February 9, 2012

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

WW Hopkins, Ph.D., Virginia Tech

Available at: https://works.bepress.com/ww_hopkins/2/


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

**W. Wat Hopkins**

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, whether the church had caused severe

---

1 Professor, Department of Communication, Virginia Tech.

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 (writing 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).

3 131 S.Ct. 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*
emotional distress through an intentional and outrageous attack on a private person.\(^5\) A federal jury found that it had, awarding Albert Snyder, the father of the Marine at whose funeral the church members held a protest, $2.9 million in compensatory and $8 million damages.\(^6\) To characterize the case as being about picketing would be akin to casting \textit{Hustler Magazine v. Falwell},\(^7\) 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.\(^8\) 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,\(^9\) but he did not mention the tort of intentional infliction of emotional

\footnotesize{http://www.rcfp.org (writing that the case was based on controversial speech about matters of public concern). \textit{See also infra} notes 146-53 and accompanying text.}

\(^5\) \textit{See} \textit{Hustler Magazine v. Falwell}, 485 U.S. 46, 50 n.3 (1988); \textit{RESTATEMENT (SECOND) OF TORTS} § 46 (1977). \textit{See also infra} note 11 and discussion accompanying \textit{infra} notes 17-20, 154-75.

\(^6\) Snyder v. Phelps, 533 F. Supp. 2d 567, 574 (D. Md. 2008). The jury also found for Snyder on claims of intrusion and conspiracy. \textit{Id.} The district court reduced the punitive damages to $2.1 million. \textit{Id.} at 571.

\(^7\) 485 U.S. 46 (1988).

\(^8\) 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 and was part of the record. \textit{See} 131 S.Ct. at 1214 n.1; \textit{id.} at 1226 n.15 (Alito, J., dissenting). \textit{See also infra} notes 205-10 and accompanying discussion.

\(^9\) 131 S.Ct. at 1213.
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 Chief Justice Roberts’ opinion – an opinion that will make it difficult, if not impossible, for private persons to win 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. Albert Snyder clearly proved his case against the Westboro Baptist Church to the jury, and the district court affirmed. The Court paid scant attention to the tort, however, ignored its own precedent, and

10 Id. at 1215.
11 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 17-20, 154-64.
12 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. He did not discuss the element of intent or recklessness.
13 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.
14 Westboro Baptist Church has admitted that its primary goal in protesting at military funerals is to gain publicity. See infra notes 75-76 and accompanying discussion.
16 Hustler altered the burden of proof in intentional infliction cases for public officials and public persons, but did not address the tort as applied to private persons. See discussion accompanying infra notes 195-201.
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 *Snyder*, intentional infliction of emotional distress, as a speech-based tort, is all but dead.

**HUSTLER, INTENTIONAL INFlictION OF EMOTIONAL DISTRESS AND PRIVATE PERSONS**

The Supreme Court, prior to *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. While the burden of proof generally refers to conduct, the tort has commonly been applied to speech-based offenses, as it was in *Hustler v. Falwell*.

In *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 distress. The Court overturned a $200,000 verdict against the magazine for the publication of an attack aimed at the Rev. Jerry Falwell. *Hustler* had published a parody

---


19 See id. at illus. 1.


21 Id. at 56. Justice Anthony Kennedy took no part in the case, id. at 57; Justice Byron White concurred in the judgment, but wrote that the actual malice rule did not apply, id. For a discussion of actual malice as applied to public and private persons, see infra notes 43-63 and accompanying discussion.
of the Campari Liquor advertising campaign in which it portrayed Falwell as having a drunken, incestuous encounter with his mother. 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, and a jury held in favor of Hustler on Falwell’s libel action, finding that the parody could not reasonably be understood as describing actual facts. The jury found in favor of Falwell, however, on intentional infliction of emotional distress, and the Fourth Circuit affirmed.

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. Chief Justice William Rehnquist compared the parody to the works of political cartoonists and satirists who became involved in political debates throughout history. 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 Roosevelt, it is, nonetheless, deserving of the same protection because of its political

22 Id. at 48.
23 Id. at 49. Appropriation is the only of the four traditional invasion of privacy torts recognized in Virginia. See W. Wat Hopkins, Mass Communication Law in Virginia 100-14 (3d ed. 2001).
24 485 U.S. at 49.
25 Id.
26 Hustler Magazine v. Falwell, 797 F.2d 1270 (4th Cir. 1986).
28 485 U.S. at 54-55.
nature.\textsuperscript{29} In such political disputes, the Court held, “outrageousness” was insufficient for liability,\textsuperscript{30} because sufficient breathing space is required to encourage robust political debate.\textsuperscript{31} 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.\textsuperscript{32}

The application of the actual malice test to the parody in \textit{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 \textit{Hustler} magazine had published the parody with knowledge of falsity.\textsuperscript{33} At the bottom of the page on which the parody appeared, \textit{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.”\textsuperscript{34} \textit{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

\begin{small}
\begin{itemize}
  \item[$\textsuperscript{29}$] \textit{Id.}
  \item[$\textsuperscript{30}$] \textit{Id.} at 55.
  \item[$\textsuperscript{31}$] \textit{Id.} at 52.
  \item[$\textsuperscript{32}$] \textit{Id.} at 56.
  \item[$\textsuperscript{33}$] 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.” \textit{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. \textit{Id.} at 92.
  \item[$\textsuperscript{34}$] 485 U.S. at 48.
\end{itemize}
\end{small}
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.\(^35\)

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.\(^36\) Applying actual malice to intentional infliction, he wrote, was like “forcing a square peg into a round hole.”\(^37\) 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.\(^38\) 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.\(^39\) As Smolla wrote:

---


\(^{37}\) SMOLLA, supra note 27, at 171.


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.\footnote{SMOLLA, supra note 27, at 170. See also Smolla, supra note 36, at 427 (writing that the actual malice rule cannot simply be superimposed on intentional infliction).}

\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,\footnote{485 U.S. 46, 56 (1988).} 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, that is, to determine whether the content of the offensive publication focused on matters of public concern, thereby deserving protection. The Court had rejected such a test in libel law,\footnote{See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974), overruling Rosenbloom v. Metromedia, Inc., 388 U.S. 130 (1971). See also discussion accompanying infra notes 46-51.} however, clearly did not want to resurrect it for the intentional infliction tort.

In *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.

Three years later, in *Curtis Publishing Co. v. Butts*, the Court extended the rule to public figures, though it did not fully delineate public figure status. In the 1971 case of *Rosenbloom v. Metromedia, Inc.*, the actual malice rule was expanded again. Writing for a plurality, 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. It was the nature – or content – of the speech, therefore, that should control the plaintiff’s burden of proof rather than the status of the plaintiff. Justice Brennan continued that approach in his dissent to *Gertz v. Robert Welch, Inc.*, in which the Court overruled the *Rosenbloom* plurality. The *Gertz* Court reaffirmed that public debate is important and, therefore, some falsehood must be believed.

---

44 *Id.* at 279-80.
45 388 U.S. 130 (1967).
46 403 U.S. 29 (1971).
47 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.
48 403 U.S. at 43-44.
49 418 U.S. 323 (1974). Justice Brennan adhered to his *Rosenbloom* opinion, maintaining that the best protection for robust debate required that actual malice be applied when private persons were involved “in matters of public or general interest.” *Id.* at 61 (Brennan, J., dissenting). *See also* Philadelphia Newspapers v. Hepps, 475 U.S. 767, 799-80 (Brennan, J., concurring).
protected “in order to protect speech that matters.” 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.

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.

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

---

50 Id. at 341.
51 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.
52 418 U.S. at 345.
advantage of “[T]he first remedy” available to persons attacked by false defamations\textsuperscript{53} – rebutting speech with speech.\textsuperscript{54} Therefore, private persons are more vulnerable to injury, and the state interest in protecting them is correspondingly greater.\textsuperscript{55} 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.\textsuperscript{56} 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.”\textsuperscript{57} Therefore, the “public or general interest” test was inadequate in serving the interests at stake.\textsuperscript{58}

The Court re-emphasized that holding two years after \textit{Gertz} in \textit{Time, Inc. v. Firestone},\textsuperscript{59} 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.\textsuperscript{60} Subject-matter classifications, the Court held, often result in an improper balance. “It was our recognition and rejection of this weakness in the \textit{Rosenbloom} test which led us in \textit{Gertz}\textsuperscript{53} Id. at 344.

\textsuperscript{54} 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.”).

\textsuperscript{55} 418 U.S. at 344.

\textsuperscript{56} \textit{Id.} at 344–45.

\textsuperscript{57} \textit{Id.} at 345.

\textsuperscript{58} \textit{Id.} at 346.

\textsuperscript{59} 424 U.S. 448 (1976).

\textsuperscript{60} \textit{Id.} at 454.
to eschew a subject-matter test." And nine years later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 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*.”

In *Hustler* the Court emphasized the importance of protecting speech on matters of public concern, but it’s clear that a primary reason the parody constituted speech of public concern was Falwell’s status as a public figure who was an active participant in a public debate. The confluence of a public figure embroiled in a public debate – not simply the existence of a matter of public concern— required the heightened standard. 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 distinction and establishing what one authority called a very broad “inquiring-minds-want-to-know” kind of standard, the Supreme Court ignored a large body of precedent and effected a significant shift from a person-based standard to a subject-matter-based standard.

---

61 Id. at 456.
63 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.
64 See Posting of Howard Wasserman to http://www.prawfsblogs.com (Mar. 2, 2011, 8:31 a.m.).
65 See discusion accompanying *infra* notes 91-92.
68 See Wasserman, *supra* note 64.
**Snyder v. Phelps**

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

---

69 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.

70 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).

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

72 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).
been gay or who had beliefs with which the church members objected.\textsuperscript{73} Church members began picketing at military funerals in 2005.\textsuperscript{74} They readily admit that they choose military funerals because of the heightened publicity caused by the protests,\textsuperscript{75} a motive acknowledged by the Court.\textsuperscript{76} The church is listed by the Southern Poverty Law Center as one of six hate groups in Kansas,\textsuperscript{77} and by the Anti-Defamation League as one of seventeen extremist groups in the United States.\textsuperscript{78}

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.\textsuperscript{79} The church has challenged some of the statutes, with mixed results.\textsuperscript{80}

\textsuperscript{73} 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, \textit{Privacy and Funeral Protests}, 87 N.C. L. REV. 151, 159 (2008); \textit{Westboro Baptist Church – World’s Most Famous Calvinists} (1 of 8), http://youtube.com/watch?v=hmlr9P-vkSQ (last visited Apr. 1, 2011).

\textsuperscript{74} See Wells, \textit{supra} note 73, at 160.

\textsuperscript{75} 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).

\textsuperscript{76} 131 S.Ct. at 1217.

\textsuperscript{77} 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.


\textsuperscript{79} See Stephen R. McAllister, \textit{Funeral Picketing Laws and Free Speech}, 55 U. KAN. L. REV. 575, 579, 614-19 (2007); Wells, \textit{supra} note 73, 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
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

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).

81 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).


82 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 75, 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
displaying a stylized image of two males engaging in anal sexual intercourse.\(^{83}\) 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.\(^{84}\) 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.\(^ {85}\) The district court granted summary judgment for the defendants on the defamation and publicity claims.\(^ {86}\) 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

---

83 See Brief of Petitioner for Writ of Certiorari, supra note 82, at 4.

84 533 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.


85 533 F. Supp. 2d at 572.

86 Id.
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. The defendants also had 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.

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. 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.

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,”

\[87\] Id. at 573.
\[88\] Id.
\[89\] Id. at 571.
\[90\] Id. at 576.
\[91\] Id. at 577.
\[92\] Id.
\[93\] Id. at 580-81. On the issue of severe emotional distress, see infra notes 172-75 and accompanying discussion.
and that those injuries were caused by the “extreme and outrageous” conduct of Phelps and his followers.94 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.”95 The video, the court held, invaded Snyder’s privacy during a time of bereavement.96 Finally, because there was evidence that the members of the Phelps family joined to accomplish unlawful acts, there was evidence of conspiracy.97

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 opinion98 or rhetorical hyperbole99 about matters of public concern.100 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.”101

---

94 Id. at 581.
95 Id.
96 Id.
97 Id. at 581-82.
99 Id. at 220.
100 Id. at 222-23.
101 Id. at 218.
The Fourth Circuit was critical of the district court for its focus on issues raised by Snyder that were addressed in *Hustler Magazine v. Falwell*\(^{102}\) and *Gertz v. Robert Welch, Inc.*\(^{103}\). 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.\(^{104}\) 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 event.’”\(^{105}\) The Fourth Circuit adopted the content-based analysis, and, though it was contrary to precedent, the Supreme Court adopted the same analysis.\(^{106}\)

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

When the Supreme Court granted *certiorari* in *Snyder v. Phelps*\(^{107}\) in March 2010, free speech advocates began lining up to explain that, while the activities of Westboro

---


\(^{103}\) 418 U.S. 323 (1974).

\(^{104}\) 580 F.3d at 222.

\(^{105}\) Id.

\(^{106}\) 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 219-22.

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.

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 wrong. 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


110 See Brief of Scholars of First Amendment Law as Amici Curiae in Support of Respondents at 7, Snyder v. Phelps, 09-751 (2010).

111 See Brief of the Reporters Committee, supra note 108, at 2.

112 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.

finding that Albert Snyder should not be awarded damages for the church’s attacks on him and his family.\textsuperscript{114} Though Chief Justice Roberts mischaracterized the case,\textsuperscript{115} 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.”\textsuperscript{116} That is, Justice Stevens recognized that the case involved intentional infliction of emotional distress rather than simply controversial or unpopular speech.\textsuperscript{117}

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

\textsuperscript{114} See Brief of the Reporters Committee, supra note 108, 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 154-64 and accompanying discussion.

\textsuperscript{115} See supra notes 2-3 and accompanying discussion.

\textsuperscript{116} Justice John Paul Stevens, Address at the Federal Bar Council Annual Law Day (May 3, 2011) (Copy on file with the author.).

\textsuperscript{117} See infra notes 146-53 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.”

The boundaries of the public concern test are not well defined, Chief Justice Roberts wrote, but the Court has established some guiding principles. Matters of public concern, the chief justice wrote, are any matters “‘of political, social or other concern to the community,’” including any subject “‘of legitimate news interest.’” In addition, the inappropriate or controversial nature of the speech is irrelevant to the question of whether it deals with a matter of public concern.

To determine the public or private nature of speech, Chief Justice Roberts reported that 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,” that is, the content, form and context of the speech.

---

118 131 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.

119 Id. at 1216.

120 Id. (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

121 Id. (quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

122 Id. (quoting Rankin v. McPeherson, 483 U.S. 378, 387 (1987)).

123 Id.

124 Id. (quoting Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).
The Court held that the content of the protest “plainly relates to broad issues of interest to society at large,” that is, “the fate of our Nation, homosexuality in the military, and scandals involving the Catholic Clergy.”

The context of the speech also contributed to its public nature. 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. Chief Justice Roberts noted that Albert Snyder had proved he had suffered severe emotional distress, 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. “Simply put, the church members had the right to be where they were,” the chief justice wrote. 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 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.” In addition, the chief justice found that the record confirmed “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.”

---

125 Id. at 1217.
126 Id.
127 Id. at 1217-18.
128 Id. at 1218.
129 Id.
130 Id. at 1217.
131 Id. at 1219.
Chief Justice Roberts also rejected outrageousness as a test in private-person intentional infliction cases, calling it “a highly malleable standard” with “inherent subjectiveness.”\textsuperscript{132} 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.\textsuperscript{133}

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.\textsuperscript{134} 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, leaving the state with some remedy to protect private persons from speech-related attacks.\textsuperscript{135} The Court’s holding, therefore, was narrow.\textsuperscript{136}

\begin{flushright}
\textsuperscript{132} \textit{Id.} (citing \textit{Hustler}, 485 U.S. 46, 55 (1988)).
\end{flushright}

\begin{flushright}
\textsuperscript{133} \textit{Id.} The Court also held that Albert Snyder was not part of a captive audience and, therefore, there was no intrusion. \textit{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. \textit{Id.} at 1220. These holdings are not disputed in this article.
\end{flushright}

\begin{flushright}
\textsuperscript{134} \textit{Id.} at 1221 (Breyer, J., concurring).
\end{flushright}

\begin{flushright}
\textsuperscript{135} \textit{Id.} (Breyer, J., concurring). \textit{See also} Shulman, supra note 106, at 39; Posting of Danielle Criton to http://www.concurringopinions.com (Mar. 6, 2011, 2:44 p.m.).
\end{flushright}

\begin{flushright}
\textsuperscript{136} Justices have been disappointed by interpretations of so-called “narrow” holdings. \textit{See, e.g.}, Justice John Paul Stevens’s reaction to what he found to be a misinterpretation of \textit{FCC v. Pacifica Found.}, 438 U.S. 726 (1978), by the Court in \textit{FCC v. Fox Television Stations}, 129 S.Ct. 1800, 1827 (2009) (Stevens, J., dissenting). Justice Lewis Powell concurred in \textit{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
\end{flushright}
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 dissented. “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 church’s strategy of getting attention by picketing funerals demonstrates the outrageousness of their actions, Justice Alito wrote. In addition, the meaning of the signs used in the protest could not be missed. Because the church chose to protest a 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. 1, 11-13 (2011).

137 131 S.Ct. at 1221 (Breyer, J., concurring).

138 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”).

139 Id. at 1223 (Alito, J., dissenting). For a discussion of the burden of proof in cases of intentional infliction of emotional distress, see infra notes 154-64 and accompanying discussion.

140 Id. (Alito, J., dissenting). See also supra note 13.

141 Id. at 1224 (Alito, J., dissenting).
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.”

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, and could not be insulated by the fact that it occurred on public property.

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.

---

142 Id. at 1225 (Alito, J., dissenting). Because a church funeral raises thoughts of the afterlife, Justice Alito wrote, 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. Id. (Alito, J., dissenting).

143 Id. at 1226 (Alito, J., dissenting).

144 Id. at 1227 n.15 (Alito, J., dissenting).
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.”

**WESTBORO BAPTIST CHURCH AND INTENTIONAL INFILCTION**

*Snyder v. Phelps* is easy to mischaracterize. Free speech advocates, for example, contend that the tort of intentional infliction of emotional distress as applied to the case would allow recovery for the publication of material that is merely offensive, that it would establish an offensiveness exception, or that it would allow recovery based on listeners’ emotional reactions to speech. 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.”

Similarly, Fourth Circuit Judge J. Harvie Wilkinson III, dissenting from that court’s holding in *Falwell v. Flynt*, wrote that the intentional infliction tort allows for

---

145 Id. at 1228 (Alito, J., dissenting).
146 Amicus Brief of the Thomas Jefferson Center for the Protection of Free Expression at 30, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), cert. granted 130 S.Ct. 1737 (2010) (No. 08-1026) [hereinafter Amicus Brief of the Thomas Jefferson Center].
147 Brief of the Reporters Committee, supra note 108, at 4.
148 Id. at 10. See also Press Release, supra note 4.
149 Press Release, supra note 4.
damages “for no other reason than hurt feelings.”

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, and Rodney Smolla wrote in support of 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. 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.

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 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

---

150 Falwell v. Flynt, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissenting from the denial of rehearing en banc).


152 Smolla, supra note 36, at 8.

153 Amicus Brief of the Thomas Jefferson Center, supra note 146, at 30.
distress was severe.\textsuperscript{154} “Extreme and outrageous” is a test significantly different from “offensive.”\textsuperscript{155}

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{156} “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{157} The distress “must be far more than minor discomfort.”\textsuperscript{158} Indeed, the Kansas Supreme Court recently held that the absence of psychiatric or medical treatment “weighs against a finding of extreme emotional distress.”\textsuperscript{159} An award of damages cannot be made, the court held, simply because of “elevated fright, continuing concern, embarrassment, worry and nervousness.”\textsuperscript{160} The tort, “Is something very like assault. It consists of the

\begin{itemize}
\item \textsuperscript{154} 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.”).
\item \textsuperscript{155} See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977).
\item \textsuperscript{156} See, e.g., Bass v. Hendrix, 931 F. Supp. 523, 531 (S.D. Ohio 1996) (noting that mere insults and hurt feelings are insufficient to sustain liability); Valadez v. Emnis Commc’ns, 229 P.3d 389, 394 (Kan. 2010) (“The law will not intervene where someone’s feelings merely are hurt.”).
\item \textsuperscript{158} Id. at 346.
\item \textsuperscript{159} Valadez, 229 P.3d at 395.
\item \textsuperscript{160} Id. See also Bass, 931 F. Supp. at 532 (indicating that symptoms like psychological problems, suicidal tendencies and post-traumatic stress would be required for a finding of severe emotional distress).
\end{itemize}
intentional, outrageous infliction of mental suffering in an extreme form.”¹⁶¹ The
Restatement (Second) of Torts reports that “the law intervenes only where the distress
inflicted is so severe that no reasonable man could be expected to endure it.”¹⁶² 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.”¹⁶³ The tort involves speech
that is being used as a weapon, and – like “false rumors [and] invasions of privacy” —
such “direct attacks” should be actionable.¹⁶⁴

Proving the elements of the burden of proof for intentional infliction of emotional
distress, therefore, 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 find such
protests to be a particularly effective means of conveying their message,¹⁶⁵ issued a press
release and traveled from Kansas to Maryland in order to picket at Matthew Snyder’s
funeral,¹⁶⁶ carrying with them an arsenal of signs aimed at the Syders. Church members
later posted on the church’s Web site a video attacking the Syders. The conduct,
therefore, was intentional.

¹⁶³ Valadez, 229 P.3d at 394.
¹⁶⁴ Solove, supra note 151.
¹⁶⁵ See Phelps-Roper v. Strickland, 539 F.3d 356, 359 (6th Cir. 2008).
There is little dispute that the activities of the church members were outrageous.\textsuperscript{167} 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 and because Matthew Snyder was a Marine.\textsuperscript{168}

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,\textsuperscript{169} but that is irrelevant. No one associated with \textit{Hustler} magazine notified Jerry Falwell of the parody or drew his attention to it. One would not expect Falwell to be a reader of \textit{Hustler}, and he became aware of the attack because of questions from a reporter,\textsuperscript{170} just as Snyder became aware of the church’s activities when he watched a news program. By virtue of publishing the parody, \textit{Hustler} had demonstrated its intent to cause severe emotional distress. Similarly, the highly publicized demonstration followed by the publication of the video on the

\begin{itemize}
  \item \textsuperscript{167} 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, \textit{supra} note 146, at 16.
  \item \textsuperscript{168} \textit{See} Brief of Petitioner for Writ of Certiorari, \textit{supra} note 82, at 4. 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. \textit{Westboro Baptist Church, supra} note 73. Daniel Solove writes that Westboro’s speech was not directed at a particular individual. Solove, \textit{ supra} note 151. This selection of signs, however, seems to at least establish the likelihood that persons were, indeed, targeted. \textit{See supra} note 82.
  \item \textsuperscript{169} 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, \textit{supra} note 109, at 20.
  \item \textsuperscript{170} \textit{See SMOLLA, supra} note 27, at 1.
\end{itemize}
Internet ensured notice of the attack to millions of people – certainly to more people than the single issue of *Hustler* magazine could reach.\(^{171}\)

In addition, evidence of Snyder’s emotional distress, as Chief Justice Roberts noted,\(^{172}\) 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.\(^{173}\) 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.”\(^{174}\) 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.”\(^{175}\)

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, had 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.

---

\(^{171}\) 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.


\(^{173}\) *Snyder*, 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).

\(^{174}\) *Id.* at 589.

\(^{175}\) *Snyder*, 580 F.3d at 213-14.
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, for example, have no First Amendment protection, while commercial speech, indecent speech, intimidating speech, and speech of “purely private concern” are protected, but have less protection than speech involving matters of public concern. Personal abuse,


177 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.”).


like fighting words and obscenity, “is not in any proper sense communication of information or opinion safeguarded by the Constitution.”

Snyder effected a shift in the paradigm. While court-watchers are unsure about the significance of the case, 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 and between matters of public and private concern are among those problems. 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

---


186 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 67.

187 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.).

188 See Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 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’”).

189 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).
proof as public figures or public officials. It’s clear that public people voluntarily inject themselves into matters of public concern and part of assuming public-person status is the willingness to accept the added risk of public commentary and criticism.  

Private people on the other hand, are private: They remain out of the view of the public and are not embroiled in debate on matters of public concern. The Court has also recognized a difference between public and private persons, especially in tort actions, and established a reasonable balance between protections for robust debate and for the rights of private persons to remain private. Arguably private persons sometimes are involuntarily embroiled in matters of public concern, and when that happens, possibly, they should face the same burdens as public persons. 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. Indeed, until Snyder, the Court so recognized.

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. Hustler altered some aspects of the tort, but it left others intact. For example, the Court, as Smolla writes, “was quite careful to

---

190 See W. Wat Hopkins, The Involuntary Public Figure: Not So Dead After All," 21 CARDOZO ARTS & ENT. L.J. 1, 23-27 (2003).


192 See Hopkins, supra note 190, at 44-49.

193 Gertz, 318 U.S. at 345. But see, Hopkins, supra note 190, at 44-49.

194 See supra notes 54-63 and accompanying discussion.
limit the decision to public officials and public figures.”195 It left untouched the application of the tort to private persons.

In addition, Robert Post writes, “It cannot be that *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.”196 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 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.197 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 matters of public concern and takes place in a public sphere.


196 Post, *supra* note 188, at 662.

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.

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 issue was how

---


198 Borden, *supra* note 197, at 314.

200 See Bentley, *supra* note 198, at 840.

201 See, e.g., Chaiken v. VV Publishing Corp., 907 F. Supp. 689, 699 (S.D.N.Y. 1995) (applying New York law and holding that private persons bringing intentional infliction actions involving matters of public concern must prove gross responsibility, the same standard as private persons in defamation actions); State v. Carpenter, 171 P.3d 41, 55-56 (Alaska 2007) (holding that actual malice is required in Alaska when intentional infliction cases involve matters of public concern and the issue of truth or falsity is involved); Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 906 (Utah 1992) (holding that private persons must prove negligence in order to sustain actions for intentional infliction, since that is the burden of proof for private persons bringing libel actions in Utah).

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.\textsuperscript{203} However, outrageousness was found insufficient in Hustler in order to preserve the breathing space necessary for public discourse.\textsuperscript{204} 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.\textsuperscript{205} 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 Internet “may raise distinct issues in this context.”\textsuperscript{206} The chief justice, therefore, though acknowledging that the Court was required to make “an independent examination of the

\textsuperscript{203} 131 S.Ct. 1207, 1219 (2011). Except for the citation referenced at \textit{supra} note 118, Chief Justice Roberts cites \textit{Hustler} only once, 131 S.Ct. at 1215, reporting that the Court had held that “not all speech is of equal First Amendment performance.”

\textsuperscript{204} \textit{See supra} notes 30-31 and accompanying discussion.

\textsuperscript{205} \textit{See} Sacks, \textit{supra} note 2, at 64.

\textsuperscript{206} 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. \textit{Id.}
whole record.”

Justice Alito criticized the majority for that failing. 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

---

207 Id. at 1216 (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984)).

208 Id. at 1226 (Alito, J., dissenting).

209 Id. at 1226 n.15 (Alito, J., dissenting).


211 Id. Jeffery Shulman agreed. He wrote that ignoring the video meant the Court the case on “half the record.” Shulman, supra note 106, 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).

212 Shulman, supra note 106, at 36-37.

213 Id. at 37.
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 demonstrable connection between the Snyders and the church.  Courts resolving cases involving involuntary public figures in other tort actions have agreed. Chief Justice Roberts found the speech protected, despite the personal attack, because of its “overall thrust and dominant theme.” 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.

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, 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. Even if the public concern test is better than the public/private person test when applied to public persons in intentional infliction cases –

214 Id. at 38.
215 See Hopkins, supra note 190, 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).
217 See Wasserman, supra note 64.
218 See supra notes 50-58 and accompanying discussion.
and it may be\textsuperscript{219} – Snyder v. Phelps provided little guidance on when speech is public or private.\textsuperscript{220} Indeed, as some scholars have indicated, the ruling is likely to rule out liability for intentional infliction of emotional distress cases when a court determines that the offending speech is about a matter of public concern,\textsuperscript{221} while, at the same time, insulating severely emotionally damaging speech aimed at strangers by publicity seekers.\textsuperscript{222}

This “significant shift” from a person-based to a content-based test is based on a set of facts that does not involve public debate.\textsuperscript{223} While the rights and privileges of gay persons and the war in Iraq are certainly matters of important public concern,\textsuperscript{224} 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

\textsuperscript{219}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{220}See Sacks, supra note 2, at 65; Wasserman, supra note 64.

\textsuperscript{221}See Richards, supra note 67.

\textsuperscript{222}See Criton, supra note 135.

\textsuperscript{223}Wasserman, supra note 64.

\textsuperscript{224}See Snyder, 580 F.3d 206, 223 (4th Cir. 200 ); Shulman, supra note 39, at 314.
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 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’

---

225 Shulman, supra note 39, at 124.
226 Id. at 37
227 131 S.Ct. at 1221 (Breyer, J., concurring).
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 attacked, if the attack is cloaked in the garb of matters of public concern and takes place in public.

**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 and prayer meetings. The speech is problematic because it constituted a verbal assault. The speech might have

228 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.

229 *Id.* at 1218.

230 *Id.* See also Criton, *supra* note 135; Richards, *supra* note 67.


constituted fighting words, that is, words that “by their very utterance inflict injury or tend to incite an immediate breech of the peace.” 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 that doctrine, 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 opinion safeguarded by the Constitution.” 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.” Since Snyder was not defamed, intentional infliction of emotional distress was his 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, 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.

---


234 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 136, at 23-30 (writing that the Court has interpreted *Chaplinsky* narrowly to the point of eviscerating the doctrine established by the case).


237 See SMOLLA, supra note 27, passim.
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 Snyder 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. 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.