

CASENOTES

THE GRADUAL, CONSTITUTIONAL DESTRUCTION OF INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS, AND WHY THE SUPREME COURT MADE THE RIGHT CALL IN *SNYDER V. PHELPS*

I. INTRODUCTION

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹ Limitations on freedom of speech, however, are nothing new; throughout American history, both state and federal legislatures have passed several notable laws that have infringed upon such freedoms.²

Speech, though protected by the First Amendment, may also be deemed tortious. Maryland, like most states, permits recovery for speech-caused harm under a claim for intentional infliction of emotional distress.³ Several notable Supreme Court cases, beginning in the mid-twentieth century, expanded First Amendment protections for defendants in tort actions, the extent of which depended on a variety of factors, including: whether the plaintiff was considered a public figure; whether the speech was of public or private interest; how strong the link between the plaintiff and the communication was; and whether the defendant was a media outlet.⁴ *Hustler v. Falwell* was the first case where

1. U.S. CONST. amend. I, *cited in Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

2. *See* Sedition Act, Ch. 74, 1 Stat. 596 (1798), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=720> (displaying the original text of the Sedition Act); *see also* Paul Finkelman, *Book Review: Cultural Speech and Political Speech in Historical Perspective*, 79 B.U.L. REV. 717, 726 (1999) (discussing the Comstock Acts); *see* Espionage Act, Ch. 30, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. § 792 (2010)).

3. *Harris v. Jones*, 281 Md. 560, 566 (1977), *cited in Snyder*, 131 S. Ct. at 1215.

4. *See* *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), *cited in Snyder*, 131 S. Ct. at 1216; *Phila. Newspapers v. Hepps*, 475 U.S. 767 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

the Court applied such factors to speech that might constitute intentional infliction of emotional distress.⁵

Most recently, *Snyder v. Phelps* has addressed the difficult question of where Constitutional speech protections and state tort law intersect, and where one must yield to the other.⁶ What follows are the pertinent facts and procedural history of *Snyder*, as well as an overview of the more notable developments in First Amendment interpretation, displaying the Supreme Court's willingness to allow wider and wider First Amendment insulation to defendants in tort cases. This progression leads, perhaps inevitably, to the Supreme Court's holding in *Snyder*. And although the *Snyder* Court ultimately held correctly by extending First Amendment protection to Snyder, the defendant, it altered the factor-based test previously used to determine when speech causing emotional distress is protected. In doing so, the Court effectively eliminated the factor considering whether the target of the defendant's speech was a public or private figure. Although the elimination of this consideration was an appropriate extension of First Amendment protection to tort defendants and in line with the historically expansive trend with which the Court has interpreted the First Amendment, the Court should have explicitly stated as much in its opinion.

Section II details the facts and holding of the *Snyder* opinion. Section III takes a historical approach to the development of First Amendment interpretation and illustrates the ever-expanding treatment the Court has given the First Amendment. Section IV offers a detailed description of the Court's reasoning in *Snyder*. Section V offers a critical analysis of the Court's opinion; specifically, this Section notes that, while the elimination of the consideration of whether the plaintiff is a private or public figure is an appropriate extension of First Amendment protection given to defendants in speech-based tort claims, the majority opinion's lack of clarity in this regard is both inappropriate and leaves the lower courts in a state of confusion moving forward. Section VI offers a brief conclusion.

5. *Hustler v. Falwell*, 485 U.S. 46, 56 (1988), cited in *Snyder*, 131 S. Ct. at 1211.

6. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

II. FACTS AND HOLDING

A. FACTS

In March of 2006, Albert Snyder was notified that his son—a Lance Corporal in the United States Marine Corps—was killed in action in Al Anbar province, Iraq.⁷ Thereafter, Snyder arranged to hold his son’s funeral at the family church in Westminster, Maryland,⁸ and several local newspapers published the time and location for the service in the obituary notices.⁹ Upon learning of the funeral, Fred Phelps and the Westboro Baptist Church issued a press release detailing their intention to picket at the service.¹⁰ Phelps then traveled to Maryland with six members of his family to picket at the Snyder funeral.¹¹

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas in 1955.¹² Preaching their biblical interpretation—a chief component of which is that “God hates and punishes the United States for its tolerance of homosexuality”—Phelps and his congregation have picketed nearly 600 funerals, many of them military funerals, in the past twenty years.¹³ Following September 11, 2001, Phelps came to believe the attacks were divine retribution for the sins of the United States, and that also due to those sins, the United States was drawn into two wars.¹⁴ The church has expressed these views through routine and well-publicized picketing which generally addresses homosexuality “(as a front burner issue), as [well as] fornication, adultery, murder, greed, idolatry, and pride.”¹⁵ Military funerals in particular draw the church’s attention, because they believe that “soldiers are dying because of America’s sin and proud refusal to repent”¹⁶

7. Brief of Appellant–Petitioner at 8, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751).

8. *Id.*

9. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008).

10. *Id.*

11. *Snyder*, 131 S. Ct. at 1213.

12. *Id.*

13. *Id.* (citing Brief for Rutherford Institute as Amicus Curiae Supporting Respondents, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751)).

14. Initial Brief of Appellee–Respondent at 12, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751).

15. *Id.* at 11.

16. *Id.* at 12.

Prior to the funeral and the picketing, the Westboro group notified local police of their intent to picket and conduct themselves peaceably, without behaving violently, yelling, or trespassing.¹⁷ On the day of the Snyder funeral, the Westboro group picketed at three public locations—near the Maryland State House, the United States Naval Academy, and Matthew Snyder’s funeral.¹⁸ The signs they carried stated their beliefs: “God Hates the USA/Thank God for 9/11”; “America is Doomed”; “Don’t Pray for the USA”; “Thank God for IEDs”; “Thank God for Dead Soldiers”; “Pope in Hell”; “Priests Rape Boys”; “God Hates Fags”; “You’re Going to Hell”; and “God Hates You.”¹⁹ The funeral picketers were located approximately 1000 yards away from the funeral site.²⁰ However, the funeral procession passed within 200–300 yards of the picketers.²¹

While Albert Snyder was unable to see what was actually written on the signs, he later learned of their content while watching the evening news.²² He filed suit in the district court of Maryland against Fred Phelps, several members of the Phelps family, and the Westboro Baptist Church. He asserted five causes of action under Maryland law: (1) defamation;²³ (2) invasion of

17. Brief for Appellee–Respondent at 18, 131 S. Ct. 1207 (2011) (No. 09-751).

18. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

19. *Id.*

20. *Id.*

21. *Id.* There was some disagreement as to whether the appellant actually viewed the signs en route to the funeral. The appellant contended that he could see the signs from the vehicle carrying him and his daughters to the service. Brief for Appellant–Petitioner at 10, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), *cited in Snyder*, 131 S. Ct. at 1213. The appellees, however, contended that viewing the signs from the route taken by the appellant to the funeral would have been “physically impossible.” Brief for Appellee–Respondent at 18, 131 S. Ct. 1207 (2011) (No. 09-751).

22. *Snyder*, 131 S. Ct. at 1213-14. Upon their return to Kansas, appellees continued to use Lance Corporal Snyder’s death as a vehicle for their message via their “epic,” published on the church-run website www.godhatesfags.com. *Id.* at 1214 n.1. Entitled “The Burden of Marine Lance Cpl. Matthew Snyder,” the epic “stated that Albert Snyder and his ex-wife ‘taught Matthew to defy his creator,’ ‘raised him for the devil,’ and ‘taught him that God was a liar.’” *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008). The appellant learned of the “epic” after running a Google search of his son’s name. *Id.* The “epic” was not considered by the Supreme Court because the appellant made no mention of it in his petition for certiorari to the Court. *Snyder*, 131 S. Ct. at 1214 n.1. Chief Justice Roberts noted in his opinion that Rule 14.1(g) of the Supreme Court states that a “petition must contain [a] statement ‘setting out the facts material to consideration of the question presented.’” *Id.* Lacking such a statement, the court felt compelled to decline consideration of the epic. *Id.*

23. “A defamatory statement is one that tends to expose a person to public scorn,

privacy—intrusion upon seclusion;²⁴ (3) invasion of privacy—publicity given to private life;²⁵ (4) intentional infliction of emotional distress;²⁶ and (5) civil conspiracy.²⁷

B. PROCEDURAL HISTORY

The United States District Court for the District of Maryland granted summary judgment in favor of the defendants on the defamation and publicity-given-to-private-life claim.²⁸ With respect to the defamation claim, the court found that the speech was “religious opinion” that “would not realistically tend to expose Snyder to public hatred or scorn.”²⁹ With respect to Snyder’s publicity claim, it concluded that the claim failed because the defendants had not publicized any private information.³⁰ The court allowed the three remaining claims to proceed to a jury.³¹ There, Snyder argued the following: (1) the defendants intruded upon his personal affairs, which were not a matter of public concern; (2) their conduct was outrageous, entitling Snyder to punitive damages; (3) their conduct would be considered highly offensive to a reasonable person; and (4) they intended to harm him.³² Snyder

hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person.” *See Murray v. UFCW Int’l, Local 400*, 289 F.3d 297, 305 (4th Cir. 2002).

24. “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy.” *See Trundle v. Homeside Lending, Inc.*, 162 F. Supp. 2d 396, 401 (D. Md. 2001).

25. *See, e.g., Furman v. Sheppard*, 744 A.2d 583, 588 (Md. Ct. Spec. App. 2000), which states the following:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

26. A plaintiff may recover on a claim for intentional infliction of emotional distress by showing that “the defendant intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.” *Snyder*, 131 S. Ct. at 1215 (citing *Harris v. Jones*, 281 Md. 560, 565-66 (1977)).

27. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011); *see BEP, Inc. v. Atkinson*, 174 F. Supp. 2d 400, 409 (D. Md. 2001), which states the following:

A civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff.

28. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572-73 (D. Md. 2008).

29. *Id.*

30. *Id.*

31. *Id.*

32. Complaint at 9-12, 533 F. Supp. 2d. 567 (D. Md. 2006) (No. RDB-06-1389).

sought general, special, and punitive damages.³³ The defendants contended that the Free Speech and Free Exercise Clauses of the First Amendment each insulated them from liability under state tort law.³⁴ Furthermore, Phelps and the Westboro Church argued that Lance Corporal Snyder was a public figure, that his father became a public figure, and that he turned the funeral into a public event by placing obituaries in local newspapers.³⁵

The court's jury instructions detailed the First Amendment protections to be given to defendants, noting that the protections do not necessarily extend to tortious actions against private figures as they do to public figures.³⁶ The jury found for Snyder on all three of the remaining claims, holding Phelps and the Westboro Church liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.³⁷ Phelps and the Westboro Church filed a motion for remittitur, and the court reduced the punitive damages to \$2.1 million, leaving the other findings intact.³⁸

33. Complaint at 9-12, 533 F. Supp. 2d 567 (D. Md. 2006) (No. RDB-06-1389).

34. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576 (D. Md. 2008). The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. CONST. amend. I.

35. *Snyder*, 533 F. Supp. 2d at 577. The Supreme Court of the United States has recognized that not all tortious speech is entitled to First Amendment protections, but rather a balancing act must take place between protecting the civil liberties of the speaker and the injured party's right to privacy. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

36. *Snyder v. Phelps*, 580 F.3d 206, 214-15 (4th Cir. 2009). Specifically, the court stated the following:

As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. You must balance the Defendant's expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. . . . You must determine whether [the appellees'] actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

Id.

37. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011). The district court granted appellees request for a stay of execution of judgment pending appeal. *Snyder*, 580 F.3d at 216 n.6.

38. *Snyder*, 580 F.3d at 216. In the federal courts, a judgment cannot stand where the damages awarded are so excessive as to shock the judicial conscience. *Gasparini v. Ctr. for Humanities*, 518 U.S. 415, 431 (1996). When granting a motion for remit-

Phelps and the Westboro Church appealed to the Fourth Circuit Court of Appeals, again contending that their speech was protected by the First Amendment.³⁹ The Fourth Circuit found that the signs Phelps and the Westboro Church displayed addressed matters of public concern, namely “the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.”⁴⁰ The Fourth Circuit further found that none of the statements could be interpreted with any certainty as referring specifically to Snyder or his deceased son.⁴¹ The Fourth Circuit ultimately reversed the district court, relying chiefly on the Supreme Court’s holding in *Hustler v. Falwell* as the basis for its conclusion that the picketing was entitled to First Amendment protection.⁴² The court did not detail the relevance of the specific torts in question; rather, it “reversed the district court wholesale,

titur, a judge offers the plaintiff an award lower than that awarded by the jury; however, should the award be refused, a new trial is generally given. *Id.* at 433. Appellees also filed motions for judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, new trial, relief from judgment, and relief of law and equity, all of which were denied. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008).

39. *Snyder v. Phelps*, 580 F.3d 206, 210 (4th Cir. 2009). Snyder declined to cross-appeal the decision to exclude his claims for defamation and publicity given to private life; thus, their exclusion was not considered on appeal. *Id.* at 213. Furthermore, at no point did the appellees contest the sufficiency of the evidence, or that liability may be found absent First Amendment protection; as such, the Fourth Circuit found that the appellees had waived their right to challenge the sufficiency of the evidence, and proceeded to consider only the First Amendment defense. *Id.* at 216. It is for this reason that the remainder of this examination will focus on the First Amendment considerations at play, particularly with regard to the free speech defense, rather than the sufficiency of the claims with regard to Maryland tort law.

40. *Snyder*, 580 F.3d at 223.

41. *Id.* at 223-24. With regard to the “epic,” “The Burden of Marine Lance Cpl. Matthew A. Snyder,” the Fourth Circuit held that First Amendment protection was applicable largely because it was “hyperbolic and figurative language . . . which would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.” *Id.* at 224-25.

42. *Id.* at 226, cited in *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). For a detailed discussion of *Hustler*, see *infra* Section III. It is noteworthy that the Fourth Circuit’s opinion described the appellees’ statements as “distasteful and repugnant.” *Snyder*, 580 F.3d at 226. The opinion, written by Judge King, quotes an earlier Fourth Circuit judge, Judge Hall, in a 1993 opinion, in expressing its distaste:

Judges defending the Constitution ‘must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.’

Id. (citing *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir. 1993)).

holding that the judgment [of the court below] wrongly ‘attach[ed] tort liability to constitutionally protected speech.’”⁴³

Snyder appealed the Fourth Circuit’s decision, and the United States Supreme Court granted a writ of certiorari.⁴⁴ Snyder argued that because he was a private figure with no connection to the issues being protested by Phelps and the Westboro Church, the Fourth Circuit improperly relied on *Hustler v. Falwell*, which deals exclusively with suits against public figures.⁴⁵ Snyder also contended that the messages on the signs were not matters of public concern, due to the fact that they were connected with a private funeral service,⁴⁶ and that the decision “vitiates the tort of intentional infliction of emotional distress . . . turn[ing] outrageousness from the threshold element of the tort into an affirmative defense”—a holding that would ultimately allow defendants to escape liability by using speech that is particularly public, offensive, and provocative.⁴⁷

Phelps and the Westboro Church countered that their speech was public and not proven false, thus entitling them to First Amendment protection.⁴⁸ Further, they again contended that Snyder became a limited public figure by interacting with the media both during and after his son’s funeral.⁴⁹ Finally, they claimed that Snyder was not a member of a captive audience and that no balancing of interests was required because there was no conflicting exercise in that Snyder was permitted to conduct his son’s funeral and they were permitted to exercise their right to

43. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (citing *Snyder*, 580 F.3d at 226).

44. *Snyder v. Phelps*, 130 S. Ct. 1737 (2010), cited in *Snyder*, 131 S. Ct. at 1215.

45. Initial Brief of Appellant–Petitioner at 22–23, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09–751). *Hustler v. Falwell*, 485 U.S. 46 (1988) was a landmark case that allowed *Hustler Magazine* to successfully defend a claim for intentional infliction of emotional distress by famed preacher and television personality Jerry Falwell on First Amendment grounds, due largely to Falwell’s status as a public figure, and the notion that “one ‘of the prerogatives of American citizenship is the right to criticize public men and measures.’” Initial Brief of Appellant–Petitioner at 23, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09–751) (quoting *Hustler*, 485 U.S. at 51 (quoting *Baumgartner v. U.S.*, 322 U.S. 665, 673–73 (1944))); see also *infra* Section III.

46. *Snyder*, 131 S. Ct. at 1217.

47. Initial Brief of Appellant–Petitioner at 20, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09–751).

48. Initial Brief of Appellee–Respondent at 29, 36–37, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09–751).

49. *Id.* at 32.

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free expression.⁵⁰

Noting that its holding was narrow, the Supreme Court affirmed the Fourth Circuit and found that the statements and actions of the defendants “addressed matters of public import,” entitling them to First Amendment protection.⁵¹ Specifically, the Court *held* that when dealing with speech in a public forum on matters of public concern, the speaker is insulated from liability in tort actions, regardless of both the plaintiff’s status as a public or private figure and the otherwise tortious nature of the speech itself.⁵²

III. BACKGROUND

This Section offers a broad historical view of the development of First Amendment interpretation for the purpose of demonstrating that the *Snyder* decision, expanding First Amendment protection to even the most vile speech, is well in line with the ever expanding protection provided by the Court in this context. Subsection A begins with a discussion of the state of free speech in the post-revolutionary Union. Subsection B describes the dramatic change of direction taken by the Court following World War I. Subsection C describes a number of seminal mid-twentieth century cases that set forth the foundations for the modern doctrine controlling the intersection of free speech protections and speech-based tort actions. Subsection D gives a brief description of the elements of the various tort claims involved in the *Snyder* case, and Subsection E discusses the important legal distinction between private and public speech.

A. SPEECH IN THE EARLY UNION

In addressing First Amendment speech protections, scholars have often focused on the evolution of free speech in the United States after World War I.⁵³ It is worth noting, however, that for many years after the enactment of the First Amendment, a great deal of speech was not free at all. Take, for instance, the Sedition

50. Initial Brief of Appellee–Respondent at 29, 37, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751).

51. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). The decision reached for the appellees was 8-1, with Justice Breyer concurring and Justice Alito penning the lone dissent. *Id.* at 1207.

52. *Snyder*, 131 S. Ct. at 1220.

53. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1207 (1983).

Act of 1798. Enacted a decade after the Bill of Rights, the Act was a measure “patently unconstitutional by modern standards.”⁵⁴ Signed into law by John Adams, it stated that anyone who “write[s], print[s], utter[s], or publish[es] . . . writing or writings against the United States . . . the Congress . . . or the President shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.”⁵⁵

The Sedition Act was short-lived in the United States; after his election as President, Thomas Jefferson pardoned all those convicted under the Act’s provisions.⁵⁶ Years later, the Supreme Court remarked that “although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”⁵⁷

A later example is the post-Civil War Comstock Act, a colossal victory for the advocates of censorship,⁵⁸ which permitted the federal government to prosecute anyone who sent “obscene” material through the mail or in any way transported it across state lines.⁵⁹ The Act created a new post office position, a special agent tasked with rooting out the obscene; “during this period [Anthony] Comstock pursued ‘vice,’ as he conceived it, with unrelenting zeal.”⁶⁰ Comstock, the plan’s chief architect and proponent, confiscated materials ranging from pornography to works of fiction and nonfiction, medical journals discussing abortion or birth control, as well as works by Walt Whitman and Leo Tolstoy, just to name a few.⁶¹ Some estimates place the total destroyed volume of books during Comstock’s reign at thirty-six tons of literature.⁶² Perhaps most interesting is that “throughout the late nineteenth and early twentieth centuries, courts enforced the Comstock Act without much thought.”⁶³

54. *Lee v. Weisman*, 505 U.S. 577, 626 (1992).

55. Sedition Act, Ch. 74, 1 Stat. 596 (1798), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=720>.

56. Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1591 (2000).

57. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 276 (1964); see *infra* Section III.D.

58. Finkelman, *supra* note 2, at 726.

59. *Id.* at 726-27.

60. *Id.* (quoting DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 30 (Cambridge Univ. Press 1997)).

61. *Id.* at 727.

62. Donna I. Dennis, *Obscenity Law and its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 53 (2007).

63. Finkelman, *supra* note 2, at 728 (citing DAVID M. RABBAN, *FREE SPEECH IN ITS*

B. A SEA CHANGE FOLLOWING THE FIRST WORLD WAR

The years between World War I and II marked a significant progression in the development First Amendment doctrine.⁶⁴ However, before progress would be made, there were a number of seminal cases that chilled private speech protections; as often as not, these cases stemmed from the recently passed Espionage Act. Following America's entry into World War I, the Espionage Act of 1917 made it illegal to make statements that might in any way hinder America's war effort.⁶⁵ There was a distinct period after World War I in which the modern free speech doctrine got off to an inauspicious start, and speech was, as often as not, censored by some of the same legal scholars—e.g., Judge Learned Hand and Judge Oliver Wendell Holmes—who would later author some of the most influential opinions on First Amendment interpretation.⁶⁶ For instance, in *Schenk v. United States*, Justice Holmes wrote a decision affirming a defendant's conviction for distributing leaflets designed to dissuade others from enlisting in violation of the Espionage Act:⁶⁷ "The question in every case is whether the words used . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁶⁸ In *Schenck*, "Holmes developed and then applied the 'clear and present danger' test to uphold the convictions of socialists who had opposed World War I."⁶⁹

FORGOTTEN YEARS 32-41, 43, 64, 69 (Cambridge Univ. Press 1997)).

64. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1718 (1991). During the period between America's entrance into World War I and the arrival of the 1930s, "Again and again, the Supreme Court rejected claimed First Amendment rights in favor of the government's power to regulate speech and punish dissenting speakers. Not until the 1930s did the Court begin to recognize a constitutional prohibition on censorship." *Id.*

65. See the Espionage Act, Ch. 30, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. § 792 (2011)), which states the following:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

66. Rabban, *supra* note 53, at 1208.

67. *Schenck v. United States*, 249 U.S. 47, 48-49 (1919).

68. *Id.* at 52-53.

69. Finkelman, *supra* note 2, at 738.

Other courts deciding speech cases around the same time as *Shenck*, however, exhibited a more “flexible and libertarian” doctrinal approach to First Amendment interpretation.⁷⁰ *Masses Publishing Co. v. Patten*, for instance, was a case tried in the southern district of New York and presided over by Justice Learned Hand in which the plaintiff, a publishing company, sought an injunction against the postmaster general for refusing to distribute a publication containing anti-war sentiments.⁷¹ The court granted the injunction, ordering the postmaster to distribute the publication.⁷² Judge Hand’s opinion declared that the Espionage Act was not violated insofar as the plaintiffs had not “directly . . . counsel[ed] or advise[ed] insubordination” as specifically required under the act.⁷³

Abrams v. United States, another case dealing with the Espionage Act, involved the circulation of anti-American publications during wartime.⁷⁴ While the Supreme Court affirmed the convictions, Justice Holmes penned a now famous dissent in which he first stated that they ought to be overturned, as their speech in no way constituted a clear and immediate danger to the nation,⁷⁵ and then proceeded to espouse the virtues of a right to free speech in a democracy.⁷⁶ Though the majority opinion in *Abrams* reflected a narrow First Amendment interpretation,⁷⁷ Justice Holmes’ dissent marked somewhat of a watershed moment.⁷⁸ “Holmes’s

70. Finkelman, *supra* note 2, at 738.

71. *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

72. *Id.* at 543.

73. *Id.* at 540-41.

74. *Abrams v. United States*, 250 U.S. 616, 616-18 (1919).

75. *Id.* at 627.

76. *See id.* at 630. Specifically, Justice Holmes stated the following:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Id.

77. Rabban, *supra* note 53, at 1208.

78. *Id.* at 1303.

expression of libertarian values in *Abrams* reveals the extent to which he had become more sensitive to First Amendment concerns in the eight months following his opinions for a unanimous Court in *Schenck*, *Frohwerk*, and *Debs*.⁷⁹

C. THE MID-TWENTIETH CENTURY: THE FIRST AMENDMENT COLLIDES WITH STATE TORT LAW

Beginning with a defamation action in *New York Times Co. v. Sullivan*,⁸⁰ the Supreme Court has considered, reconsidered, and refined the role of First Amendment protection in tort actions.⁸¹ The case presented an issue of first impression, asking the high court to consider the interplay between constitutional speech protections and state tort liability.⁸² In *New York Times*, a Montgomery, Alabama commissioner sued a newspaper for libel following its publication of an article describing local police meeting civil rights demonstrations with intimidation and violence and insinuating that the commissioner was complicit in their actions.⁸³ The newspaper did not contest that certain statements contained in the publication did not accurately portray the events as they occurred.⁸⁴ Nevertheless, the Supreme Court ruled in its favor, setting the legal standard upon which future cases would build: in an action by a public official against a media defendant for libel, the defendant will be held liable only if the public official demonstrates actual malice.⁸⁵ The Court defined actual malice as publication of a statement with “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁸⁶

New York Times paved the way for a line of cases that expanded upon the framework established therein and attempted to strike the right balance between free speech and personal privacy.⁸⁷ In *Gertz v. Robert Welch, Inc.*,⁸⁸ the Supreme Court held

79. Rabban, *supra* note 53, at 1208.

80. 376 U.S. 254 (1964).

81. Lucila I. van Dam, Note, *Long Live the Lie Bill!*, 41 U. MICH. J.L. REFORM 525, 543 (2008).

82. *N.Y. Times*, 376 U.S. at 256.

83. *Id.* at 256-58.

84. *Id.* at 258.

85. *Id.* at 283.

86. *Id.* at 280.

87. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 281 (2010).

that a private figure was not required to meet the standard of actual malice required in suits by public figure plaintiffs and that “the States could constitutionally allow *private* individuals to recover damages for defamation on the basis of any standard of care except liability without fault.”⁸⁹ The Court further developed the parameters of liability in *Philadelphia Newspapers v. Hepps*,⁹⁰ stating, “When the speech is of exclusively private concern and the plaintiff is a private figure . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.”⁹¹ *Hepps* further required private plaintiffs in suits against media defendants to bear the burden of showing the falsity of the speech in question to recover.⁹² As a result of these holdings, it behooves plaintiffs in such cases to frame themselves as private individuals, thus depriving defendants of a great deal of the available First Amendment protections.⁹³

The well-known case of *Hustler v. Falwell* was a landmark free speech case with a colorful set of facts.⁹⁴ *Hustler Magazine*, a nationally distributed magazine that published, among other things, hardcore pornography, ran a mock advertisement in which Reverend Jerry Falwell, a nationally recognized preacher on political, social, and moral affairs, described his first sexual encounter as a “drunken incestuous rendezvous with his mother in an outhouse.”⁹⁵ Falwell filed suit claiming libel, invasion of privacy, and intentional infliction of emotional distress.⁹⁶ At trial, the jury found for Falwell on the intentional infliction of emotional distress claim and awarded damages.⁹⁷ The Supreme Court took note of the fact that “graphic depictions and satirical cartoons have played a prominent role in public and political debate.”⁹⁸ The Court went on to state the following:

88. 418 U.S. 323 (1974).

89. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (emphasis added).

90. 475 U.S. 767 (1986).

91. *Id.* at 775.

92. *Id.* at 777.

93. Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81, 81-82 (2006).

94. *Hustler v. Falwell*, 485 U.S. 46 (1988).

95. *Id.* at 48.

96. *Id.* at 49.

97. *Id.*

98. *Id.* at 54.

The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.⁹⁹

The Court also noted that not all speech is protected equally, as in the case of vulgar, offensive, or shocking speech, which is "not entitled to absolute constitutional protection under all circumstances."¹⁰⁰ Likewise, protections may also be limited in the instance of so-called "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁰¹ Nonetheless, the court found for the magazine, specifically expanding the holding in *New York Times* to the tort of intentional infliction of emotional distress, stating that suits involving the emotional distress of a public plaintiff require the plaintiff to show actual malice, as with suits for defamation or invasion of privacy.¹⁰²

D. STATE TORT LAW

Snyder, like *New York Times* and *Hustler*, essentially involves the intersection of state tort law and constitutional protections. In particular, defamation, invasion of privacy, and intentional infliction of emotional distress have demonstrated a particular proclivity for reacting with the protections provided by the First Amendment.¹⁰³

Under Maryland law, the applicable state law in *Snyder*, to succeed on a claim for intentional infliction of emotional distress, a plaintiff must show the following:

- (1) the conduct was intentional or reckless;
- (2) the conduct was extreme or outrageous;
- (3) there was a causal connection between the wrongful con-

99. *Hustler v. Falwell*, 485 U.S. 46, 55-56 (1988) (citing *FCC v. Pacifica Foundation*, 438 U. S. 726, 745-46 (1978)).

100. *Id.* at 56 (citing *FCC*, 438 U.S. at 747).

101. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-72 (1942)).

102. *Id.* at 56.

103. *See, e.g.*, *N.Y. Times, Co. v. Sullivan*, 376 U.S. 256 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Hustler*, 485 U.S. 46.

duct and the emotional distress; and

(4) that the emotional distress was severe.¹⁰⁴

Conduct is considered outrageous when it is found to be “so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as . . . utterly intolerable in a civilized community.”¹⁰⁵ Thus, when a plaintiff sues for intentional infliction of emotional distress as a result of speech, the determinate issue is whether the First Amendment protects what would otherwise be considered tortious conduct.¹⁰⁶

Also vulnerable to a First Amendment defense, intrusion upon seclusion presumes first that the plaintiff had an expectation of privacy and permits recovery when the plaintiff can show that the defendant has intentionally intruded upon “another person’s solitude, seclusion, private affairs or concerns in a manner which would be highly offensive to a reasonable person.”¹⁰⁷ In contrast with the tort of defamation, which focuses on the inherent truth or falsity of the information circulated by the defendant, the tort of intrusion upon seclusion focuses on the methods by which the defendant obtained the information.¹⁰⁸

Under Maryland law, civil conspiracy consists of two or more persons in agreement to “accomplish an unlawful act,” or who employ illegal means to complete an objective “not in itself illegal,” provided that the plaintiff suffers damages as a result.¹⁰⁹

E. PUBLIC VS. PRIVATE SPEECH

The Supreme Court has well established that speech “concerning public affairs is more than self-expression; it is the essence of self-government.”¹¹⁰ Consequently, “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”¹¹¹ To

104. *Harris v. Jones*, 281 Md. 560, 566 (1977).

105. *Harris v. Jones*, 281 Md. 560, 567 (1977), *cited in Snyder v. Phelps*, 131 S. Ct. 1207, 1223 (2011).

106. *Snyder*, 131 S. Ct. at 1213.

107. *Trundle v. Homeside Lending, Inc.*, 162 F. Supp. 2d 396, 401 (D. Md. 2001).

108. *Id.*

109. *Green v. Wash. Suburban Sanitary Comm’n*, 259 Md. 206, 221 (1970).

110. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), *cited in Snyder*, 131 S. Ct. at 1215.

111. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), *cited in Snyder*, 131 S. Ct. at 1215.

determine whether speech is one of public or private concern, the test, though not “well-defined,”¹¹² examines the “content, form, and context of a given statement, as revealed by the whole record.”¹¹³

With regard to *context*, the Court stated in *Frisby v. Schultz*, that certain locations are more traditionally recognized for public discourse than others. *Frisby*, in discussing a public street as an appropriate forum for public debate, stated that the Court has “identified three types of fora: ‘the traditional public forum, the public forum created by government designation, and the nonpublic forum.’”¹¹⁴ Public streets in particular have operated as the prototypical site of public debate for most of human history.¹¹⁵ The Supreme Court has held that a plaintiff does not need to show actual malice to recover in defamation cases that do not involve matters of public concern.¹¹⁶ An issue is of public concern when it relates “‘to any matter of political, social, or other concern to the community,’ . . . or when it is ‘the subject of legitimate news interest.’”¹¹⁷

However, even when addressing issues of public concern, there are limited exceptions to constitutional speech protections; the captive audience doctrine, for instance, has been applied sparingly to protect unwilling listeners from protected speech.¹¹⁸ Under this doctrine, the chief component is choice—whether the hearers may elect *not* to hear a particular message.¹¹⁹ The captive audience doctrine, however, may allow a plaintiff to successfully sue in tort for speech which would otherwise be constitutionally protected when the hearer has no choice in whether or not he or she is on the receiving end of that speech.¹²⁰ The rationale is that a society that values freedom of speech “presup-

112. *San Diego v. Roe*, 543 U.S. 77, 83 (2004), *cited in Snyder*, 131 S. Ct. at 1216.

113. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

114. *Frisby v. Schultz*, 487 U.S. 474, 479-80 (1988) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985)).

115. *Frisby*, 487 U.S. at 480, *cited in Snyder*, 131 S. Ct. at 1218.

116. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

117. *Snyder*, 131 S. Ct. at 1216 (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983) and *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

118. *Id.* at 1220.

119. *Ginsberg v. New York*, 390 U.S. 629, 649 (1968).

120. *See Kovaks v. Cooper*, 336 U.S. 77 (1949) (holding that projecting amplified speech from a moving vehicle was not protected, as a result of the likely unwillingness of the listeners to hear such speech from within their homes).

poses the capacity of its members to choose.”¹²¹

IV. THE SUPREME COURT'S DECISION IN *SNYDER V. PHELPS*

In finding for Phelps and the Westboro Church, the Court in *Snyder* relied heavily on the notion that the speech involved was of public concern and, as such, was entitled to all the protections provided by the First Amendment.¹²² This was premised largely on the sentiment set forth in *New York Times*, which regards uninhibited debate on public issues as being crucially important to any First Amendment considerations.¹²³ While there was also a brief response to Snyder's argument that the captive audience doctrine should be applied in this case, the suggestion was quickly dismissed since the picketers maintained sufficient distance from the funeral service.¹²⁴ The Court further noted that “the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”¹²⁵

In determining whether the speech in *Snyder* was of private or public concern, the Court relied on the definition set forth in the Supreme Court case of *Connick v. Myers*,¹²⁶ which defined speech as public when it is relevant to any issues within the community¹²⁷ or when it is a matter of genuine news interest.¹²⁸ In so doing, the Court provided several examples of speech that is exclusively private in nature. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹²⁹ for instance, the Court held that, generally speaking, an individual's credit report is a matter of purely private concern.¹³⁰ Similarly, in *San Diego v. Roe*,¹³¹ the Court held that a government employer's regulation of employee speech regarding videos of a public employee engaging in sex was not a matter of public concern, as they “did nothing to inform the public about any aspect of the [employing agency's] functioning or

121. *Ginsberg*, 390 U.S. at 649.

122. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

123. *Id.* at 1222 (citing *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 270(1964)).

124. *Id.* at 1220.

125. *Id.* (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975)).

126. *Connick v. Myers*, 461 U.S. 138 (1983).

127. *Snyder*, 131 S. Ct. at 1216 (citing *Connick*, 461 U.S. at 146).

128. *Id.* (citing *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

129. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

130. *Snyder*, 131 S. Ct. at 1216 (citing *Dun & Bradstreet*, 472 U.S. at 762).

131. *San Diego v. Roe*, 543 U.S. 77 (2004).

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operation.”¹³²

The Court stated that the test used to assess the public or private nature of speech examines the “content, form, and context.”¹³³ Essentially, the Court evaluates “what was said, where it was said, and how it was said.”¹³⁴

As to Phelps’s and the Westboro Church’s speech, the Court stated that the signs pertained to “broad issues of interest to society at large,”¹³⁵ namely the “political and moral conduct of the United States . . . the fate of our Nation . . . homosexuality in the military, and scandal involving the Catholic clergy.”¹³⁶ While the Court acknowledged that some of the signs could be argued to have been directed toward Matthew Snyder (e.g., “You’re Going to Hell” and “God Hates You”), ultimately the finding did not alter its conclusion that the central purpose of the demonstration was to comment on issues of public concern.¹³⁷

The Court next addressed the speech’s context, dismissing Snyder’s contention that conducting such a demonstration in connection with his son’s funeral necessarily made this a matter of private concern.¹³⁸ The Court emphasized the fact that the demonstration was conducted on public property, and “the funeral setting [did] not alter that conclusion.”¹³⁹ Specifically, the Court noted that the public streets occupy a “special position in terms of First Amendment protection”¹⁴⁰ and “have repeatedly [been] referred to . . . as the archetype of a traditional public forum.”¹⁴¹

The Court next addressed the claim that Phelps’s and the Westboro Church’s contention that the demonstration was meant to convey their opinion on public matters was merely a smokescreen they employed to insulate themselves from liability

132. *Snyder*, 131 S. Ct. at 1216 (citing *San Diego*, 543 U.S. at 84).

133. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (citing *Dun & Bradstreet*, 472 U.S. at 761).

134. *Id.*

135. *Id.*

136. *Id.* at 1217.

137. *Id.*

138. *Snyder*, 131 S. Ct. at 1217.

139. *Id.*

140. *Id.* at 1218 (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)).

141. *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

as they mounted a personal attack on Snyder.¹⁴² The Court dismissed this assertion, pointing out that Phelps and the Westboro Church were engaged in such actions long before they became aware of Matthew Snyder's death, and there could "be no serious claim that Westboro's picketing did not represent its 'honestly believed' views on public issues."¹⁴³

In discussing the plaintiff's burden of proof in a claim for intentional infliction of emotional distress, the Court, relying on *Hustler*, remarked that "outrageousness" is a highly subjective standard that poses "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasant' expression."¹⁴⁴ In other words, individuals in our society are sometimes required to abide vicious insults for our society to protect constitutional principles, and a subjective standard can jeopardize those standards by allowing jurors to deal out justice based on their own passions.¹⁴⁵ In the end, the Court found that the jury finding of "outrageousness" could not overcome the "special protection" extended to the picketers' statements given how, where, and when they delivered those statements.¹⁴⁶ After concluding that both Snyder's intentional infliction of emotional distress claim and his claim for intrusion upon seclusion must fail, the Court held that the failure of his claim for civil conspiracy was a necessary consequence, since the picketers did not engage in any "unlawful activity."¹⁴⁷

Justice Breyer delivered a concurring opinion that presented a hypothetical to illustrate the limited scope of the holding.¹⁴⁸ Justice Breyer imagined a situation in which one person assaults another, knowing assault to be both illegal and newsworthy, as a means to disseminate opinions on a matter of public concern, relying on the First Amendment to shield him or her from liability.¹⁴⁹ Justice Breyer asserted that, in such a case, the holding of

142. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (citing *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

143. *Id.*

144. *Snyder*, 131 S. Ct. at 1219 (quoting *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510 (1984)).

145. *Id.* (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

146. *Id.*

147. *Id.* at 1220; see also *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

148. *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring).

149. *Id.*

Snyder would not leave the state powerless to protect the rights of the individual being assaulted, chiefly because the demonstration which took place in this case *was* “lawful and in compliance with all police directions.”¹⁵⁰ Justice Breyer noted that Snyder could not see the picketers from the funeral itself, which tended to weaken the outrageous aspect of the conduct.¹⁵¹

Justice Alito authored the lone dissent, opening with the assertion that “our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”¹⁵² Notably, the dissenting opinion placed crucial importance on the fact that Snyder was not a public figure.¹⁵³ Justice Alito further noted that Phelps and the Westboro Church have near-limitless mediums at their disposal with which to communicate their constitutionally protected viewpoints on any topics they wish, including written publications, sermons, speeches, and public forums.¹⁵⁴ In addition, Justice Alito stated that the picketers had a vast number of alternative locations where they could conduct such a demonstration without emotionally damaging Snyder, bolstering Snyder’s argument that the picketers’ conduct concerning the public interest aspects of their protest was little more than a smoke-screen.¹⁵⁵ Furthermore, the dissent’s analysis sharply contrasted with the majority in the assertion that the statements in this case “make no contribution to public debate” and that this is precisely the type of instance for which the tort of intentional infliction of emotional distress exists.¹⁵⁶

The dissenting opinion further noted the difficulties of recovering on a claim of intentional infliction of emotional distress and emphasized that Phelps and the Westboro Church “long ago abandoned any effort to show that those tough standards were not satisfied here.”¹⁵⁷ Instead, Phelps and the Westboro Church relied solely on First Amendment protection, and in the view of

150. *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011).

151. *Id.* at 1221-22 (Breyer, J., concurring).

152. *Id.* at 1222 (Alito, J., dissenting).

153. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting). It is particularly noteworthy that there was no discussion in the majority opinion regarding the appellant’s status as a public or private figure.

154. *Id.* (Alito, J., dissenting).

155. *Id.* at 1223-24 (Alito, J., dissenting).

156. *Id.* at 1222 (Alito, J., dissenting).

157. *Id.* at 1222-23 (Alito, J., dissenting).

the dissent, the majority inappropriately obliged.¹⁵⁸ The dissenting opinion also disagreed with the majority's interpretation of the signs themselves, noting that some, such as "God Hates Fags," would "have been understood as suggesting—falsely—that Matthew was gay."¹⁵⁹ The opinion combined this viewpoint, in consideration with the previously mentioned epic,¹⁶⁰ which described Matthew Snyder's upbringing and life in some detail, to arrive at the conclusion that Phelps and the Westboro Church "specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military."¹⁶¹

Further, the dissent found that the majority held for Phelps and the Westboro Church for three chief reasons, all of which the dissent considered unsound. First, because the Court mistakenly believed that the demonstration spoke to broad public issues.¹⁶² The dissent reasoned that the First Amendment "allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently."¹⁶³

Second, the dissent stated that the majority found for the picketers because the attack was "not motivated by a private grudge"—a point of view that the dissent found provided "no basis for the strange distinction the Court appear[ed] to draw."¹⁶⁴ The dissent stated that, even if this assertion is taken as true, a "cold and calculated strategy [designed] to slash a stranger as a means of attracting public attention" should heighten culpability, not mitigate it.¹⁶⁵

Third, the majority relied on the fact that the protest occurred on a public street, which, in the dissent's opinion, turned such public streets into "free-fire zone[s] in which otherwise actionable verbal attacks are shielded from liability."¹⁶⁶ While the

158. *Snyder v. Phelps*, 131 S. Ct. 1207, 1223 (2011). (Alito, J., dissenting).

159. *Snyder v. Phelps*, 131 S. Ct. 1207, 1225 (2011) (Alito, J., dissenting).

160. *See supra*, note 22.

161. *Id.* at 1225-26 (Alito, J., dissenting).

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

163. *Id.* (Alito, J., dissenting).

164. *Id.* (Alito, J., dissenting).

165. *Snyder*, 131 S. Ct. at 1227 (Alito, J., dissenting).

166. *Id.* (Alito, J., dissenting).

dissent recognized the traditional role of the public thoroughfare in fostering public debate, Justice Alito did not believe that the location in which the speech took place should have been dispositive.¹⁶⁷ “Neither classic ‘fighting words’ nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently.”¹⁶⁸

Finally, the dissent noted that *Hustler v. Falwell* concerned a public figure, the holding of which was inapplicable to the facts in this case, as that holding was meant to be specifically limited to situations involving public figures, and that the plaintiff here was a private figure.¹⁶⁹ Furthermore, the dissent noted that the Court in *Hustler* stated that its holding was to be limited to “‘publications such as the one here at issue,’ namely, a caricature in a magazine.”¹⁷⁰ Thus, there is no reason why the First Amendment protection extended by *Hustler* to a defendant that allegedly defamed a public figure should be applied in *Snyder*.¹⁷¹

V. ANALYSIS

The most striking takeaway from *Snyder v. Phelps* is what the majority did *not* state in its opinion—specifically, whether the plaintiff is a private or public figure, and what effect, if any, that status has on the First Amendment protections available to the defendant. This omission by the Court effectively expands First Amendment protections due to alleged tortfeasors in speech-based tort actions, in accord with the trend toward greater First Amendment protections exhibited by the Court over the past two centuries. The courts have long wrestled with exactly what speech is to be given special protection in tort actions. *New York Times* made it clear that uninhibited public debate on public issues was of paramount importance insofar as constitutional considerations and protections were concerned.¹⁷² As such, the law has developed in a manner that often provides defendants in speech-related tort actions with First Amendment protection

167. *Snyder v. Phelps*, 131 S. Ct. 1207, 1227 (2011).

168. *Id.*

169. *Id.* at 1228.

170. *Id.* (quoting *Hustler*, 485 U.S. at 56).

171. *Snyder*, 131 S. Ct. at 1228.

172. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964), *cited in Snyder*, 131 S. Ct. at 1215.

when the speech concerned is of legitimate public interest. *New York Times* dealt with a public official plaintiff and speech of public interest and set forth the required standard of actual malice to recover in defamation,¹⁷³ whereas *Gertz* held that a private figure plaintiff only had to show the required common law elements of defamation to recover.¹⁷⁴ *Hepps* further defined the field, holding that for a private plaintiff dealing with speech of private concern, “the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.”¹⁷⁵ However, it is precisely the majority opinion’s total *lack* of discussion regarding the plaintiff’s status that is both worthy of discussion and somewhat baffling.

If one interprets the Court as silently classifying the appellant as a public figure, then the law has been advanced little as a result of the holding in this case; *Snyder v. Phelps* becomes merely an updated reiteration of *Hustler v. Falwell*—albeit, one with arguably more shocking and offensive speech—in that it is the Supreme Court providing First Amendment protection after a public figure sues on speech of general public interest. If that is the case, then there was little purpose served in granting certiorari in the first place, and the Court likely would not have done so. There would be little reason for the Supreme Court to elect to hear a case such as this, properly decided by the Fourth Circuit based upon current precedent only to reiterate what the court below had already stated.

However, if one interprets the Court as silently classifying the appellant as a private figure (which seems to be the only interpretation to be drawn from the Court’s opinion), then the protection has been expanded significantly and now extends to cases involving either public or private figure plaintiffs, so long as the *speech* is of public concern. In effect, the Court has changed the rule, setting a particularly low threshold considering the relatively broad definition of what constitutes a matter of “public concern.”¹⁷⁶ After all, American society contains a sizable contingent that revels in the tragic minutiae of the lives of others.¹⁷⁷ When

173. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

174. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

175. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 775 (1986).

176. *See supra* Section III.F.

177. One need only look at TMZ.com, *US Weekly*, *The Biggest Loser*, *Intervention*, or *Judge Judy* for evidence of this.

all that is required for an issue to be elevated to a matter of public interest is that a section of the public be interested, it is unclear how the Courts will continue to classify issues of private interest in the age of the twenty-four hour news cycle, celebrity magazines, Facebook, and Twitter.

The Court, perhaps wisely, notes *Dun & Bradstreet* and *San Diego* to at least preserve the arguably necessary fiction that some speech may still be of only private interest, thereby preserving the tortious nature of written and verbal defamation and intentional infliction of emotional distress.¹⁷⁸ The difference between those two cases and the facts in *Snyder* is that in those two cases there was no *spectacle*. There were no press releases; no one's aim was to generate as much publicity as possible, as was the case in *Snyder*. The danger, then, becomes that tortious actors may insulate themselves from liability by making themselves newsworthy or by simply conducting their tortious conduct in public, as Justice Breyer's hypothetical details¹⁷⁹ and Justice Alito's dissent warns against.¹⁸⁰

Justice Breyer seems to think that this opinion will not eviscerate the tort of intentional infliction of emotional distress because the actors in this case were not committing intrinsically illegal acts, as they were acting in full accordance with the law.¹⁸¹ However, this unwittingly adds another element to recovery for intentional infliction of emotional distress when the speech is on a matter of public interest: the plaintiff must first show that the speaker was illegally *speaking*, independent of the legality of what was said.

There is some discussion by the majority that the speech involved in this case was not of private concern—i.e., not precisely directed at Matthew Snyder personally—as deduced from the defendants' record of conducting similar demonstrations at the funerals of others, including others in the military; the Court states that “there can be no serious claim that Westboro's picketing did not represent its ‘honestly believed’ views on public issues.”¹⁸² This begs the question: Is the Court analyzing the appellees' sincerity of belief based upon their long record of similar behavior?

178. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

179. *Snyder v. Phelps*, 131 S. Ct. 1207, 1221, 1226 (2011) (Breyer, J., concurring).

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

181. *Id.* at 1221 (Breyer, J., concurring).

182. *Id.*

If so, that means that they escaped liability, not because this was a one-time affair, but because they have made a habit out of using their speech to make points at the expense of the emotional well-being of others. As such, the Court is left to presume that any similar statements made are general commentary and opinion rather than pointed attacks against specific individuals. How may the outcome have been different had this been their first picketing at a military funeral? The Court may have found that these were pointed, surgical, verbal attacks of private concern directed at Snyder. If so, then the opinion in *Snyder* does not provide a workable framework for lower courts to follow in future cases; if actors may insulate themselves from liability resulting from outrageous conduct by showing a pattern of related outrageous conduct communicating an alleged message of any kind, such a ruling as *Snyder* may result in more outrageous, emotionally devastating conduct, not less, and fewer instances where the perpetrators are held liable.

The Court does note in passing that states are not powerless to prevent extraordinarily hurtful speech in similar cases, citing as evidence the current Maryland law, establishing a buffer zone which must be maintained between funerals and demonstrators.¹⁸³ While it is also brought to the Court's attention that "43 other States and the Federal Government" have now imposed such restrictions,¹⁸⁴ the Court refuses to tackle the issue head-on, relying on legislatures to take up the cause after the fact.

Moreover, there is no reason to believe that statutory solutions will stand up to Constitutional attack. While the Supreme Court case of *Hill v. Colorado* did hold that a statute preventing demonstrations such as picketing and handing out leaflets within 100 feet of a hospital was constitutional,¹⁸⁵ the same case also noted that "an injunctive provision creating a speech-free 'floating buffer zone' with a 15-foot radius violates the First Amendment"¹⁸⁶ Whether the Supreme Court will ultimately determine that such funeral statutes consist of "reasonable time, place, or manner restrictions"¹⁸⁷ such as is required by the First

183. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (citing MD. CRIM. LAW CODE ANN. 10-205 (Lexis Supp. 2010)).

184. *Id.* (citing Brief for American Legion as *Amicus Curiae* 18-19 n.2).

185. *Hill v. Colorado*, 530 U.S. 703, 733-35 (2000).

186. *Id.* at 712 (citing *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997)).

187. *Snyder*, 131 S. Ct. at 1218 (citing *Clark v. Cmty. for Creative Non-Violence*,

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Amendment or fall within the unconstitutional realm occupied by the so-called “floating buffer zone” remains to be decided.

The inconsistencies highlighted above illustrate precisely why this area of law is so notoriously difficult to navigate, why statutory remedies are so likely to come up short, and why the Supreme Court needs to be as explicit as possible in their reasoning and as transparent as possible in their logic when deciding cases such as *Snyder*.

VI. CONCLUSION

If the history of the First Amendment teaches anything, it is that its interpretation is always evolving. Few would argue that as a nation we are not better off with the present construction given to the Free Speech clause when compared with past constructions such as those given during the reign of the Sedition or Comstock Acts. The law, whether a given society likes to admit it or not, will always be a reflection of the times, and as such, it will always be in a state of flux as time passes and old conventions give way to new ones. The phrase “all men are created equal,” for instance, carries a different kind of weight when espoused by a slave-owning nation as opposed to one that has outlawed slavery, yet few today truly doubt that that sentiment of equality was genuinely held by Jefferson when he penned it.¹⁸⁸ As time passed, however, it came to mean something different, something more, as American society progressed through the Civil War, the outlawing of slavery, the Civil Rights Movement, and the dissolution of the Jim Crow laws. The same can be said for free speech. Where the notion of free speech began as an ideal, we, as a society, have become bolder, more sure of ourselves; as a nation, we generally feel less and less of a need to censor dissent and silence the opposition. Over time, American society has progressively subscribed to Justice Holmes’ assertion “that the best test of truth is the power of the thought to get itself accepted in

468 U.S. 288, 293 (1984)).

188. In the original text, Jefferson elaborated on this notion of equality among men in one of the notes of grievance against the British monarch, in which he criticized the crown for permitting slavery, the institution running contrary to the principles to which he was ascribing his name. “The grievance announced that the King had waged ‘cruel war against human nature itself.’” However, ultimately, the passage was deleted at the behest of delegates from the slave-owning states of South Carolina and Georgia. G. Edward White, *Revisiting the Ideas of the Founding*, 77 U. CIN. L. REV. 969, 987 (2009).

the competition of the market.”¹⁸⁹ The nation should be proud of this trend.

We are fortunate enough to exist in a time and place where free speech is fiercely protected, and the purest form of the Revolutionary-era sentiments the world has ever seen have been permitted to develop into young adulthood. That the Sedition Act, the Comstock Act, McCarthyism, and the like, did not cripple and kill the free speech ideal in the United States is little short of miraculous. As a result, however, we must sometimes sacrifice our own sense of justice to that higher ideal.

The preceding is not to say that the Court was wrong in deciding *Snyder*. Rather, it seems that the Court reached, painstakingly, what was an inevitable conclusion in a free society. The issue that must be taken with the majority opinion, however, is that it functions in a somewhat hypocritical bubble in its reluctance to comment on the status of Snyder as a private citizen in the sense that its silence may be interpreted by some as mere oversight rather than a purposeful omission—a result the Court must be aware of—allowing greater judicial discretion in future cases and less predictability for potential litigants. There has been an unmistakable trend since its penning toward more expansive protection offered by the First Amendment. Under such a developmental scheme, it seems improbable and against long odds that speech-based tort actions have survived as long as they have. It also seems that the Court, despite its silence on the issue, *is* holding that the previously relevant status of a plaintiff as a public or private citizen is no longer significant should the speech in question be deemed a matter of public concern. Such an assertion by the Court is well-aligned with our national ideals, despite the outrage that most Americans must feel stemming from the conduct of Phelps and the Westboro Church. If that is to be the declared law of the land, so be it, but if for no other reason than to clarify previously well-defined law that has now been muddied by this opinion, our High Court should have the courage of its convictions to come out and say as much.

Peter J. Segrist

189. *Abrams v. United States*, 250 U.S. 616, 630 (1919).