,\textsuperscript{140} or that it would allow recovery based on listeners’ emotional reactions to speech.\textsuperscript{141} Indeed, an attorney for the Reporter’s Committee for Freedom of the Press, glowing over the decision, said that a holding for Snyder “would have threatened a great deal of public debate on controversial topics if any listeners could show they were personally distressed to hear unpleasant speech.”\textsuperscript{142}

Similarly, Fourth Circuit Judge J. Harvie Wilkinson III wrote that the intentional infliction tort allows for damages “for no other reason than hurt feelings.”\textsuperscript{143} Daniel Solove writes that the fact that a person becomes “very upset” by speech is outweighed by the need to provide First Amendment protection for expression,\textsuperscript{144} and Rodney Smolla would support a rule that, in order for damages to be awarded in a speech case, there must be palpable evidence of some harm “other than” emotional distress.\textsuperscript{145} In addition, the Thomas Jefferson Center for the Protection of Free Speech, in an amicus brief to the Fourth Circuit supporting the Westboro church, argued that, even though the content of the views expressed may have constituted “extreme and outrageous conduct,” because the claim was “based entirely on distaste for the Phelps’ views,” the messages should enjoy First Amendment protection.\textsuperscript{146}

None of those characterizations aligns with the tort of intentional infliction of emotional distress, which has nothing to do with simply unpleasant speech or speech that is merely offensive or upsetting. To win an intentional infliction case, a plaintiff must

\textsuperscript{140} Brief of the Reporters Committee, supra note 103, at 4.
\textsuperscript{141} Id. at 10. See also Press Release, supra note 4.
\textsuperscript{142} Press Release, supra note 4.
\textsuperscript{143} Falwell v. Flynt, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissenting from the denial of rehearing en banc).
\textsuperscript{145} Smolla, supra note 33, at 8.
\textsuperscript{146} Amicus Brief of the Thomas Jefferson Center, supra note 139, at 30.
prove: (1) the defendant’s conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; (4) the emotional distress was severe.\textsuperscript{147} “Extreme and outrageous” is significantly different from “offensive.”\textsuperscript{148}

The impact of the speech must extend well beyond mere upset feelings, and the actions of the speaker must extend well beyond simply being offensive.\textsuperscript{149} “Even if the defendant’s conduct is outrageous and intentional,” First Amendment scholar Robert E. Drechsel writes, “liability will not attach unless the emotional distress is severe.”\textsuperscript{150} The distress “must be far more than minor discomfort.”\textsuperscript{151} Indeed, the Kansas Supreme Court recently held that the absence of psychiatric or medical treatment “weighs against a finding of extreme emotional distress.”\textsuperscript{152} An award of damages cannot be made, the court held, simply because of “elevated fright, continuing concern, embarrassment, worry and nervousness.”\textsuperscript{153} The tort, “Is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.”\textsuperscript{154} The Restatement (Second) of Torts reports that “the law intervenes only where the distress

\textsuperscript{147} See Hustler, 485 U.S. 46, 50 n.3 (1988) (citing 797 F.2d 1270, 1275 n.4 (4th Cir. 1986) (citing Womack v. Eldridge, 210 S.E.2d 145 (Va. 1974))). See also RESTATEMENT (SECOND) OF TORTS § 46 (1977) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”).


\textsuperscript{149} See, e.g., Bass v. Hendrix, 931 F. Supp. 523, 531 (S.D. Ohio) (noting that mere insults and hurt feelings are insufficient to sustain liability); Valadez v. Emmis Commc’ns, 229 P.3d 389, 394 (Kan. 2010) (“The law will not intervene where someone’s feelings merely are hurt.”).


\textsuperscript{151} Id. at 346.

\textsuperscript{152} Valadez, 229 P.3d at 395.

\textsuperscript{153} Id. See also Bass v. Hendrix, 931 F. Supp. 523, 532 (S.D. Tex. 1996) (indicating that symptoms like psychological problems, suicidal tendencies and post-traumatic stress would be required for a finding of severe emotional distress).

\textsuperscript{154} William Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 MICH. L. REV. 874, 874 (1939), quoted in Drechsel, supra note 150, at 339.
inflicted is so severe that no reasonable man could be expected to endure it.”

One court reported that “[The] conduct must be outrageous to the point that it goes beyond the bounds of decency and is utterly intolerable in a civilized society.”

The speech is being used as a weapon, and – like “false rumors [and] invasions of privacy” — such “direct attacks” should be actionable.

Proving the elements of the burden of proof for intentional infliction of emotional distress is an onerous task that extends well beyond showing offensiveness or hurt feelings. Yet, the conduct of the members of Westboro Baptist Church and the results of that conduct fulfill the elements of that burden. The church, which has made a practice of picketing the funerals of dead military personnel because members believe such protests to be a particularly effective means of conveying their message, issued a press release and traveled from Kansas to Maryland in order to picket at Matthew Snyder’s funeral, carrying with them an arsenal of signs aimed at the Snyders. Church members later posted on the church’s Web site a video attacking the Syders. The conduct, therefore, was intentional.

There is little dispute that the activities of the church members were outrageous. The signs they selected specifically targeted the Snyder funeral – the signs identified the Snyders as living in Maryland and attacked them because they were Roman Catholics.

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156 Valadez, 229 P.3d at 394.
157 Solove, supra note 144.
160 The Thomas Jefferson Center for the Protection of Free Expression is one disputant to the proposition. In a brief supporting the Westboro church, the center argued that the picketing was neither extreme nor outrageous. Amicus Brief of the Thomas Jefferson Center, supra note 139, at 16.
and because Matthew Snyder was a Marine. A video of their activities produced by a British journalist and posted on YouTube demonstrates not only the outrageous behavior of the church members, but their intent to be outrageous.

Church members may have taken no specific action to draw the attention of Albert Snyder to the video posted on the church’s Web site, but that is irrelevant. No one associated with Hustler magazine notified Jerry Falwell of the parody or drew his attention to it. One would not expect Falwell to be a reader of Hustler, and he became aware of the attack because of questions from a reporter, just as Snyder became aware of the church’s activities when he watched a news program. By virtue of publishing the parody, Hustler had demonstrated its intent to cause severe emotional distress. Similarly, the highly publicized demonstration followed by the publication of the video on the Internet ensured notice of the attack to millions of people – certainly to more people than the single issue of Hustler magazine could reach.

In addition, evidence of Snyder’s emotional distress, as Chief Justice Roberts noted, was compelling. He testified that he is often tearful and angry and becomes so sick that he actually vomits. He said he cannot separate thoughts of his son from the signs at the demonstration, and that he believes his emotional injury to be permanent.

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161 See Brief of Petitioner for Writ of Certiorari, supra note 77, at 4. Daniel Solove writes that Westboro’s speech was not directed at a particular individual. Solove, supra note 144. This selection of signs, however, seems to at least establish the likelihood that persons were, indeed, targeted. See supra note 77.

162 Westboro Baptist Church, supra note 68.

163 The Thomas Jefferson Center argues that the posting of the video was “entirely lawful,” and the church is not liable for exercising its “legal rights in a permissible way.” Brief of the Thomas Jefferson Center, supra note 104, at 20.

164 See SMOLLA, supra note 24, at 1.

165 Though the statistics are now out of date, Reno v. ACLU, 521 U.S. 844, 849-52 (1997), provides a nutshell report of how the Court views the Internet and the content distributed thereby.


167 Snyder v. Phelps, 533 F. Supp. 2d 567, 588-89 (D. Md. 2008). Much of this description was also quoted by the Fourth Circuit, 580 F.3d 206, 213 (4th Cir. 2009).
The district court judge also reported that Snyder was often reduced to tears during the trial, was “visibly shaken and distressed,” and was granted the opportunity several times to leave the courtroom to compose himself. “The jury,” the judge wrote, “witnessed firsthand Plaintiff’s anguish and the unresolved grief he harbors because of the failure to conduct a normal burial.”

In addition, expert witnesses testified that Snyder’s diabetes had worsened and his depression deepened as a result of the actions by church members, “thereby preventing him from going through the normal grieving process.”

The burden of proof for intentional infliction of emotional distress is narrow and onerous, but Albert Snyder clearly met that burden. The Supreme Court, however, and applied a subject-matter test in such cases, rather than a public/private person test, raising the bar for any private people who become subject to verbal attacks.

**Analysis**

The Supreme Court has established that under the First Amendment speech cannot be punished because it embarrasses, offends, or causes hurt feelings, even if the very purpose of the speech is to cause offense. The Court has recognized that “not all speech is of equal First Amendment importance.” Fighting words and obscenity,

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168 Id. at 589.
169 580 F.3d at 213-14.
171 See Hustler v. Falwell, 485 U.S. 46, 53 (1988) (The art of the editorial cartoonist, for example, “is often not reasoned or evenhanded, but slashing and one-sided;” it is a weapon of attack, scorn, and ridicule.); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”).
for example, have no First Amendment protection, while commercial speech,\textsuperscript{175} indecent speech,\textsuperscript{176} intimidating speech,\textsuperscript{177} and speech of “purely private concern”\textsuperscript{178} are protected, but have less protection than speech involving matters of public concern. Personal abuse, like fighting words and obscenity, “is not in any proper sense communication of information or opinion safeguarded by the Constitution.”\textsuperscript{179}

\textit{Snyder} changed the rules of the game.\textsuperscript{180} While court-watchers are unsure about the significance of the case,\textsuperscript{181} it seems clear that it has eviscerated what had been a reasonable balance between the interests of private persons and the need to protect robust debate about matters of public concern. There is no dispute that libel law is mired with problems in both theory and practice. Differentiating between private and public figures\textsuperscript{182} and between matters of public and private concern are among those problems.\textsuperscript{183} Definitional problems aside, however, a strong argument can be made that private persons – however they are defined – should not confront the same onerous burden of proof as public figures or public officials. It’s clear that public people voluntarily inject


\textsuperscript{178} Dun & Bradstreet, 472 U.S. 749, 759 (1985).

\textsuperscript{179} Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

\textsuperscript{180} A common reaction to the case by many Court watchers is that it adds very little to the debate over how to reconcile free speech with tort liability, see Sacks, supra note 2, at 66, and that it leaves many questions unanswered, see Richards, supra note 62.

\textsuperscript{181} One commenter wrote, for example, that the decision “might define the term,” and that it constitutes a new chapter on unpopular speech, Robert Barnes, Justices Allow Funeral Protests, WASH. POST, Mar. 3, 2011, at A1, while another found it “eminently predictable” and that it broke no new ground, Posting of Kevin Golbert at http://www.comlawblog.com (Apr. 13, 2011, 8:20 p.m.).

\textsuperscript{182} See Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARBOR. 601 669 (1990) (writing that, though the public official branch of the public person distinction is relatively clear, the public figure branch “is ambiguous, half justified by the notion that speech about public figures is normatively relevant to democratic self-governance, and half by the notion that speech about public figures concerns matters of ‘notoriety’ that have, in a purely descriptive sense, already caught ‘the public’s attention’”).

\textsuperscript{183} See id. at 670 (writing that the Court itself demonstrated the difficult task of determining what matters are of public concern by rejecting the Rosenbloom rule in Gertz).
themselves into matters of public concern and part of assuming public-person status is the willingness to accept such a risk.\textsuperscript{184}

Private people on the other hand, are private. Arguably they sometimes are involuntarily embroiled in matters of public concern, and when that happens, possibly, they should face the same burdens as public persons.\textsuperscript{185} When they are targets, however, even though they are only bystanders, it is both unfair and legally illogical to saddle them with the same burdens as public persons, even when the issues used to attack them involve matters of public concern. Whatever logic one may argue for the existence of “involuntary public figures” in libel law, that logic does not apply to intentional infliction of emotional distress.\textsuperscript{186} Indeed, until \textit{Snyder}, the Court so recognized.\textsuperscript{187}

\textit{Hustler v. Falwell} provided significant protection against lawsuits brought by persons who enter the fray of public debate, but it did not gut intentional infliction of emotional distress as applied to private persons. \textit{Hustler} altered some aspects of the tort, but it left others intact. The Court, as Smolla writes, “was quite careful to limit the decision to public officials and public figures.”\textsuperscript{188}

In addition, Robert Post writes, “It cannot be that \textit{Falwell} absolutely protects all verbal means of intentionally inflicting emotional distress, all forms of racial, sexual, and religious insults, so long as the offending communications do not contain false factual statements.”\textsuperscript{189} That is, the case did not eliminate the tort – though it may have done so as a practical matter for public persons. Jerry Falwell would have won his case, had it not

\begin{footnotesize}
\textsuperscript{184} See W. Wat Hopkins, \textit{The Involuntary Public Figure: Not So Dead After All},” 21 CARDOZO ARTS & ENT. L.J. 1, 23-27 (2003).
\textsuperscript{185} See \textit{id.} at 44-49
\textsuperscript{187} See \textit{supra} notes 50-59 and accompanying discussion.
\textsuperscript{188} Smolla, \textit{supra} note 33, at 427.
\textsuperscript{189} Post, \textit{supra} note 182, at 662.
\end{footnotesize}
been for the heightened burden of proof imposed by the Court. Indeed, Falwell did win his case until that burden was imposed. First Amendment scholar Diane L. Borden also suggests that the “invisible” person in the case – Falwell’s mother, Helen – would have won an intentional infliction case, had she been alive when the parody was published. Clearly, she would not have won under Snyder. Though she was a private person and not involved in the debate over pornography, she was fair game under the Court’s new rule: The outcome of a case is controlled by the fact that an attacker may target a private person not involved in matters of public concern so long as the attack is cloaked in the garb of matters of public concern and takes place in a public sphere.

Even though the Court did not specifically address private persons in Hustler, Borden points out, that does not mean they are not implicated by the decision. To the contrary, she notes, “[I]f the Court’s logic were to be consistent, a private person would be required to meet a lower standard of fault than would a public person.” The extension of that logic, another authority writes, would mean private persons would have to prove actual malice in order to recover punitive damages for intentional infliction of emotional distress. Indeed, some courts have applied just that logic, holding that private persons bringing suits for intentional infliction of emotional distress face a more stringent burden of proof in some circumstances.

192 Borden, supra note 190, at 314.
193 See Bentley, supra note 191, at 840.
Chief Justice Roberts, however, took a different route, avoiding the issue of intentional infliction of emotional distress and diverting the case to one focusing on matters of public concern. Clearly the chief justice didn’t want to extend the balance established in intentional infliction cases by the *Hustler* Court, but the question was how the *Snyder* Court could avoid the public/private issue that had been so prevalent in tort law. It did so in large part by picking and choosing the facts and the law to be applied to those facts. Chief Justice Roberts, for example, addressed the issue of outrageousness, finding it insufficient as an element of the burden of proof, one of the Court’s few acknowledgements to *Hustler*. However, outrageousness was found insufficient in *Hustler* in order to preserve the breathing space necessary for public discourse. The direct result was that public persons were assigned an expanded burden of proof – the actual malice test. That rationale does not apply to private persons not involved in such debates – there is no breathing space to preserve in the absence of a debate.

Second, the Court chose to avoid the issue raised by the video attack on Snyder and thereby, as one authority wrote, decided half the case. Chief Justice Roberts wrote that the Court was not considering the video, but his explanation is not satisfying: The Snyders had not made a strong enough argument for its inclusion, and the posting on the

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195 *See* Shulman, *supra* note 101, at 38.
196 *131 S.Ct. 1207*, 1219 (2011). Except for the citation referenced at *supra* note 113, Chief Justice Roberts cites *Hustler* only once, *131 S.Ct. at 1215*, reporting that the Court had held that “not all speech is of equal First Amendment performance.”
197 *See supra* notes 27-28 and accompanying discussion.
198 *See* Sacks, *supra* note 2, at 64.
Justice Alito wrote that the requirement, acknowledged by the Court, that it make “an independent examination of the whole record,” mandated that it consider the video. In addition, he wrote, the video was part of the evidence that the jury considered, and the protest and video were “parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress.” Indeed, Craig Trebilcock, one of Snyder’s attorneys, said the case hinged on the video. Without it, Trebilcock said, the case is merely “a group with unpopular signs on a street corner.” If that had been Snyder’s entire case, “[W]e might not even have brought the case because mean people with unpopular signs on a street corner is generally recognized as First Amendment protected.”

Even without the video, however, Jeffery Shulman writes that there was a personal nature to the protest, one Chief Justice Roberts avoided by holding that those personal attacks were of a public nature. In so doing, the chief justice watered down the tort of intentional infliction of emotional distress. Under the Court’s tort law jurisprudence, Shulman wrote, for the church to be protected, there must be something about Snyder’s conduct that would allow speech to be directed at him, but there was no

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199 131 S.Ct. at 1214 n.1. Chief Justice Roberts wrote that Snyder did not include arguments about the video in the petition for certiorari and only devoted one paragraph to the video in the argument section of the opening merits brief. *Id.*

200 *Id.* at 1226 (Alito, J., dissenting).

201 *Id.* at 1226 (Alito, J., dissenting).


203 *Id.* Jeffery Shulman agreed. He wrote that ignoring the video meant the Court the case on “half the record.” Shulman, *supra* note 101, at 36. Shulman also wrote that by not considering the epic, the Court “took most of the good constitutional stuff” out of the case. *Id.* at 35. *See also* Sacks, *supra* note 2, at 65 (writing that ignoring the video left many questions unanswered).

204 Shulman, *supra* note 101, at 36-37.

205 *Id.* at 37.
demonstrable connection between the Snyders and the church.\textsuperscript{206} Courts resolving cases involving involuntary public figures have agreed.\textsuperscript{207} Chief Justice Roberts found the speech protected, despite the personal attack, because of its “overall thrust and dominant theme.”\textsuperscript{208} He did not explain why the “overall thrust” outweighed the series of individual attacks on the Snyders, but one might expect that the reason was that such a focus helped define the speech as being on matters of public concern rather than a targeted attack.\textsuperscript{209}

A focus on the issues presented – tort law in general and intentional infliction of emotional distress in particular – would have required the Court to either follow its precedent or explain why it was overruling, distinguishing or modifying that precedent. Prior to Snyder, as has been demonstrated, there was a balance between speech on matters of public concern and speech aimed at private persons. Because of a compelling state interest in protecting private persons not involved in such matters, the Court crafted a rule that granted such people additional protection.\textsuperscript{210} Even if the public concern test is better than the public/private person test when applied to public persons in intentional infliction cases – and it may be\textsuperscript{211} – Snyder v. Phelps provided little guidance on when speech is public or private.\textsuperscript{212} Indeed, as some scholars have indicated, the ruling is likely to rule out liability for intentional infliction of emotional distress cases when a court

\textsuperscript{206} Id. at 38.
\textsuperscript{207} See Hopkins, supra note 184, at 44-45 (writing that some courts have found libel plaintiffs to be involuntary public figures if they take actions that are likely to be scrutinized or publicized, even if they do not voluntarily enter the public eye).
\textsuperscript{208} 131 S.Ct. 1207, 1217 (2011).
\textsuperscript{209} See Wasserman, supra note 60.
\textsuperscript{210} See supra notes 50-54 and accompanying discussion.
\textsuperscript{211} See, e.g., Rosenbloom v. Metromedia, 403 U.S. 23, 43 (1971) (plurality) (“If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved.”). Some scholars would disagree. See, e.g., Stephen J. Mattingly, Drawing a Dangerous Lie: Why the Public-concern Test in the Constitutional Law of Defamation is Harmful to the First Amendment, and What Courts Should Do About It, 47 U. LOUISVILLE L. REV. 739 (2009).
\textsuperscript{212} See Sacks, supra note 2, at 65; Wasserman, supra note 60.
determines that the offending speech is about a matter of public concern, while, at the same time, insulating severely emotionally damaging speech aimed at strangers by publicity seekers.

This “significant shift” in the law is based on a set of facts that does not involve public debate. While the rights and privileges of gay persons and the war in Iraq are certainly matters of important public concern, the facts of the case do not indicate that the plaintiff was involved in the debate. Albert Snyder was a private person who became the target of an expressive attack without voluntarily entering a public debate, or, as a matter of fact, without participating in a public debate at all. As the Court made clear in Gertz, whether a libel case relates to matters of public concern is irrelevant when the plaintiff is a private figure. And, as the Court made clear in Hustler, only public figures and public officials face a heightened burden of proof in cases of intentional infliction of emotional distress. When private persons bring such suits, the heightened burden is not an issue, and, therefore, whether offending language involves matters of public concern or whether the language constitutes statements of fact or statements of opinion is irrelevant. The question is whether the publisher – through action or speech – succeeded in intentionally inflicting serious emotional harm on a specific person, and whether the conduct or speech is outrageous.

The same buffer between public and private persons that exists in libel and privacy law should apply in cases involving intentional infliction of emotional distress. It does not advance the cause of free expression to allow outrageous attacks on private

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213 See Richards, supra note 62.
214 See Criton, supra note 125.
215 Wasserman, supra note 60.
216 See Snyder v. Phelps, 580 F.3d 206, 223 (4th Cir. 200 ); Shulman, supra note 36, at 314.
persons who have not entered the fray of public debate. Similarly, as Jeffrey Shulman notes, “The speech-based emotional distress suit does not operate to restrict public discourse; it restricts only the use of speech to inflict injury, the use of words as weapons.” The purpose of the tort was to allow recovery for exactly the kind of speech targeted at Albert Snyder by the Westboro Baptist Church. The effect of the holding is to create a type of Catch-22 for the Snyders: If the speech was not about them, it was protected as a matter of public concern; if it was about them, it was protected as hyperbolic rhetoric.

Justice Breyer seemed to recognize these infirmities. He wrote that the Opinion of the Court does not hold that the state is powerless to provide private individuals with protection. The argument rings hollow, however. In what circumstances would the Court hold that a plaintiff had proved intentional infliction of emotional distress? The attack would have to be outside the view of the public. Despite Chief Justice Roberts’ objection to Justice Alito’s use of the term “free-fire zone” to describe public space under Snyder, the Opinion of the Court reports that Westboro Baptist Church was protected, in part, because the offending speech occurred in a place where the protesters “had the right to be[].” Private people therefore, are not likely to have a remedy when verbally

217 Shulman, supra note 36, at 124.
218 Id. at 37
219 131 S.Ct. at 1221 (Breyer, J., concurring).
220 Justice Alito, in his dissent, criticized the Court for creating a “free-fire zone” on the public streets in which “otherwise actionable verbal attacks are shielded from liability.” Id. at 1227 (Alito, J., dissenting). Chief Justice Roberts responded by writing that the characterization was wrong. There is no free-fire zone, he wrote, but Westboro’s actions on a public street “heightens concerns that what is at issue is an effort to communicate to the public the church’s views on matters of public concern.” Id. at 1218 n.4.
221 Id. at 1218.
attacked, if the attack is cloaked in the garb of matters of public concern and takes place in public. 222

CONCLUSION

The speech of the Westboro Baptist Church is problematic, not because it involves matters of public concern. The speech is not utterly without redeeming social value, nor is it knowingly false; it may be speech that matters. Indeed there is some evidence that the activities of the church promote positive speech. Responses to the church’s demonstrations have included welcoming songfests 223 and prayer meetings. 224 The speech is problematic because it constituted a verbal assault. It could have been held to constitute fighting words, that is, words that “by their very utterance inflict injury or tend to incite an immediate breech of the peace.” 225 Even if the face-to-face confrontation of fighting words is not present in the Snyder case, one could clearly argue that the words used by church members inflicted injury by their very utterance. Since the Court enunciated the fighting words doctrine in 1942, however, it has not upheld a conviction under the fighting words doctrine in any case, 226 suggesting that the concept is no longer viable. As an alternative, the speech of the church was certainly “[p]ersonal abuse,” that is, speech the Court has held “is not in any proper sense communication of information or

222 Id. See also Criton, supra note 125; Richards, supra note 62.
226 See Note: The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment, 106 HARV. L. REV. 1129, 1129 (1993). See also Hopkins, supra note 126, at *32-37 (writing that the Court has interpreted Chaplinsky narrowly to the point of eviscerating the doctrine established by the case).
opinion safeguarded by the Constitution."227 If the fighting words doctrine is dead, however, the Court is not likely to allow liability for speech that falls into the category of “personal abuse,” leaving intentional infliction of emotional distress Snyder’s only remedy for the verbal attack.

_Hustler_ and _Snyder_ are very different cases, but neither involved speech that was being advanced as the truth. There was no doubt that the dispute in _Hustler_ involved matters of public concern,228 and the Court provided extra protections for parties in a debate by requiring a heightened burden of proof for public person disputants. The _Snyder_ Court, on the other hand, diverted the issue from intentional infliction of emotional distress and ignored the public/private distinction, finding that a holding that offending speech involves matters of public concerns trumps all other factors, which is unfortunate. Intentional infliction of emotional distress could provide private people with protection against unwarranted attack from persons who were not attempting to engage in a public debate but simply to gain attention. One has trouble imagining why a group would attack an innocent bystander for any but self-serving motives, and such attacks do not deserve First Amendment protection.

The Court easily could have used _Hustler_ as the foundation for a rule that did not eliminate the balance between the rights of speakers and the private persons they attack. Rather than providing absolute protection when offending speech appears to involve matters of public concern, the Court could have established that First Amendment protection applies when the speech both involves matters of public concern and is targeted at public officials or public figures – or at private persons engaged in the debate.

228 See SMOLLA, supra note 24, passim.
The rule has its foundation in *Hustler* and *Gertz* and is applicable to *Snyder*. The rule would not impact protesters who speak on matters of public concern without brutalizing private persons who are not involved in the debate.

Albert Snyder was not embroiled in debate over a matter of public concern when attacked by the Westboro Baptist Church – he was a mourning father doing no more than attempting to bury his son in peace. That right was denied him because of the designed efforts of church members to intentionally inflict upon him severe emotional distress. The boundaries of intentional infliction cases are narrowly drawn and, as such, provide protection for private people without burdening the guarantees of free speech and a free press. The balance provided by the tort of intentional infliction of emotional distress is lost, thanks to *Snyder v. Phelps*. That balance did not significantly inhibit free speech, but its loss serves to inhibit the rights of private people to be free from brutal, unwarranted attacks.