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Protest Heard around the World: Why the Supreme Court's Decision in Snyder v. Phelps Protects Too Much Speech, Challenges the Court's Historical Balance between Free Speech and State Tort Claims, and Leaves Tort Victims with Little Remedy

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THE PROTEST HEARD AROUND THE WORLD: WHY THE SUPREME COURT'S DECISION IN *SNYDER V. PHELPS* PROTECTS TOO MUCH SPEECH, CHALLENGES THE COURT'S HISTORICAL BALANCE BETWEEN FREE SPEECH AND STATE TORT CLAIMS, AND LEAVES TORT VICTIMS WITH LITTLE REMEDY

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ABSTRACT

On March 2, 2011, the Supreme Court ruled in *Snyder v. Phelps* that the First Amendment protected a religious group's offensive speech at a protest the group held during the funeral of an American soldier killed in Iraq, primarily because the speech was on matters of "public concern." In one of the most talked about cases in recent memory, the Court confronted the hurtful speech of what may be one of the most outspoken and disliked hate groups in the early twenty-first century—the Westboro Baptist Church ("Westboro"). Fred Phelps, the leader of Westboro who founded the church in 1955, believes that it is his "duty" to deliver the church's message at funerals, a message that frequently includes statements such as "God

Hates the USA," "Thank God for Dead Solders," "Fag Troops," "Semper Fi Fags," and "AIDS Cures Fags."

Snyder v. Phelps has been described as a case that addresses "the clash between two fundamental and long standing American values: freedom of speech and 'the right to be let alone.'" Not surprisingly, *Snyder* has already been labeled "the most charged on the Supreme Court docket [in 2011]." Despite the emotional setting of a controversial protest at a soldier's private funeral, and Westboro's plainly hateful and hurtful speech during and after the soldier's funeral that resembled more of a personal attack on the soldier and his family than a public rally, most First Amendment scholars have hailed the decision as the correct one. However, *Snyder* effectively leaves plaintiffs with legitimate Intentional Infliction of Emotional Distress (IIED) claims with little recourse, and may serve as a protection for speech the First Amendment was not designed to protect, i.e., private hurtful speech that injures private plaintiffs.

In fact, a thorough review of *Snyder* and the Court's prior speech/tort precedent suggests that the Snyder Court struck an improper balance between free speech interests and the state's interest in protecting its citizens from IIED. When *Snyder* is viewed in the context of the Supreme Court's prior speech/tort cases, it appears that the Court's decision places too much emphasis on the nature of Westboro's speech, provides little consideration for the nature of Mr. Snyder's injuries or his rights as a private citizen, and may be inconsistent with the Court's longstanding tradition of balancing First Amendment interests with state-tort claims. This article explores *Snyder*'s shortcomings and its dangerous implications for future private plaintiffs hurt by speech-causing IIED.

> "At one time protecting . . . one's peace of mind was at the heart of emotional distress law. Judicial application of the publickness standards enunciated in [*Sullivan*] and its progeny, and later in the *Hustler Magazine* case, has resulted in case law that gives an almost-absolute blanket of protection to the media. While it is extremely important for the courts to be vigilant in assuring a free press, it is also important that an individual's right to his or her . . . emotional well being be given the utmost protection. The law's emphasis on the public status of the plaintiff rather than the historically forthright claim that . . . emotional harm demand[s] remedy, requires careful scrutiny and revision. The courts have

> strayed far from the core ideas embodied in . . . the tort of emotional distress."[1]
>
> Diane L. Borden, First Amendment Scholar

> "To not provide a remedy for psychologically injurious speech truly would be to sacrifice one set of rights for another."[2]
>
> Jeffery Shulman, Professor, Georgetown University Law Center

I. INTRODUCTION

On March 2, 2011, the Supreme Court ruled in *Snyder v. Phelps* that the First Amendment protected a religious group's offensive speech at a protest the group held during the funeral of a soldier who died in Iraq.[3] In one of the most talked about cases in recent history, the Court confronted the hurtful speech of what may be one of the most outspoken and disliked hate groups in the early twenty-first century—the Westboro Baptist Church ("Westboro").[4] The Church believes "God hates and punishes the United States for its tolerance of homosexuality . . . ."[5] Westboro's self-proclaimed mission "involves

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* Law Clerk to the Honorable James K. Singleton, United States District Court Judge for the District of Alaska. I would like to especially thank my parents and brother for their continued support, as well as Professors Larry Levine and Clay Calvert for their wisdom and guidance.

1. Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of* Hustler Magazine v. Falwell, 35 GONZ. L. REV. 291, 316-17 (1999).

2. Jeffrey Shulman, *Free Speech at What Cost?:* Snyder v. Phelps *and Speech Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 342 (2010).

3. Snyder v. Phelps, 131 S. Ct. 1207, 1207 (2011).

4. *See* Mary Anne Franks, *When Bad Speech Does Good*, 43 LOY. U. CHI. L.J. 395, 399-400 (2012) ("One is hard pressed to find a group more universally hated across the ideological spectrum than the WBC. Vocal Critics of the WBC include Bill O'Reilly, Sarah Palin, Michael Moore, and John Stewart. Numerous Christian organizations have condemned the Church, as has the Ku Klux Klan."); *see also* Eric Marrapodi, *Foo Fighters protest Westboro Baptist Church*, CNN BELIEF BLOG (Sept. 19, 2011, 12:34 PM), http://religion.blogs.cnn.com/2011/09/19/foo-fighters-protest-westboro-baptist-church/?iref=allsearch ("The Topeka, Kansas-based Westboro was started by Fred Phelps in 1955 and is best known for protesting soldier's funerals . . . [and] is regularly sued for defamation.").

5. *Snyder*, 131 S. Ct. at 1210.

staging 'daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning nation-destroying filth,'" because "the 'modern militant homosexual movement poses a clear and present danger to the survival of America.'"[6] It is estimated that "in the more than 20 years that the members of [Westboro] have publicized their message, they have picketed nearly 600 funerals,"[7] and "orchestrated over 42,760 demonstrations at homosexual parades and other events."[8]

Fred Phelps, the leader of Westboro who founded the church in 1955, believes that it is his duty to deliver the church's message at funerals.[9] This message frequently includes statements such as "God Hates the USA," "Thank God for Dead Solders," "Fag Troops," "Semper Fi Fags," and "AIDS Cures Fags."[10] Westboro's "tactics are deliberately shocking, offensive, and extreme, representing a calculated effort to attract international media attention and spread its message to the world."[11] By "all accounts, the Phelps family has enjoyed monstrous success in their ploys for attention: hate, it seems, breeds plenty of press."[12] In her recent article on Westboro, published in the *California Law Review*, Professor Christina Wells remarked: "Few people will lose sleep if the Court finds that the First Amendment allows Albert Snyder to sue the Phelpses for intentional infliction of emotional distress and invasion of privacy for protesting near his son's funeral."[13]

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6. Jonathan S. Carter, *Passive Virtues Verses Aggressive Litigants: The Prudence of Avoiding a Constitutional Decision in* Snyder v. Phelps, 89 N.C. L. REV. 326, 330 (2010) (quoting God Hates Fags, Westboro Baptist Church FAQs, GodHatesFags.com, http://www.godhatesfags.com/faq.html (last visited Nov. 9, 2010)).

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

8. Carter, *supra* note 6, at 331.

9. Snyder v. Phelps, 580 F.3d 206, 211-12 (4th Cir. 2009).

10. *Id.*

11. Carter, *supra* note 6, at 331.

12. *Id.*

13. Christina Wells, *Regulating Offensiveness:* Snyder v. Phelps, *Emotion, and the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 71-72 (2010) (arguing that Mr. Snyder's IIED claim should be dismissed as it does not fit within the Court's long history of protecting offensive speech).

Snyder v. Phelps has been described as a case that addresses "the clash between two fundamental and longstanding American values: freedom of speech and 'the right to be let alone.'"[14] Indeed, the Supreme Court's decision in *Snyder* ended a long and heated battle that started in 2006, when Westboro protested Matthew Snyder's ("Matthew") funeral, a soldier who died in the line of duty in Iraq.[15] The church also published an "epic" on its website, www.godhatesfags.com, titled "The Burden of Marine Lance Corporal Matthew Snyder," and stated that Matthew's parents "raised him for the devil," taught him that God was a liar, and told him to "defy his creator."[16] The epic also stated that "God 'rose up' Matthew in order to kill him and that 'Matthew fulfilled his calling' to create an opportunity for others to preach God's word."[17]

After Matthew's father, Albert Snyder ("Mr. Snyder"), viewed a news broadcast of Westboro's protest and the contents of the epic, he sued Westboro and several of its members in federal court, alleging intentional infliction of emotional distress ("IIED") and other state tort claims.[18] Mr. Snyder presented "evidence of extreme and severe emotional distress leading to physical illness, worsening of his diabetes, severe depression, and an inability to have positive memories about his son," among other things.[19] The jury awarded Mr.

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14. Deana Pollard Sacks, Snyder v. Phelps, *The Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE. L. J. ONLINE 193, 193 (2010) ("Freedom of Speech is a cherished and distinguishing characteristic of American Democracy, while the right to be left alone has been acclaimed as the 'most comprehensive of rights and the right most valued by civilized men.'"). The question of how to balance the First Amendment's free speech clause with state tort law is always a difficult one, because "[a] First Amendment challenge to a tort judgment is a clash of divergent legal cultures. The advocates speak different languages and embrace different faiths." David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 759-60 (2004). ("First Amendment jurisprudence seeks precision and predictability, insists on narrow remedies, and distrusts juries. Tort Law embraces broad, flexible principles that aim to provide structures by which outcomes can be decided, usually by juries, in a manner that is more than a little ad hoc.").

15. Snyder v. Phelps, 580 F.3d 206, 211 (4th Cir. 2009).

16. *Id.* at 212.

17. Sacks, *supra* note 14, at 197.

18. *Snyder*, 580 F.3d at 212; Sacks, *supra* note 14, at 197.

19. Sacks, *supra* note 14, at 197.

Snyder $2.9 million in compensatory damages and $8 million in punitive damages, but the district court reduced the jury's punitive damages award to $2.1 million, effectively reducing Mr. Snyder's total recovery to $5 million.[20] On appeal, the Fourth Circuit reversed, holding that "[n]otwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and epic are constitutionally protected."[21]

The Supreme Court granted certiorari and ultimately affirmed the Fourth Circuit's decision. The Court based its decision to protect Westboro's speech primarily on two grounds: the speech could be "fairly characterized as constituting speech on a matter of public concern," and Westboro "had the right to be where they were."[22]

The Court's decision in *Snyder* made national headlines and sparked national debate, two things Westboro has also done very well.[23] Following the Court's decision, the leader of Westboro "told reporters . . . that the congregation would 'quadruple' the number of funeral protests."[24] In fact, "Margie J. Phelps, daughter of church leader Fred Phelps and legal counsel for the group," explained to reporters: "Let me tell you what this church does: Shut up all that talk about infliction of emotional distress . . . . When you're standing there

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20. *Snyder*, 580 F.3d at 215-16; Snyder v. Phelps, 533 F. Supp. 2d 567, 73 (D. Md. 2008); Sacks, *supra* note 14, at 197-98.

21. Snyder v. Phelps, 580 F.3d 206, 226 (4th Cir. 2009).

22. Snyder v. Phelps, 131 S. Ct. 1207, 1217-18 (2011).; *see also* Adam Liptak, *Justices Rule for Protesters at Military Funerals*, N.Y. TIMES, Mar. 2, 2011, *available at* http://www.nytimes.com/2011/03/03/us/03scotus.html?pagewanted=all&_r=0 (explaining that two primary factors required a ruling in favor of the Church. "First, its speech was on matters of public concern . . . . Second, the members of the church 'had the right to be where they were.'").

23. *See Snyder*, 131 S. Ct. at 1224 (Alito, J., dissenting) (discussing Westboro's national picketing strategy and how successful its "outrageous" strategy has been in creating publicity for the group); Carter, *supra* note 6, at 331 ("[T]he Phelps family has enjoyed monstrous success in their ploys for attention . . . .").

24. Nick Wing, *Westboro Baptist Church Promises to 'Quadruple' Down On Protests After Supreme Court Ruling,* THE HUFFINGTON POST (Mar. 2, 2011), http://www.huffingtonpost.com/2011/03/02/westboro-baptist-church-supreme-court_n_830484.html.

with your young child's body bits and pieces in a coffin, you've been dealt some emotional distress by the Lord your God."[25]

Not surprisingly, *Snyder* has already been described as "among the most charged on the Supreme Court docket [in 2011]."[26] Yet, despite the emotional setting of a controversial protest at a soldier's funeral, and Westboro's plainly hateful and hurtful speech during and after Matthew's funeral, most First Amendment scholars have hailed the decision as the correct one.[27] John Yoo, a professor of law at Berkeley, noted that "[t]his was and should have been an easy case for the Supreme Court." Professor Yoo further stated, "Chief Justice Roberts and the 8-1 majority of the Court reached exactly the right decision."[28] He added, "[w]hile I find Phelps' message despicable, the Court's decision is a welcome reaffirmation of the right to robust free speech . . . ."[29] Lisa McElroy, who consistently posts on the prominent Supreme Court blog SCOTUSblog, commented, "[w]hile it's true that the facts of this case are particularly disturbing, most legal experts agree that the decision in this case is probably right . . . because the Court has held time and time again that the First Amendment was designed to protect speech that we do not like."[30] She added, "So what's the fuss? Haven't we known that for a while that speech we do not like is protected (think pornography, videos of animals being killed, white supremacist's mantras)?"[31]

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25. *Id.*

26. Sean Gregory, *Why the Supreme Court Ruled for Westboro*, TIME (Mar. 3, 2011), http://www.time.com/time/nation/article/0,8599,2056613,00.html.

27. *See* Lisa McElroy, *Last week's opinions in Plain English,* SCOTUSBLOG (Mar. 6, 2011, 7:15 AM), http://www.scotusblog.com/2011/03/last-weeks-opinions-in-plain-english-2/ [hereinafter McElroy]; *see also* Miriel M. Thomas, *That's Not Real Freedom,* HUMANE PURSUITS, HUMANE PURSUITS, (Mar. 14, 2011) http://humanepursuits.wordpress.com/2011/03/14/thats-not-real-freedom/ ("The decision is probably technically correct, but its implications for the future of American freedom are grim.").

28. John Yoo, *SCOTUS Upholds First Amendment Rights in* Snyder v. Phelps, RICOCHET (Mar. 2, 2011, 12:07 PM), http://ricochet.com/main-feed/SCOTUS-Upholds-First-Amendment-Rights-in-Snyder-v.-Phelps.

29. *Id.*

30. *See* McElroy, *supra* note 27.

31. *Id.*

At first glance, the decision in *Snyder* appears in line with "many earlier decisions that said the First Amendment exists to protect robust debate on public issues and free expression, no matter how distasteful."[32] So, one may ask, what is the point of criticizing *Snyder* when the vast majority of legal scholars believe this case was an "easy," slam dunk decision for the majority, especially when case law seemingly backs up this view?[33] Indeed, it was just a year earlier when this same Court struck down a federal statute that criminalized the "commercial creation, sale, or possession of certain depictions of animal cruelty," ruling that the law was "substantially overbroad, and therefore invalid under the First Amendment," and declaring: "Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech . . . [but] [d]epections of animal cruelty should not be added to that list."[34] Furthermore, *Snyder* appears in line with the First Amendment jurisprudence over the last thirty years, where the Court has carved out broad protections for even hurtful political speech.[35] Yet, the effect of the Court's decision in *Snyder* ultimately leaves plaintiffs like Mr. Snyder with little recourse, and may serve as a protection for speech the First Amendment was not designed to protect, *i.e.*, private hurtful speech that injures private plaintiffs.[36] In fact, when viewed with a closer lens, *Snyder* contains

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32. Mark Sherman, *Westboro Baptist Church Wins Supreme Court Appeal Over Funeral Protests,* THE HUFFINGTON POST (Mar. 2, 2011 9:34 PM) http://www.huffingtonpost.com/2011/03/02/westboro-baptist-church-w_n_830209.html.

33. *E.g.,* United States v. Stevens, 130 S. Ct. 1577 (2010) (overturning a ban on animal crush videos); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (protecting corporations' political speech); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (protecting Hustler's political ad parody); Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (granting an injunction against Nazi group deprived group of First Amendment right to express their ideas).

34. *Stevens*, 130 S. Ct. at 1580.

35. *See* McElroy, *supra* note 27 and accompanying text; *see supra* note 33 and accompanying text.

36. Snyder v. Phelps, 131 S. Ct. 1207, 1222-29 (2011) (Alito, J., dissenting) (arguing the First Amendment should not protect private assaults on private plaintiffs in this context); *see Falwell*, 485 U.S. at 56 (protecting public speech that concerned a public official to allow "breathing space" for robust political debate); Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (allowing the states to set their own fault standard in defamation cases where the plaintiff was a private figure

three fundamental flaws, all of which form the bulk of this article's analysis.

First, the majority focused primarily on whether Westboro's speech was public or private. The majority used the nature of Westboro's speech as a trump card and provided scant analysis on two other traditional balancing factors the Court has previously employed beginning with *New York Times Co. v. Sullivan* ("*Sullivan*") and its progeny—the nature of the plaintiff and the nature of the injury.[37] Second, the majority cited *Hustler Magazine v. Falwell* ("*Falwell*") in defense of Westboro, claiming that the case stands for the broad proposition that the First Amendment's Free Speech Clause "can serve as a defense in state tort suits," including IIED claims. However, *Falwell's* facts differ markedly from *Snyder's*, suggesting that *Falwell* is much narrower than the majority would admit.[38] Finally, the majority's analysis creates a dangerous implication for future private individuals hurt by hateful speech causing IIED, as it

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and refusing to require private plaintiffs to show actual malice because "private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater."); New York Times Co. v. Sullivan, 376 U.S. 245, 270 (1964) (requiring public officials to prove actual malice by clear and convincing evidence in order to recover in defamation in order to protect "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."); Nat Stern, *The Intrinsic Character of Defamatory Content As Grounds For a Uniform Regime of Proving Libel*, 80 MISS L.J. 1, 7, (2010) (arguing that Sullivan's actual malice standard was always a tool to foster public debate and not a natural outgrowth of defamation law).

37. *Snyder*, 131 S. Ct. at 1215 (majority opinion) ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."); Sacks, *supra* note 14, at 204 (arguing that the Supreme Court's speech/tort cases all involve three balancing factors, which the Court has traditionally used to strike a proper balance between the First Amendment and the state's right to protect it citizens from torts); *see also* Shulman, *supra* note 2, at 322-25 ("Since 1964, the Court has carefully measured the competing weights of public discourse and private personality.").

38. *Snyder*, 131 S. Ct. at 1213-14; Clay Calvert, War *and [Emotional] Peace: Death in Iraq and the Need to Constitutionalize Speech-Based Claims Beyond* Hustler v. Falwell, 29 N. ILL. U. L. REV. 51, 61-63 (2008) (explaining that *Hustler*'s standard is narrow and applies only to public officials and public speech in the form of political parody, and though the author argues for extending the standard to private plaintiffs, he admits the Court did not consider how its ruling would affect private individuals).

allows Westboro and other hate groups to "bootstrap" their private assaulting speech with public speech, effectively immunizing their private speech from tort liability.

Accordingly, after a thorough review of *Snyder* and the Court's prior speech/tort precedent, there may be more to the story than meets the eye. This article explores *Snyder* in an effort to demonstrate that the Supreme Court may have struck an improper balance between free speech interests and the state's interest in protecting its citizens from IIED. When *Snyder* is viewed in the context of the Supreme Court's prior speech/tort cases, it appears that the Court's decision placed too much emphasis on the nature of Westboro's speech, provided little consideration for the nature of Mr. Snyder's injuries or his rights as a private citizen, and may have been inconsistent with the Supreme Court's longstanding tradition of balancing First Amendment interests with state tort claims.[39]

Section II summarizes *Snyder*, including the facts of the case and the lower court decisions. It also provides an in-depth analysis of the Supreme Court's decision.

Section III sets forth the history of prior speech/torts cases and discusses the three traditional balancing factors in an effort to show that the Supreme Court ignored two of these balancing factors by focusing only on the nature of Westboro's speech. This Section also discusses the history of defamation and IIED and counters the conventional argument that defamation and IIED are different torts, meaning IIED does not deserve the type of compensation usually given in defamation cases.

Section IV explores the Supreme Court's decision in *Falwell* and argues that the majority in *Snyder* improperly applied *Falwell's* holding to the detriment of Mr. Snyder and future plaintiffs alike. This Section then questions Professor Clay Calvert's argument that the standard in *Falwell* should extend even to private plaintiffs if the speech is on matters of public concern.[40]

Section V discusses the "bootstrapping" implications that flow from the majority's analysis. It also discusses how this bizarre situation cannot be squared with a similar anti-bootstrapping rule in defamation law. This rule prevents defendants, through their own

39. Sacks, *supra* note 14, at 204.

40. Calvert, *supra* note 38, at 63.

potentially defamatory conduct at issue, from bootstrapping private plaintiffs with public figure status, preventing defendants from benefitting from their defamatory behavior. This section also sets forth two hypotheticals in order to demonstrate the dangerous implications *Snyder* created.

Finally, Section VI concludes by providing some policy recommendations that more properly balance the competing interests in future cases similar to *Snyder*.

One important disclaimer is appropriate before we jump into the Supreme Court's decision in *Snyder* and how it is inconsistent with the Court's prior relevant speech-tort jurisprudence. While this article discusses how the balance *Snyder* struck between free speech and tort interests may be misguided or "inconsistent" with prior precedent and the First Amendment's intended protections, it does not claim that this is an easy topic or that there is an easy answer. In fact, this question is extremely difficult, as a "First Amendment challenge to a tort judgment" represents "a clash of divergent legal cultures."[41] Indeed, "[t]he culture of First Amendment jurisprudence seeks precision and predictability . . . insists on narrow remedies, and distrusts juries," while "[t]ort law embraces broad, flexible principles that aim not so much to prescribe outcomes as to provide structures by which outcomes can be decided, usually by juries, in a manner that is more than a little ad hoc."[42] In a recent article on the topic, David Anderson aptly noted that tort law and the First Amendment are "uneasy bedfellows," precisely because they serve very different purposes.[43] Accordingly, this paper does not assume there is an easy way to balance these competing interests, but only that *Snyder* apportioned the balance incorrectly.

In fact, I vehemently agree with the notion that speech on public issues about public figures or officials deserves vigorous protections. Yet, a thorough examination of *Snyder* reveals that the case is more complicated than this generally accepted First Amendment principle, i.e., that public speech about public figures on public issues deserves robust protections.[44] In truth, *Snyder* deserves our attention because

41. Anderson, *supra* note 14, at 759-60.

42. *Id.*

43. *See id.* (describing the differences inherent in tort and constitutional law).

44. & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759

some dangerous implications flow from the balance the Court struck for future private plaintiffs who may become emotionally distressed by hurtful, hateful speech.

II. *SNYDER V. PHELPS*

A. The Procedural History

Based on both Westboro's protest at Matthew's funeral and the epic published on its website, Mr. Snyder sued Westboro and several of its members in federal court alleging "five state law tort claims: defamation, intrusion upon seclusion, publicity given to private life, IIED, and civil conspiracy."[45] Only three of the claims—intrusion upon seclusion, IIED, and civil conspiracy—proceeded to trial.[46] There, Mr. Snyder presented "evidence of extreme and severe emotional distress leading to physical illness, worsening of his diabetes, severe depression, and an inability to have positive memories about his son," among other things.[47] The jury awarded Mr. Snyder $2.9 million in compensatory damages and "$8 million in punitive damages—$6 million for the invasion of privacy claim and $2 million for the intentional infliction of emotional distress claim."[48] After post trial motions, "the district court upheld the compensatory damages award but remitted the punitive damages award to a total of

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(1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978))); Connick v. Myers, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protections." (quoting *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982))); Garrison v. Louisiana, 379 U.S. 65, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Sullivan*, 376 U.S. at 270 ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

45. Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009).

46. *Id.* at 213.

47. Sacks, *supra* note 14, at 197.

48. Snyder v. Phelps, 533 F. Supp.2d 567, 573 (D. Md. 2008).

$2.1 million," which effectively reduced Mr. Snyder's recovery to $5 million.[49]

On appeal, the Fourth Circuit reversed.[50] Essentially, the Fourth Circuit held that the speech at issue was categorically protected by the First Amendment, ultimately ruling that the speech—both the signs and the epic—were immune from tort liability.[51] The court, taking a categorical approach, explained that certain categories of speech "are absolutely protected by the First Amendment."[52] The court noted: "the First Amendment serves to protect statements on matters of public concern that fail to contain a 'provably false factual connotation.'"[53] This category immunized Phelpses' speech, specifically the signs used for the protest, because according to the Fourth Circuit, "as utterly distasteful as these signs are, they involve matters of public concern," and "no reasonable reader could interpret any of these signs as asserting actual objectively verifiable facts about Snyder or his son."[54] The court added that "[e]ven if the language of these signs could reasonably be read to imply an assertion about Snyder or his son," the

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49. *Snyder*, 580 F.3d at 215-16; Sacks, *supra* note 14, at 197-98.

50. *Snyder*, 580 F.3d at 226.

51. *See id.* at 222-26; Sacks, *supra* note 14, at 198.

52. *See Snyder*, 580 F.3d at 219-20; Sacks, *supra* note 14, at 198.

53. *Snyder*, 580 F.3d at 219-20. As to this category, the Fourth Circuit explained:

> We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to the community." In order to be treated as speech involving a matter of public concern, the interested community need not be especially large nor the relevant concern of "paramount importance or national scope."

Id. (citations omitted).

54. *Id.* at 223 (explaining that the signs "America is Doomed, "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs, "Priest Rape Boys, and "God Hates Fags," all "involve[d] matters of public concern, including 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," and that these "issues are not subjects of 'purely private concern,' but rather are issues of social, political, interest to the community").

speech was still protected because it did "not assert provable facts about an individual," but rather contained only "imaginative and hyperbolic rhetoric intended to spark debate about issues with which the [Phelps] are concerned."[55]

The Fourth Circuit noted that the signs "You're Going to Hell," and "God Hates You," were "a closer question," but ultimately concluded that "these two signs [could not] reasonably be interpreted as stating actual facts about any individual," and thus were "entitled to First Amendment protection."[56] Although the Fourth Circuit also recognized that the epic posted on the Church's website presented a "more difficult question" because its "title could lead a reasonable reader to initially conclude that the epic asserts facts about" Matthew, the Fourth Circuit found it also was protected by the First Amendment because "a reasonable reader would understand it to contain rhetorical hyperbole, and not actual provable facts about Snyder and his son."[57]

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55. *Id.* The Fourth Circuit added:

> Whether "God Hates" the United States or a particular group, or whether America is "doomed," are matters of purely subjective opinion that cannot be put to objective verification. The statement, "Thank God," whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb "hate" and graphic references to terrorist attacks, the defendants used the sort of "loose, figurative, or hyperbolic language" that seriously negates any impression that the speaker is asserting actual facts about an individual.

Id. (citations omitted).

56. *Id.* at 224. ("Thus, even if the reasonable reader understood the 'you' in these signs to refer to Snyder or his son, no such reader would understand those statements . . . to assert provable facts about either of them.").

57. Consider the court's analysis on the epic, which I find unconvincing:

> Such a title could lead a reasonable reader to initially conclude that the Epic asserts facts about this particular soldier. The Epic's subtitle, however, immediately connects its contents to the Defendants' protest and the various signs displayed there . . . The Epic has a photograph of the funeral protest immediately below its title, followed by nearly two pages of verbatim Bible Verses.
>
> The Epic then discusses Matthew's Life . . . After Interspersing additional excerpts from the Bible, the Epic refers to Matthews Service in the military. . . The Epic then links Matthew's death to the Defendants' protest activities . . . .

Finding all of the Phelpses' speech protected by the First Amendment, the Fourth Circuit reluctantly explained:

> Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and epic are constitutionally protected . . . 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."[58]

B. The Supreme Court's Decision

One major difference between the Supreme Court's decision and both lower courts' opinions is that the speech discussed in the

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> Notwithstanding the foregoing, the Epic cannot be divorced from the general context of the funeral protest. Indeed, it is patterned after the hyperbolic and figurative language used on the various signs . . . . In context, the Epic is a recap of the protest and was distributed through the Church website, which could not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.
>
> The general tenor of the Epic also serves to negate any impression that it was the source of any actual facts. In preparing it, the Defendants interspersed strong, figurative language with verses from the Bible. They utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggests the work of a hysterical protester rather than an objective reporter of facts. Despite referring to the Snyder family by name, the Epic is primarily concerned with the Defendants' strongly held views on matters of public concern. Indeed, the Epic explains that Matthew's death in Iraq gave the Defendants the "opportunity to preach [God's] words to the U.S. Naval Academy at Annapolis [and] the Maryland Legislature," where they protested on the very day of Matthew's funeral. Finally, the Defendants' extensive funeral picketing activities predated Matthew's funeral and continue to this day throughout the country, with many of the signs displayed at Matthew's funeral also being displayed in other protests.
>
> Thus, even when the Snyders are mentioned in the Epic, a reasonable reader would understand its contents to be primarily focused on the more general message to which their protests are directed.

Id. at 224-25 (citations omitted).

58. *Id.* at 226.

majority's opinion does *not* include the epic published on the church's website, godhatesfags.com.[59] The Court stated: "the epic is not properly before us and does not factor in our analysis," because "although the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari."[60] The Court explained that its internal Rule 14.1(g) requires the petition to contain a "statement setting out the facts material to consideration of the question presented," and that Mr. Snyder mentioned only that his "claim arose out of Phelps' intentional acts at Snyder's son's funeral."[61] The Court also noted that Snyder never responded to the "statement in opposition to certiorari that 'though the epic was asserted as a basis for the claims at trial, the petition . . . appears to be addressing only claims based on the picketing.'"[62] Indeed, "Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic."[63] Based on its foregoing conclusions and the fact that the Court thought it "raised distinct issues in this context," the Court decided not to consider the epic."[64]

One wonders if this was a legitimate way for the Court to sidestep the toughest constitutional issue in this case: how to strike a balance between state tort law and the First Amendment when speech regarding matters of private concern about a private individual—namely the epic posted on Westboro's website godhatesfags.com—causes severe emotional distress. Although this section focuses primarily on summarizing the Court's decision, the fact that the Supreme Court discussed only the Phelpses' signs and the picketing is extremely important, as it is unclear how the Court would deal with private speech causing severe emotional distress since the Court has never tackled that issue.[65]

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59. Snyder v. Phelps, 131 S. Ct. 1207, n.1 (2011) (emphasis added).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See infra* section VI.B.4, which includes a brief suggestion on how the Court could resolve this issue going forward.

1. The Majority

The Supreme Court ultimately affirmed the Fourth Circuit's opinion, concluding that Westboro's speech was immunized from tort liability by the First Amendment.[66] The Court relied on *Falwell* [67] for the broad proposition that the "Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for [IIED]."[68] Starting with this broad proposition, the majority tackled the central issue in the case: whether Westboro's *signs* were protected by the First Amendment. Accordingly, its analysis turned largely on whether Westboro's speech was "of public or private concern."[69] The Court noted that, "[S]peech on 'matters of public concern' . . . is at the heart of the First Amendment's protection," and that "the First Amendment reflects a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[70] According to the majority, "speech concerning public affairs is more than self-expression; it is the essence of self-government," and therefore "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[71]

Nevertheless, the majority recognized that "[n]ot all speech is of equal First Amendment importance," and that "First Amendment protections are often less rigorous" where the speech at issue involves "matters of purely private significance . . . ."[72] The Court clarified that private speech deserves less protection generally "because restricting speech on purely private matters" poses "'no threat to the free and robust debate of public issues,'" it does not interfere "'with a

66. *Snyder*, 131 S. Ct. at 1220-21.

67. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

68. *Snyder,* 131 S. Ct. at 1215 (citing *Falwell*, 485 U.S. at 50-51).

69. *Id.* ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.").

70. *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1985) and New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1960)).

71. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) and Connick v. Myers, 461 U.S. 138, 145 (1983)).

72. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

meaningful dialogue of ideas' . . . and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import."[73]

Thus, the Court's primary task was then to categorize Westboro's signs as either private or public speech. The Court recognized that this was no easy task and admitted "the boundaries of the public concern test are not well defined."[74] The majority articulated several guiding principles for the public concern test, principles that, according to the Court, "accord broad protection to speech to ensure that courts themselves do not become inadvertent censors."[75] Speech involves "matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest . . . ."[76] The Court also noted that the "arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'"[77] Finally, the Court cited its seminal defamation decision in *Dun & Bradstreet* for the proposition that "[d]eciding whether speech is of public or private concern requires" the Court "to examine the 'content, form and context' of that speech, 'as revealed by the whole record.'"[78] Indeed, "[i]n considering content, form, and context, no factor is dispositive and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[79]

Turning to Westboro's speech at issue, the Court concluded that the signs' "content" clearly related "to broad issues of interest to

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73. *Id.* at 1215-16 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985)).

74. *Id.* at 1216 (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004) (*per curiam*)).

75. *Id.*

76. *Id.* (citations omitted) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983) and San Diego v. Roe, 543 U.S. 77, 83-84 (2004)) (internal quotation marks omitted). The Court explained that a "legitimate news interest" is a "subject of general interest and of value and concern to the public." *Id.*

77. *Snyder*, 131 S. Ct. at 1216 (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

78. *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (internal quotation marks omitted).

79. *Id.*

society at large," and not "matters of purely private concern."[80] The majority explained that although the signs "may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[81] Once more, the "signs certainly convey[ed] Westboro's position on those issues," and "even if a few of the signs—such as 'You're Going to Hell' and 'God Hates You'—were viewed as containing messages related to [Matthew] or the Snyders specifically," the Court still concluded that those two signs "would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[82]

Mr. Snyder argued, however, that even if the content of the signs spoke to broader public issues, the "context" of the signs and their connection to Matthew's funeral made "the speech a matter of private rather than public concern."[83] The Court quickly shot this argument down, though, explaining that the "fact that Westboro spoke in connection with a funeral . . . cannot by itself transform the nature of Westboro's speech." The Court noted that the signs were "displayed on public land next to a public street" and reflected "the fact that the church finds much to condemn in modern society."[84] Mr. Snyder further claimed that Westboro conveniently used public issues—homosexuals in the military and the Catholic clergy scandals—to effectively immunize its personal attack on him and Matthew.[85] But again, the Court quickly discarded this contention, noting that

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80. *Id.* at 1216-17.

81. *Id.* at 1217.

82. *Id.*

83. *Id.*

84. *Id.* Interestingly, the Court appears to contend that Westboro's signs are on matters of public concern because they were protesting in a "public place adjacent to a public street." *Id.* at 1218. This argument is utterly unconvincing, however, because as the dissent aptly points out, "[n]either 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" simply because it the speech occurred on public property. *Id.* at 1227 (Alito, J., dissenting).

85. *Id.* at 1217 (majority opinion).

Westboro was "actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew . . . and there can be no serious claim that Westboro's picketing did not represent its honestly believed views on public issues."[86] The Court emphasized that "[t]here was no pre-existing relationship or conflict between Westboro and Snyder that might [have] suggest[ed] Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter."[87]

Mr. Snyder also contended that "Westboro's speech should be afforded less . . . protection . . . because the church members exploited the funeral 'as a platform to bring their message to a broader audience.'"[88] Once again, the Court discredited this argument. However, it did admit that "Westboro's choice to convey its views in conjunction with [Matthew's] funeral made the expression of those views particularly hurtful," and further, that "the applicable legal term—'emotional distress'—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief."[89] Yet, the Court continued to fall back on the "content, form and context" analysis from its decision in *Dun & Bradstreet*, concluding that the signs were on matters of public concern (content), that the picketing was peaceful (form), and that the protest took place "at a public place adjacent to a public street" (context).[90] Consequently, according to the Court, Westboro's speech was entitled to "special . . . First Amendment protection," because public streets

86. *Id.* Again, this argument is not persuasive. Even if the picketing did represent Westboro's "honestly believed views on public issues," it seems like two of the signs were specifically addressed at Matthew—"You're Going to Hell," and "God Hates You,"—which the Court addressed only under its "content analysis" of the public/private speech distinction. *Id.* ("And even if a few of the signs . . . were viewed as containing messages related to [Matthew] or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.") It appears that the form and context of these signs are private in nature, providing further support for Justice Alito's contention that private speech should not "be immunized simply because it is interspersed with [public] speech that is protected." *Id.* at 1226-27 (Alito, J., dissenting).

87. *Id.*

88. *Id.* (citation omitted).

89. *Id.* at 1217-18.

90. *Id.* at 1218.

are the "archetype of a traditional public forum," and "[t]he fact that Westboro conducted its picketing adjacent to 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."[91]

Ultimately, the majority concluded, "the church members had the right to be where they were."[92] Indeed, "Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged."[93] The Court explained that "[t]he picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the [funeral]," it "was not unruly," and "there was no shouting, profanity, or violence."[94] And, the majority noted, a "group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America,' and 'God Loves You,' would not have been subjected to liability."[95] Thus, "[g]iven that the speech was at a public place on a matter of public concern," the majority concluded that Westboro's speech was "entitled to 'special protection' under the First Amendment" and could not "be restricted simply because it is upsetting or arouses contempt."[96] Indeed, the Court declared that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," and that "the point of all speech protection is to shield

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91. *Id.* at 1218,1218 n.4. The Court pointed out that "[e]ven protected speech is not equally permissible in all places and at all times," and "Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach" as its speech is "subject to reasonable time, place, or manner restrictions." *Id.* at 1218 (citation omitted). The Court noted that Maryland now "has a law imposing restrictions on funeral picketing," but that since it was enacted after Matthew's funeral, the Court would not consider whether those restrictions are constitutional. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1218-19.

95. *Id.* at 1219. This statement by the Court, however, does not appear relevant, as one would be hard pressed to argue that the words "God Loves You" are hurtful, thus giving rise to an IIED claim.

96. *Id.*

just those choices of content that in someone's eyes are misguided, or even hurtful."[97]

Once the Court concluded that Westboro's signs were protected by the First Amendment, the jury verdict had to be overturned. The jury was instructed that it may "hold Westboro liable for [IIED] based on a finding that Westboro's picketing was 'outrageous.'"[98] The Court explained that "outrageousness . . . is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'"[99] "In a case such as this," the Court explained, "a jury is 'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for the suppression of vehement, caustic, and sometimes unpleasant expression.'"[100] Clarifying, the Court explained, this type of "risk is unacceptable" because "in public debate [we] must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[101]

The Court also addressed Mr. Snyder's last-ditch argument—that Westboro was "not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral."[102] The Court easily dismissed this argument, however, noting that "Westboro stayed well away from the memorial service," that "Snyder could see no more than the tops of the signs when driving to the funeral," and that there was "no indication that the picketing in any way interfered with the funeral service."[103] Accordingly, because (1) the Court sparingly, if ever, applies the

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97. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

98. *Id.*

99. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1985)).

100. *Id.* (citation omitted).

101. *Id.* (citing Boos v. Berry, 485 U.S. 312, 322 (1988)).

102. *Id.* at 1219-20. The Court explained that "in most circumstances, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer," but "[r]ather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes." *Id.* at 1220.

103. *Id.* at 1220.

captive audience doctrine "to protect unwilling listeners from protected speech," and (2) Mr. Snyder was unable to show that his "privacy interests [were] . . . invaded in an essentially intolerable manner," the majority declined "to expand the captive audience doctrine to the circumstances presented" in this case.[104]

After making it very clear that Westboro's signs and the manner in which it picketed was constitutionally protected, the majority tried to limit its holding to the facts of this case.[105] "Our holding today is narrow," the Court stated, "and the reach of our opinion here is limited by the particular facts before us."[106] The majority noted, "Westboro believes that America is morally flawed; many Americans might feel the same about Westboro."[107] In fact, the Court admitted that "Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible," but that "Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials."[108] Moreover, the Court added that even though "[t]he speech was indeed planned to coincide with Matthew Snyder's funeral," it "did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of the speech."[109] The Court ultimately declared:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation, we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[110]

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104. *Id.*

105. *Id.* ("[T]he sensitivity and significance of the interest presented in clashes between First Amendment and state law rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

2. *Justice Breyer's Concurrence*

Justice Breyer wrote a short concurrence, in which he argued that the majority's analysis was limited to *Snyder*'s facts, and that the majority did "not hold or imply that the State is always powerless to provide private individuals with necessary protection . . . [w]here First Amendment values and state-protected (say privacy related) interests seriously conflict."[111] He was quick to point out that the majority's opinion restricted "its analysis . . . to the matter raised in the petition for certiorari, namely, Westboro's picketing activity," but that "[t]he opinion does not examine in depth the effect of the television broadcasting . . . [n]or does it say anything about Internet postings."[112]

Breyer's attempt to characterize the majority's analysis as a narrow decision was a reaction to the dangerous implication that logically flows from the majority's analysis—at least from the dissent's and my view. As Breyer noted—and Justice Alito also discussed—

> the dissent requires us to ask whether our holding unreasonably limits liability for IIED—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publically revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm.[113]

Breyer asked, "Does our decision leave the State powerless to protect the individual against invasions of, e.g., personal privacy, even in the most horrendous of such circumstances?"[114] "As I understand the Court's opinion," Breyer explained, "it does not hold or imply that the State is always powerless to provide private individuals with necessary protection."[115]

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

112. *Id.* ("While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern." (citing Frisby v. Shultz, 487 U.S. 474 (1988))).

113. *Id.*

114. *Id.*

115. *Id.*

Breyer's point was that "[a] state can sometimes regulate picketing, even on matters of public concern," and thus the majority held only that Westboro's *picketing* was protected based on very specific facts of the case—namely, that "Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions," and the picketing itself "could not be seen or heard from the funeral ceremony. . . ."[116] "Consequently," Breyer concluded, "the First Amendment protects Westboro," and as "I read the Court's opinion, it holds no more."[117]

3. The Dissent

Justice Alito vigorously dissented, essentially arguing that "the First Amendment does not entirely preclude liability for [IIED] by means of speech," and that in this case it was "abundantly clear that [Westboro] . . . specifically attacked [Matthew]" with speech that "was not speech on a matter of public concern."[118] Thus, the primary difference between the majority and the dissent is that Justice Alito truly believed Westboro's speech involved matters of purely private concern.[119]

According to Justice Alito, "signs stating 'God Hates You,' and 'Thank God for Dead Soldiers,' reiterated the message that God had caused Matthew's death in retribution for his sins," and that "[e]ven if those who attended the funeral were not alerted in advance about [Westboro's] intentions, the meaning of those signs would not have been missed . . . [because Westboro] chose to stage their protest at [Matthew's] funeral and not at any of the other countless available venues."[120] Thus, "a reasonable person would have assumed that there was a connection between the messages on the placards and the deceased."[121] Additionally, Justice Alito believed that "since a funeral . . . brings to mind thoughts about the afterlife, some of [the]

116. *Id.* (emphasis added).
117. *Id.* at 1222 (Alito, J., dissenting).
118. *Id.*
119. *Id.*
120. *Id.* at 1225.
121. *Id.*

signs—e.g., 'God Hates You,' . . . and 'You're Going to Hell'—would have likely been interpreted as referring to God's judgment of the deceased."[122] Justice Alito also pointed out the "signs reading 'God Hates Fags,' 'Semper Fi Fags,' 'Fags Doom Nations,' and 'Fag Troops,' . . . would most naturally have been understood as suggesting—falsely—that Matthew was gay," which clearly points to only a private issue.[123]

Justice Alito's self-proclaimed "most important" point was that the majority's conclusion—that the "overall thrust and dominant theme" of Westboro's speech was on matters of public concern—was "quite inaccurate."[124] "As I have attempted to show," Justice Alito stated, Westboro's private "attack on Matthew was of central importance."[125] Nevertheless, Justice Alito "fail[ed] to see why actionable speech should be immunized simply because it is interspersed with speech that is protected."[126] In fact, he pointed out that, "[t]he 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 [Westboro's] attack on [Matthew] and his family should be treated differently."[127]

Another major difference between the majority and the dissent was the majority's refusal to consider the epic posted on the Internet, while the dissent thought the epic had to be considered because it was "not a distinct claim but a piece of evidence that the jury considered in imposing liability."[128] Alito argued the "protest and the epic [were] parts of a single course of conduct that the jury found to constitute [IIED]," and "[t]he Court's strange insistence that the epic" was not properly before it meant that the majority failed to make "an independent examination of the whole record."[129] Furthermore, "the Court's refusal to consider the epic contrast[ed] sharply with its

122. *Id.*
123. *Id.*
124. *Id.* at 1226-27 (citing majority opinion).
125. *Id.*
126. *Id.* at 1227.
127. *Id.*
128. *Id.* at 1225 n.15.
129. *Id.*

willingness to take notice of Westboro's protest activities at other times and locations."[130] When Justice Alito considered the epic in conjunction with Westboro's signs, he concluded it was "abundantly clear" that Westboro's speech regarded "[Matthew's] purely private conduct . . . ."[131]

Justice Alito also emphasized Westboro's strategy throughout his dissent, a strategy that he believed "worked because it is expected that [Westboro's] verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief."[132] Indeed, "the more outrageous the funeral protest, the more publicity [Westboro] is able to obtain."[133] "In this case," Westboro "brutally attacked [Matthew], and this attack, which was almost certain to inflict injury, was central to [Westboro's] well-practiced strategy for attracting public attention."[134] Accordingly, Justice Alito concluded that Justice Breyer's analogy completely captured Westboro's strategy for voicing their message. Exactly what happened in this case—namely, Westboro's verbal assaults on Mr. Snyder with speech on matters of private concern interlaced with general statements on matters of public concern—is now immunized because of the majority's conclusion that Westboro's speech discussed matters of public concern and was therefore protected by the First Amendment.[135] "This is the strategy," Alito declared, "that they have routinely employed—and that they will

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130. *Id.*

131. *Id.* at 1226.

132. *Id.* at 1224.

133. *Id.* at 1225 n.15 (2011) (Alito, J., dissenting). Justice Alito pointed out that

> when the Church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson, proclaiming that she was "better off dead"—their announcement made national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest.

Id. In addition, "in 2006, the church got air time on a talk radio in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman." *Id.*

134. *Id.* at 1227.

135. *Id.* at 1226-27.

continue to employ—inflicting severe and lasting emotional injury on an ever growing list of innocent victims."[136]

A fair reading of the dissent does not suggest that Justice Alito believes Westboro's hurtful and hateful speech is entitled to little or no protection by the First Amendment. On the contrary, he contends just the opposite, that "the First Amendment ensures that they have almost limitless opportunities to express their . . . strong opinions on certain moral, religious, and political issues."[137] After listing all the ways in which they could constitutionally express their views,[138] Justice Alito added, "they may express their views in terms that are 'uninhibited,' 'vehement,' and 'caustic'."[139] "It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivities by launching vicious verbal attacks that make no contribution to public debate."[140]

Justice Alito's overall point is that on the facts as he sees them, the Court is shifting the balance too far in favor of First Amendment protections at the expense of a state's interest in protecting its citizens from intentional torts. It was the combination of Westboro's strategy of exploitation, the funeral setting, the fact that Mr. Snyder was a private individual, and his belief that Westboro's speech was on purely private matters that made him the only member of the Court to conclude that Westboro was not entitled to First Amendment protection.[141] "At funerals," he stated, "the emotional well-being of bereaved relatives is particularly vulnerable," and "[e]xploitation of a funeral for the purpose of attracting public attention intrudes upon their grief and may permanently stain their memories of the final

136. *Id.* at 1226.

137. *Id.* at 1222.

138. *Id.*

> They may write and distribute books, articles, and other texts; they may make and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out emails.

139. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

140. *Id.*

141. *Id.* at 1222-29.

moments before a loved one is laid to rest."[142] "Allowing family members to have a few hours of peace without harassment does not undermine public debate."[143] Ultimately, he concluded: "in this setting, the First Amendment permits a private figure to recover for [IIED] caused by speech on a matter of private concern."[144]

III. THE BALANCE IS OFF: *SNYDER* CARELESSLY FAVORS THE FIRST AMENDMENT AND IGNORES LONGSTANDING BALANCING PRINCIPLES IN THE SPEECH/TORT JURISPRUDENCE

Snyder, at its most basic level, stands for the proposition that even offensive and hurtful public speech on public issues that inflicts serious emotional distress is protected by the First Amendment.[145] The decision appears to mirror prior decisions in this arena because it reflects our nation's longstanding belief that "Freedom of speech is among the most cherished American freedoms."[146] To be sure, the Supreme Court also recognized some sixty years ago that "it is a prized American privilege to speak one's mind."[147] Indeed, "strong protections for freedom of speech reflect the Court's longstanding belief that '[i]t is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate that hate menaces stable government; and that the fitting remedy for evil counsels is good ones.'"[148]

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142. *Id.* at 1227-28.

143. Id. at 1228.

144. *Id.*

145. *Id.* at 1220 (majority opinion) ("On the facts before us, we cannot react to that pain by punishing the speaker. As a nation, we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

146. Sacks, *supra* note 14, at 198; Calvert, *supra* note 38, at 78 ("[T]he First Amendment guarantee of political speech is the essential freedom that defines our ability—both individually and collectively—to speak in unfettered fashion on the most pressing issues of the day, and to express approval or disapproval of the functioning of our representative government.") (citation omitted).

147. Sacks, *supra* note 14, at 198.

148. Sacks, *supra* note 14, at 198 (citing Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)); *see also* Calvert, *supra* note 38, at 78 (describing counterspeech as best way to deal with outrageous opinions and that counterspeech and debate are "essential for a democratic society").

Yet, the "Supreme Court has repeatedly recognized that civil liability for speech is not trumped by the First Amendment, but instead requires a reconciliation of the important social policies furthered both by tort law and the First Amendment."[149] Beginning in the 1960s, "the [Supreme] Court first recognized start tort law as state action, and thus that the First Amendment could operate as a partial or complete bar to tort liability arising from speech."[150] Deana Pollard Sacks, a distinguished Professor of Law at Texas Southern University, argues that since *Sullivan*, where the Supreme Court began "constitutionalizing" state tort claims to actualize First Amendment protection of speech subject to tort liability," the Court has "specifically rejected a categorical approach and instead balanced the various interests at stake in recognition that, as venerable and fundamental as free speech is, it is not the only societal interest at risk when one person's speech infringes on another's personal interest protected by tort law."[151]

Sacks rightly points out, "in a series of subsequent cases over the past half-century, the Court identified a number of balancing factors that determine the level of heightened evidentiary burdens necessary to reconcile tort claims with First Amendment policies."[152] Indeed, the Court's jurisprudence over the last fifty years suggests that when confronted with the competing interests of the First Amendment and state tort law, the "Court's opinions indicate that all competing interests should be considered."[153] To be sure, as Professor Sacks points out, the Court has articulated "three primary balancing factors to determine the level of constitutional protection for tortious speech: (1) the plaintiff's level of vulnerability and need for state law protection (the public figure/private individual distinction); (2) the nature of the speech as public or private; and (3) the nature of the plaintiff's injury."[154]

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149. Sacks, *supra* note 14, at 199.

150. Sacks, *supra* note 14, at 194-95.

151. Sacks, *supra* note 14, at 195; Shulman, *supra* note 2, at 322-25 (describing the Court's approach post-*Sullivan* as balancing the public and private interests when weighing free speech and tort interest).

152. Sacks, *supra* note 14, at 195; Shulman, *supra* note 2, at 322-25.

153. Sacks, *supra* note 14, at 204.

154. *Id.*

Nevertheless, the majority's analysis in *Snyder* turns primarily on only the second balancing factor—the nature of the speech—as "the overall thrust and dominant theme" of Westboro's signs were, according to the majority, on matters of public concern, and thus protected by the First Amendment because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[155] In this way, *Snyder* may be inconsistent with the "Court's longstanding policy that freedom to exercise one person's liberty interests cannot justify trampling over another's liberty interest or the interest of the state, and that one person's free exercise of constitutional rights ends where such exercise unduly burdens the rights of others."[156] Initially at least, it appears to give short shrift to the first and third balancing factors articulated by the Court in its prior speech/tort cases: whether the victim is a public or private figure, and the nature of the plaintiffs injury.

As mentioned in the introduction, the question of how to balance First Amendment speech interests and the interests of tort victims is a delicate and complicated question that cannot be resolved easily, especially because tort law and constitutional law serve very different purposes. As University of Texas Law Professor David A. Anderson states:

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155. Snyder v. Phelps, 131 S. Ct. 1207, 1214-16 (2011) (citations omitted).

156. Sacks, *supra* note 14, at 199-200.

> Real Liberty for all could not exist under the operations of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.' The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country as essential to the safety, health, peace, good order, and morals of the community. (internal quotations and citations omitted).

See also Shulman, *supra* note 2, at 342 ("To not provide a remedy for psychologically injurious speech truly would be to sacrifice one set of rights for another.").

> In tort law, telling people what they should do is a secondary enterprise; whatever effect tort law has in guiding conduct arises from what it does ex post facto in the course of adjusting for losses. Precision, clarity, and certainty therefore seem, at least, to be less important than they would be if tort law were in the business of explicitly prescribing conduct. Constitutional law is in that business, however; it exists to tell government actors what they must or must not do, and the importance of clarity and certainty are therefore obvious. Tort law is majoritarian (or perhaps populist): It assumes that lay people are at least as likely as judges to make good decisions on many of the questions that ultimately determine tort liability. Because of its contermajoritarian purposes, that assumption is unavailable in much of constitutional law.[157]

This article shows that *Snyder* places too much emphasis on the nature of Westboro's speech and is inconsistent with the Court's longstanding tradition of balancing First Amendment interests against state tort claims. Accordingly, an examination of several of the Supreme Court's seminal speech/tort cases is appropriate. Such examination reveals that *Snyder* ignores the first and third balancing factors, places too much emphasis on the nature of Westboro's speech, and may be inconsistent with the Court's longstanding tradition of balancing First Amendment interests against state tort claims.[158] A brief summary of prior decisions in this arena provides at least some guidance to how the Court has tackled similar questions before, which may help place *Snyder*'s shortcomings into perspective.

A. First Amendment Interests v. State Tort Claims: Balancing the Competing Interests

In *Sullivan*,[159] the seminal case dealing with the convergence of the First Amendment and state tort laws, "the Court reconciled defamation liability with the First Amendment by tailoring the elements of the plaintiff's prima facie case in an attempt to find the optimal balance of rights to protect both personal interests and

157. Anderson, *supra* note 14, at 765.

158. Sacks, *supra* note 14, at 204.

159. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

freedom of speech."[160] In *Sullivan*, the Court stated, "in cases where that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which principles of the First Amendment . . . protect," and "we must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[161]

In doing so, the Court struck a balance between state defamation law and the First Amendment by raising the level of fault required to establish a claim for defamation by a public official to "actual malice," that is, knowledge of falsity or reckless indifference to the truth or falsity.[162] The Court crafted this fault standard for public officials because "the threat of damage suits would otherwise inhibit the fearless vigorous and effective administration of policies of government" and "the censorial power is in the people over the Government, and not in the Government over the people."[163] The *Sullivan* Court also shifted the burden to prove falsity onto the plaintiff and raised the level of proof needed to establish "actual malice" from a mere preponderance of the evidence to clear and convincing evidence.[164] Thus, *Sullivan* "specifically rejected a categorical approach to defamation liability," instead tailoring plaintiffs' evidentiary burdens to balance the competing interests. While the "actual malice" standard, burden shifting, and clear and convincing evidence standards certainly made it more difficult for public officials to pursue defamation claims, the standards represented what the Court saw as the correct balance between the First Amendment and state defamation law, while also providing officials with the possibility of prevailing on a defamation claim.[165]

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160. Sacks, *supra* note 14, at 195; *see also* Deana Pollard Sacks, Snyder v. Phelps: *A Prediction Based on Oral Arguments and The Supreme Court's Established Speech-Tort Jurisprudence*, 2010 CARDOZO L. REV. DE NOVO 418, 427 (2010) [hereinafter Sacks II].

161. *Sullivan*, 376 U.S. at 285.

162. *Id.* at 279.

163. *Id* at 282.

164. *Id.* at 278-86.

165. Sacks, *supra* note 14, at 204-05; Sacks II, *supra* note 160, at 427.

1. The First Balancing Factor: The Public Figure v. The Private Figure

In *Gertz v. Welch, Inc.* ("*Gertz*"),[166] the Court "clarified that the level of constitutional tailoring necessary to constitutionalize a claim for defamation turns primarily on the plaintiff's status as a public figure or private individual . . . ."[167] There, Gertz was an attorney retained by the family of a youth who was shot and killed by a Chicago policeman named Nuccio.[168] The state successfully prosecuted the officer for murder, but the family of the deceased youth retained Gertz "to represent them in civil litigation against [Officer Nuccio]."[169] A media organization eventually started publishing literature warning "of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship."[170] In its effort to "warn" the public, the "managing editor of American Opinion [a magazine published by the John Birch Society] commissioned an article on the murder trial of Officer Nuccio," which claimed, among other things, that: (1) the testimony of Officer Nuccio at the murder trial was false; (2) "his prosecution was part of the Communist campaign against the police;" (3) Gertz was the "architect" of the "frame-up;" and (4) that Gertz was a Leninist, a Communist-frontier, and had been a member of several Communist organizations, including an "official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which ha[d] advocated the violent seizure of [the United States] government.'"[171]

Gertz brought a defamation claim against the owner of the magazine and the case went all the way to the Supreme Court.[172] The

166. Gertz v. Welch, Inc., 418 U.S. 323 (1974).

167. Sacks, *supra* note 14, at 205 (discussing *Gertz*, 418 U.S. at 343-44); Sacks II, *supra* note 160, at 422-23 ("Gertz . . . made clear that public figures are entitled to less tort law protection than persons who lead private lives . . . .").

168. *Gertz*, 418 U.S. at 325.

169. *Id.*

170. *Id.*

171. *Id.* at 325-26.

172. *Id.* at 327-32.

Court ruled in favor of Gertz, noting that Gertz "was not a public figure" because "[h]e plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."[173] According to the Court, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly [sic] greater."[174]

Thus, *Gertz* demonstrates that "the balance between free speech and tort liability shifts toward more deference to state tort law where private individuals are injured, in recognition of the state's greater interest in protecting them."[175] This is evidenced by the fact that the Court refused to apply *Sullivan*'s "actual malice" standard to *Gertz* by reducing the level of fault to negligence and allowing "recovery of actual damages upon proof of fault by a mere preponderance of the evidence."[176] And, in justifying its decision not to extend "actual malice" to private individuals, the Court declared: "[W]e endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation."[177] In sum, "the private or public status of the plaintiff became decisive: where the plaintiff was a private figure, the states [after *Gertz*] could require only a showing of negligence by the publisher of the defamatory falsehood, even if the speech in question dealt with a matter of public concern."[178]

The public/private individual distinction was also relied upon in *Falwell*, where the court considered the "First Amendment limitations upon a State's authority to protect its citizens from [IIED]," and

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173. *Id.* at 352.

174. *Id.* at 344.

175. Sacks, *supra* note 14, at 206.

176. *Id.* at 206-07.

177. *Gertz*, 418 U.S. at 348.

178. Stephen J. Mattingly, *Drawing a Dangerous Line: Why the Public-Concern test in Constitutional Law of Defamation is Harmful to the First Amendment, and What Courts Should do About it*, 47 U. LOUISVILLE L. REV. 739, 744 (2009).

extended *Sullivan*'s "actual malice" standard to public figures claiming IIED.[179] There, Hustler published an ad parody claiming that Falwell, a nationally known religious figure, had his first sexual experience with his mother while he was drunk in an outhouse.[180] The Court ruled for Hustler, concluding that "public figures and public officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with actual malice . . . ."[181] The Court emphasized the particular importance of Falwell's status as a public figure. Because Falwell was a nationally known religious public figure the Court placed the balance in favor of the First Amendment by extending factual falsity and *Sullivan*'s "actual malice" standard.[182] After *Falwell*, however, a public figure, at least theoretically, could still prevail on an IIED claim if he or she could show that the publication contained provably false statements published with actual malice, thus suggesting that the Court left open room for valid IIED claims and did not allow the First Amendment to completely trump state tort law.[183]

2. *The Second Balancing Factor: Public Concerning Speech v. Private Concerning Speech*

The distinction between speech that contains purely private matters and speech on public issues has become one of the most important factors for a court when balancing free speech and tort issues.[184] One scholar recently explained that, "the determination of whether the speech involved a public or private matter is ultimately decisive . . ." in cases confronting the intersection of free speech and

179. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

180. *Id.* at 48.

181. *Id.* at 56.

182. *Id.* at 56-57.

183. *See id.* at 56 ("We conclude that public figures and public officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'").

184. Mattingly, *supra* note 178, at 739-40.

state tort law.[185] Indeed, *Snyder*'s analysis turned essentially on only this factor.[186]

The public/private distinction is rooted in *Sullivan*, where "the Court recognized that 'debate on public issues should be uninhibited, robust, and wide-open,' and that the protection of speech concerning public affairs—which the Court termed 'the essence of self-government'—is a central purpose of the First Amendment."[187] The Court, however, first emphasized the importance of public speech as a primary factor when considering whether to apply "actual malice" in *Rosenbloom v. Metromedia Inc.* ["*Rosenbloom*"].[188] There, the Court held that even private figures had to prove "actual malice" to succeed on a defamation claim when the speech involved matters of public concern.[189] One scholar noted: "In so holding, the Court for the first time established a content-based test to determine the level of First Amendment protection for allegedly defamatory speech."[190] The "Court roundly rejected the *Rosenbloom* plurality's public concern test" in *Gertz*, where the majority held that private plaintiffs in defamation cases were subject to only the state's fault standard as long as it was not strict liability.[191] However, the public-concern test became central to the speech/tort balancing analysis after the Court's landmark decision in *Dun & Bradstreet*.[192]

In *Dun & Bradstreet*, the Court confronted whether a private individual had to prove "actual malice" to recover presumed and punitive damages, when the false statements at issue arguably involved only matters of private concern.[193] Essentially, the question

185. *Id.*

186. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.").

187. Mattingly, *supra* note 178, at 741-42.

188. Rosenbloom v. MetroMedia, Inc., 403 U.S. 29 (1977) (Brennan, J., plurality).

189. *Id.* at 43-44.

190. Mattingly, *supra* note 178, at 742-43.

191. *Id.* at 744.

192. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-757-61 (1985); Mattingly, *supra* note 178, at 756.

193. *Dun & Bradstreet*, 472 U.S. at 751.

was whether *Gertz*'s standard (requiring private individuals to prove actual malice to recover presumed and punitive damages when the speech at issue involved matters of public concern) was applicable when the speech at issue involved matters of private concern only.[194] The Court, recognizing that "not all speech is of equal First Amendment importance," stated that "it is speech on matters of public concern that is at the heart of the First Amendment's protection."[195] Indeed, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[196] Accordingly, "speech on matters of purely private concern is of less First Amendment concern," because when regulating private speech, "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[197]

In *Philadelphia Newspapers, Inc. v. Hepps*,[198] the Court further articulated the importance of the public/private speech-balancing factor by requiring plaintiffs in defamation cases to bear the burden of proving that the speech at issue is false where the speech involves matters of public concern.[199] As one scholar noted:

> The Court's rationale was grounded in one principal First Amendment consideration: State laws that place the burden of proving truth on media defendants threaten to deter speech on issues of public concern by causing publishers to fear that liability could result from the publication of even true speech. Thus, to avoid such a "chilling effect" on true speech of public concern, the Court must provide some "breathing space" for such speech by protecting even some false speech.[200]

194. *Id.*
195. *Id.* at 758-59. (internal quotations and citations omitted).
196. *Id.* at 759. (internal quotations and citations omitted).
197. *Id.* at 759 -60 (internal quotations and citations omitted).
198. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
199. *Id.* at 768-69.
200. Mattingly, *supra* note 178, at 750.

In both *Hepps* and *Dun & Bradstreet*, the Court stressed to the lower courts the importance of determining whether the speech at issue in defamation cases involved matters of public concern.[201] Both cases clarified that when confronted with the intersection of the First Amendment and state tort interests—namely defamation—courts need to determine whether the speech involves matters of public or private concern. This determination will allow the correct balance to be drawn between the state's interest in protecting its citizens' reputations and citizens' right to free speech under the First Amendment.[202]

One thing that is clear about the public/private nature speech factor is that public speech has never served as a trump for the First Amendment's Free Speech Clause. Though some have argued that the determination of whether the speech at issue in a case is public or private is ultimately decisive,[203] the Court has roundly rejected the notion that public speech is the most important factor. In *Gertz*, as previously discussed, the Court rejected a prior decision in *Rosenbloom*, where the Court "concluded that the [*Sullivan*] standard applied in such cases that concerned public or general concern," regardless of the status of the plaintiff.[204] Yet, the *Gertz* Court specifically rejected this idea, noting "*Rosenbloom* extended the application of the [*Sullivan*] standard to a degree that the Court found unacceptable, leaving otherwise private plaintiffs without an adequate legal remedy for defamatory falsehoods injurious to their reputations."[205] As one scholar noted, "under the precedent set in *Rosenbloom*, any time a private plaintiff found himself involved in a story of interest to the public, he would be required to prove . . . actual malice," but "[w]ith *Gertz*, the Court took a step back from this broad view of the standard for the sake of protecting the truly private

201. *Id.*

202. *See id.* at 746-50 ("*Dun & Bradstreet* and *Hepps* have made it clear that, whenever the plaintiff in a defamation case is a private figure, the court must make some sort of determination about whether speech involves a public issue or is purely private.")

203. *Id.* at 739-40; Sacks, *supra* note 14, at 212-13 and accompanying text.

204. Ann E. O'Conner, *Access to Media All A-Twitter: Revisiting Gertz and the Access to Media Test in the Age of Social Networking*, 63 FED. COMM. L. J. 507, 513 (2011).

205. *Id.*

plaintiff."[206] This is important to keep in mind because it shows that the Court has not found the nature of public speech as a factor that weighs more heavily in its analysis. Rather, it suggests that the Court finds both the nature of the plaintiff and the nature of the speech to be important considerations when balancing First Amendment and state tort law interests.

3. The Third Balancing Factor: The Nature of the Plaintiff's Injury

Tort case law in general suggests that the state "values physical injury over competing property interests, at least where the injury is serious."[207] In addition, state tort law usually values and protects physical injury over emotional distress, and courts are therefore more willing to compensate for lost property rights than emotional distress.[208] It is well established that states have a greater interest in protecting physical harm over purely emotional harm, and that injury to property rights seems to trump emotional harm.[209] In *Zacchini v. Scripps-Howard Broadcasting Co.*,[210] the Court stated: "the *Sullivan* actual malice standard did not apply when the state seeks to protect the plaintiff's property interest, as opposed to . . .feelings or reputation."[211] Once more, in *Falwell*, the Court noted, "[g]enerally speaking, the law does not regard the intent to inflict emotional distress as one which should receive much solicitude."[212] Thus, the courts have looked to the nature of the plaintiff's injury and generally given more protections to physical injury and property rights over purely emotional harm.

It is also true that many states disfavor IIED in general and are highly skeptical of recovery for emotional injuries.[213] It would be

206. *Id.*

207. Sacks, *supra* note 14, at 212-13 (citing Brown v. Martinez, 361 P.2d 152 (N.M. 1961) (holding use of deadly force against non-lethal theft unlawful since the value of life is greater than property rights)).

208. *Id.*

209. *Id.*

210. Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562 (1977).

211. Sacks, *supra* note 14, at 209 (citing *Zacchini*, 433 U.S. at 573).

212. Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).; Sacks, *supra* note 14, at n.83 (citing *Falwell*, 485 U.S. at 53).

213. Williams v. City of Mount Vernon, 428 F. Supp. 2d 146, 160 (S.D.N.Y.

inaccurate to portray emotional injuries as of the sort which plaintiffs like Mr. Snyder should be compensated for, as this paper argues, without noting that historically, "Anglo-American tort law" refused to compensate plaintiffs for emotional harms "unless the plaintiff's psychological harm had arisen from a prior, 'predicate' injury—an injury that itself was recoverable under an established tort."[214] This notion is discussed only briefly here because the history of IIED and defamation is discussed in greater detail in Section III.C in response to the counterarguments against allowing Mr. Snyder and other plaintiffs to recover for IIED claims and the general notion that IIED is a completely different tort than defamation and should be treated as such.[215]

2006) ("Claims for [IIED] are 'highly disfavored'. . . under New York law." (quoting Torres v. Village of Sleepy Hollow, 379 F. Supp. 2d 478, 482 (2005))); Hill v. McHenry, 211 F. Supp. 2d 1267, 1284 (D. Kan. 2002) ("The tort of outrage . . . 'is not a favored cause of action under Kansas law'" (quoting Gillum v. Fed. Home Loan Bank of Topeka, 970 F. Supp. 843, 854 (D. Kan. 1997))); Thomas v. BSE Indus. Contractors, 624 So. 2d 1041, 1044 (Ala. 1993) ("[Under Alabama law,] the tort of outrage is a very limited cause of action that is available only in the most egregious circumstances."); McQuay v. Guntharp, 963 S.W.2d 583, 585 (Ark. 1998) ("[The Supreme Court of Arkansas] gives a narrow view to the tort of outrage . . . ."); Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 984 & n.4 (2008) ("E.g., Denny v. Elizabeth Arden Salons, 456 F.3d 427, 436 (4th Cir. 2006) ("[IIED] is 'not favored' under Virginia law." (quoting Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989))).

214. *Id.* at 987-88.

215. *See* Ben Battles, Note, *Terror, Tort, and the First Amendment*, Hatfill v. New York Times *and Media Liability for Intentional Infliction of Emotional Distress*, 72 BROOK. L. REV. 237, 268 (2006) (arguing that public speech should be protected by the First Amendment in IIED cases even when the plaintiff is a private individual in order to avoid chilling speech with "an extremely subjective outrageousness standard."); *see also* Rodney A. Smolla, *Emotional Distress and The First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L. J. 423, 439 (1988)

> To simply lift the New York Times formulation out of the context of defamation and apply it literally to the tort of infliction of emotional distress is logically indefensible, because the relationship between the publisher's conduct and the risks encompassed by the emotional distress tort differs in kind from the relationship between the conduct and risk at stake in defamation.

B. Snyder*'s Balance Is Off*

Although the Supreme Court's jurisprudence suggests the Court has traditionally explored all three balancing factors when confronted with the intersection of First Amendment interests and the state's interest in protecting its citizens from torts, a thorough reading of the majority's analysis in *Snyder* demonstrates that the Court focused almost exclusively on the nature of Westboro's speech.[216] From the outset, the Court noted that liability "in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."[217] The Court then discussed the public/private concern test articulated by the Court in *Dun & Bradstreet*, which requires an analysis of the "content, form, and context" of the speech.[218] That is not to say that the public/private concerning speech test should not be important. One scholar has noted that in defamation suits, "the determination of whether the speech involved a public or private matter is ultimately decisive . . . ."[219] Indeed, the Court has articulated since *Sullivan* that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," that public concerning speech "is at the heart of First Amendment Protection," and that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[220] Perhaps this is why the Court and many First Amendment scholars assumed that this was an easy case,

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216. Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011).("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.")

217. *Id.*.

218. *Id.* at 1211-12; *Dun & Bradstreet*, 472 U.S. at 761.

219. Mattingly, *supra* note 178, at 739-40.

220. *Snyder*, 131 S. Ct. at 1215-16; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1985) (arguing public speech is the heart of the First Amendment); Connick v. Myers, 461 U.S. 138, 145 (1983) (discussing the public speech hierarchy); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing public debate).

and that it was clear that Westboro's speech was protected since it involved matters of public concern.[221]

However, the Court in *Snyder* appears to have forgotten that *Gertz* already rejected the idea that speech on matters of public concern is the most important consideration and thus, if the speech is public, the plaintiff will be held to the "actual malice" standard regardless of his or her status.[222] As *Gertz* made clear, the *Rosenbloom* standard was "unacceptable,"[223] because if it were allowed to stand, "any time a private plaintiff found himself involved in a story of interest to the public, he would be required to prove [*Sullivan's*] actual malice."[224] As one scholar explained, "[t]his was a burden the Court was not willing to force upon all individuals without requiring a more searching inquiry into their actual role in the issue, and whether they were capable of responding to any allegations leveled at them."[225] Yet, the majority in *Snyder* appears to actually be willing to force this burden on Mr. Snyder, possibly thinking it could sidestep the issue by not discussing his status as a private individual.

Furthermore, as Professor Sacks articulates well, the history of speech/tort cases shows that whether the speech is of public concern is only one factor to consider.[226] To be sure, the *Snyder* Court never once mentioned the nature of Mr. Snyder, who clearly is a private figure. Mr. Snyder never injected himself into this controversy, but rather attempted to have a private funeral and bury Matthew in peace.[227] As the Supreme Court's jurisprudence makes clear, "private

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221. *See supra* notes 27-31 and accompanying text.

222. Gertz v. Welch, Inc., 418 U.S. 343-46 (1974); O'Conner, *supra* note 204, at 513.

223. *Gertz*, 418 U.S. at 346.

224. O'Conner, *supra* note 204, at 513.

225. *Id.*

226. Sacks, *supra* note 14, at 204-10.

227. In fact, the Phelpses claimed that Mr. Snyder was a public figure in their opening brief to the Supreme Court. Brief for Respondents at 18, Snyder v. Phelps, 131 S. Ct. 1207 (Jul. 7, 2010) (No. 09-751), 2010 WL 2826988 at *18. Professor Sacks argues rather persuasively that "First Amendment policy could be subverted if Mr. Snyder were to be characterized as a public figure based on the fact that he discussed his son's death with the media," because this could "chill his free speech rights and the rights of other grieving parents who have lost their children as a result of American international policy." Sacks II, *supra* note 160, at 426. Professor

individuals . . . are more vulnerable to injury and the state" has a greater interest in protecting them.[228] From the majority's analysis, however, it is unclear whether the Court even considered this factor. This is odd, especially because the majority cites *Falwell* as standing for the proposition that the First Amendment acts as a defense to speech causing IIED.[229] Yet, the Court protected Hustler's off-color ad parody not only because it involved speech – political satire – but also primarily because Reverend Falwell was a nationally known public figure.[230] Thus, the Court did not allow Falwell to recover *precisely* because the state had a lesser interest in protecting a nationally known public figure.[231] Indeed, only Justice Alito pointed out in his dissent that Mr. Snyder was most definitely a private figure.[232]

The majority's failure to discuss whether Mr. Snyder is a private or public figure is also troubling because it undermines one of the central justifications for having strong First Amendment protections of even hurtful and hateful political speech. To be sure, one of the reasons why the Court since *Gertz* has considered the public/private figure balancing factors is because

> the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.[233]

Sacks explained, "[t]he idea that a private person could lose his private status merely by speaking to the press about a personal tragedy is oppressive," particularly because the consequences would be "to squelch the private person's speech, possibly cause him to keep himself entirely out of fear of exploitation . . . , deprive the public of public interest speech," and "could create a ripple-effect of fear based self-censorship . . . ." *Id.*

228. *Gertz*, 418 U.S. at 344.

229. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

230. Hustler Magazine v. Falwell, 485 U.S. 46, 50-57 (1988).

231. *Id.* at 51-52.

232. *Snyder*, 131 S. Ct. at 1222, 1226 (Alito, J., dissenting).

233. *Falwell*, 485 U.S. at 51.

Public speech is entitled to special protection because our nation is committed to the free exchange of ideas and public debate. This protection goes hand-in-hand with protecting public figures and public officials less, because in order to have "robust" public debate, we need to be able to criticize public officials and public figures without fear from government censorship. Accordingly, speech about private figures like Mr. Snyder, even if arguably on public issues, surely does not demand the same type of protection as public speech about public officials.[234]

In a recent article on *Snyder*, W. Wat Hopkins, professor of communication at Virginia Tech, contended, "[t]he Court's narrow ruling in *Falwell* means that private person plaintiffs in cases of IIED need not prove actual malice to win damages," and therefore "a court in such a case must determine whether a plaintiff is a public or private person."[235] Since the Court in *Snyder* appears to have implicitly decided that private figures have the same interest as public figures and officials in IIED cases (even though it did not say so explicitly), then it should have at least addressed the public/private figure balancing factor when it denied a private plaintiff recovery for IIED where the plaintiff showed real mental and physical injuries, like Mr. Snyder.[236]

Finally, the Court hardly discussed the nature of Mr. Snyder's injuries, which were severe.[237] The Court seemed to recognize the

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234. For a counter argument to this proposition, see Battles, *supra* note 215, at 274-76, where Battles argues that "[i]n order to adequately safeguard the right to freely engage in this debate, courts considering IIED claims based on the content of speech should allow defendants to assert a newsworthiness defense," i.e., "[w]here the contested speech unquestionably relates to a matter of legitimate public concern, the IIED claim should be dismissed." *Id.* at 275-76.

235. W. Wat Hopkins, Snyder v. Phelps, *Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 174 (2010).

236. Snyder v. Phelps, 580 F.3d 206, 213-14 (4th Cir. 2009).

237. *See id.* The Fourth Circuit summarized Mr. Snyder's testimony concerning his injuries as follows:

> He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that Defendants placed a "bug" in his head, such that he is unable to separate thoughts of his son from the [Defendants'] actions: "there are nights that I just, you know, I try to think

severity of Mr. Snyder's injuries when it stated that "Westboro's choice to convey its views in conjunction with [Matthew's] funeral made the expression of those views particularly hurtful to many, especially to Matthew's father," and that "the record makes clear that the applicable legal term—'emotional distress'—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief."[238] Nonetheless, the Court acted as if the nature of Mr. Snyder's injuries made no difference in determining liability because "Westboro conducted its picketing peacefully on matters of public concern at a public place" and public speech in public places together occupy a "'special position in terms of First Amendment protection.'"[239] The Court almost lost sight of any other consideration, including Mr. Snyder's injuries, because Westboro's speech was arguably on matters of public concern. After concluding that Westboro's speech was in public and on public issues, it was as if the Court decided this case with blinders on.

In similar cases prior to *Snyder*, the Court has at least considered the nature of the injury and the state's interest in protecting that

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> of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the [M]arine [C]orps, I see those signs." He also testified that "I want so badly to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad."
>
> Plaintiff also testified as to the permanency of the emotional injury. He testified that "I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . I see that sign when I lay in bed at nights. I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son's last hour on earth." He stated also that "somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal."
>
> Throughout trial, Plaintiff demonstrated significant emotion, appearing visibly shaken and distressed, and was often reduced to tears. On occasion during the trial, Plaintiff requested and was granted leave from the courtroom to compose himself. The jury witnessed firsthand Plaintiff's anguish and the unresolved grief he harbors because of the failure to conduct a normal burial.

Id.

238. Snyder v. Phelps, 131 S. Ct. 1207, 1217-18 (2011).

239. *Id.* at 1218.

interest.[240] In defamation cases, public figures still have the opportunity to prevail on a defamation claim, even when the speech involves matters of public concern, because of the state's interest—albeit less than private individuals or private speech—in protecting reputational causing harm.[241] Further, the Supreme Court has made it clear that in defamation cases, there exists a strong and "legitimate state interest in compensating private individuals for injury to reputation."[242] Indeed, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[243] Since *Sullivan*, the Court has recognized a state's interest in protecting its citizens from reputational harm.[244] In this case, the state arguably had an even stronger interest in protecting its citizens from the type of injury Mr. Snyder suffered, which involved not only severe emotional distress, but emotional distress that caused severe physical symptoms as well.[245] As Professor Sacks noted, "Mr. Snyder . . . claimed physical injury in the form of exacerbated diabetes, which seems to warrant greater state protection and is amendable to objective verification, like property losses."[246]

In a recent article, Danielle Keats Citron, Professor of Law at Maryland University School of Law, argues persuasively that technology has truly changed the nature of emotional and reputational

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240. Sacks, *supra* note 14, at 209-10; *see supra* Part III.A.3.

241. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (requiring public figures to meet the "actual malice" standard in a claim for defamation); Gertz v. Welch, Inc., 418 U.S. 344-52 (1974). (refusing to require private plaintiffs in defamation to prove actual malice because of the state's greater interest in protecting private individuals); Sacks, *supra* note 14, at 204-06; Sacks II, *supra* note 188, at 427.

242. *Gertz* , 418 U.S. at 348.

243. *Id.* at 345.

244. *Id.* at 344-52; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-761 (1985); Sacks, *supra* note 14, at 204-10 (discussing the post *Sullivan* cases and the development of the Court's defamation cases).

245. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (requiring public figures to meet the "actual malice" standard in a claim for defamation); *Gertz*, 418 U.S. at 344-52 (refusing to require private plaintiffs in defamation to prove actual malice because of the state's greater interest in protecting private individuals); Sacks, *supra* note 14, at 204-06; Sacks II, *supra* note 188, at 427; Snyder v. Phelps, 580 F.3d 206, 213-14 (4th Cir. 2009).

246. Sacks, *supra* note 14, at 212-13.

harms, and in many cases, it has made the emotional harms worse.[247] Professor Citron explains that harms associated with twentieth century technologies, such as "revelations of embarrassing personal information and intrusions into private spheres were often temporary."[248] She notes, for example, that films "appeared in theatres for a limited time and although they might have been archived for future viewing, only a small number of people likely viewed them."[249] Likewise, [n]ewspapers remained in circulation for only a few days;" however, "twenty-first century technologies . . . magnify the harm suffered" because "the searchable, permanent nature of the internet extends the life and audience of privacy disclosures, and exacerbates individuals' emotional and reputational injuries."[250] As an example, Citron points out that "if pictures and videos of a young girls sexual abuse are posted online, they remain there indefinitely, ensuring that the victim remains haunted by the abuse as an adult."[251] Thus, according to Professor Citron, emotional and reputational harms today are "far worse" because "while public disclosures of the past were more easily forgotten, memory decay has largely disappeared," especially since search engines on the Internet "now index all content on the web, and can reproduce it instantaneously."[252] Accordingly, "the [I]nternet thus ensures that damaging personal information is not forgotten," and "individuals now must live with digital records of their lives that are deeply humiliating and reputation-harming, as well as searchable and accessible from anywhere, and by anyone, in the world."[253]

At a minimum, then, the state has at least an equal interest in protecting its citizens from both reputational harm and IIED. This interest appears even stronger in Mr. Snyder's case because he is a

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247. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1811-1814 (2010) (describing how technology has changed emotional and reputational harms by making the injuries ongoing and everlasting in the virtual world of the Internet).

248. *Id.* at 1808.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 1813.

253. *Id.* at 1814.

private individual who has shown physical symptoms associated with his emotional injuries. Furthermore, his injuries may be permanent since he will be forever reminded of Westboro's picketing and publications given that both are now on the Internet indefinitely. Instead, the Court relies on sweeping statements in favor of broad First Amendment protections without even discussing the harsh consequences that result from its decision for Mr. Snyder or future similarly situated plaintiffs.[254] Even those who believe the *Snyder* Court made the right decision cannot deny the Court's completely disregard for the nature of Mr. Snyder and his injuries in order to protect hurtful and hateful speech at the expense of private citizens' well-being.[255]

C. Addressing the Counter Arguments: The History of Defamation and IIED and Why IIED Deserves Equal Compensation Even Though Historically The Tort was Treated by the Courts With Distrust

One of the strongest counterarguments against this article (and Professor Sacks's theory) is that IIED injuries should not deserve the type of balancing, evidentiary tailoring, and compensation that plaintiffs in defamation receive. This is because, the counterargument goes, IIED and defamation are completely different torts, with different histories, and thus emotional harms deserve less compensation than reputational harms.[256] Indeed, defamation and

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254. Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," and "the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

255. *See* Anderson, *supra* note 14, 778-80 (arguing that when the First Amendment's Free Speech Clause immunizes speech that causes emotional or reputational harms, "it is the victims who bear the cost of free speech," in order for the public to receive the benefits of free speech for free. Anderson notes that that may not be the best way to deal with the competing interests, and that at a minimum, the "debate as to whether speech should be immunized from tort liability should include the possibility that potential liability [could] serve[] a useful role as an instrument of social control.").

256. *See* Battles, *supra* note 215, 274-75 (discussing the difference between the torts); *see also* Fraker, *supra* note 213, at 983-84 & n.4, 1000-01 (explaining that IIED and emotional injuries are "disfavored").

IIED share very different histories. The tort of defamation "dates back to ecclesiastical courts in the Middle Ages," and although it "did not originate in the common law . . . [b]y 1676, defamation became the province of common-law courts."[257] Courts have compensated for defamation since the birth of our nation, which can hardly be said for IIED. In fact, "throughout most of the history of Anglo-American tort law, courts did not treat the infliction of emotional distress as an independent cause of action," and "[r]ecovery for such an injury generally was unavailable unless the plaintiff's psychological harm had arisen from a prior 'predicate' injury—an injury that itself was recoverable under an established court."[258]

It was only during the late nineteenth and early twentieth century that "courts increasingly awarded damages for emotional distress unaccompanied by another injury."[259] Even "the original Restatement of Torts, published in 1934, explicitly denied liability for any claim based solely on emotional or psychological harm, even when the emotional harm caused additional, physical injuries."[260] A series of influential articles published in response to the Restatement's position would eventually help create the new independent tort of IIED,[261] but since its inception in the late 1800s and early 1900s through to today, courts and commentators have treated IIED with distrust and disdain.[262] One commentator has noted that "[i]t is no secret that

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257. Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 140-41 (2008).

258. Fraker, *supra* note 213, at 987.

259. *Id.*

260. *Id.* at 988.

261. *Id.*; *See, e.g.*, Fowler V. Harper & Mary Coate McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426 (1938); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222, 222 (1939).

262. Fraker, *supra* note 213, at 1000-01 & n.4. Fraker points out that critics of IIED "initially worried that a tort based on invisible injuries to the soul or psyche would invite unprincipled abuses in the form of falsified symptoms coupled with exaggerated allegations of offensive conduct." *Id.* at 1001. Other critics believed "that allowing widespread recovery for emotional distress would send socially deleterious signals and encourage the weaker side of human nature, endorsing a thin-skinned response to the abrasive exchanges inherent in interpersonal relations."

American law has been resistant to recognizing the legitimacy of mental injury."[263] Today, nevertheless, IIED "is now well enough established to consider it a permanent fixture of the common law of torts,"[264] and "all states have recognized [IIED] as an independent tort and have adopted Restatement Second of Torts section 46 in some form."[265]

Nevertheless, critics have a strong argument when they claim that because IIED and defamation have been treated differently over our legal system's history, defamation and IIED are simply different torts, requiring different treatments.[266] Professor Smolla, a constitutional scholar who has written extensively on the *Falwell* decision, argues that a state may provide remedies for defamation not just because of emotional harm, but rather because it serves "the state interest in deterring the publication of damaging false information and protecting reputation."[267] Smolla explains "because there is 'no constitutional value in false statements,' a state may provide remedies for injuries arising from such false statements."[268] Conversely, Smolla notes, "[w]hen no false statements of fact are involved, however, the Supreme Court has struck a sharply different [F]irst [A]mendment balance," and has never "permitted speech to be abridged solely because of its emotional impact."[269] Accordingly, Smolla and others seem to contend that the states' only interest in regulating speech causing IIED is protecting its citizens from the emotional impact of speech, which has never been enough of interest, on its own, worth protecting.[270]

Id. at 1002.

263. Adam Tucker, *A Matter of Fairness, How Denying Mental-Mental Claims Frustrates the Central Purposes of Workers Compensation Law*, 31 J. LEGAL. MED. 467, 467 (2010).

264. Martha Chamallas, *Discrimination and Outrage: The Mitigation from Civil Rights to Tort Law,* 48 WM. & MARY L. REV. 2115, 2117 (2007).

265. John J. Kirchner, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806 (2007).

266. Battles, *supra* note 215, at 274-75.

267. Smolla, *supra* note 215, at 441.

268. *Id.*

269. *Id.* at 441-42.

270. *See id.* at 440-42 ("New York Times. . ., as well as [other] First Amendment cases, reveal[s] . . . the power of speech to generate severe emotional

It is clear that defamation and IIED are different torts, with different histories and objectives, and that courts have treated IIED with distrust, particularly speech causing IIED claims. Yet, it does not necessarily follow that because of their different histories and objectives, IIED deserves less favorable treatment. As previously discussed, technology has changed the impact of both torts, particularly IIED, where hurtful and hateful speech like Westboro's picketing and epic posted online will continue to haunt Mr. Snyder for the rest of his life.[271] Technology's impact on the nature of the injury has at least changed the way we should we think and talk about IIED since technology has made these emotional injuries from offensive speech potentially never-ending.[272] To be sure, "in the defamation context, law has already recognized that the longevity of damaging information deepens its destructive power," which is why "plaintiffs asserting libel claims (defamation accomplished in writing) need not prove damages whereas those bringing slander claims (defamation accomplished in spoken word) do."[273] Thus, because new technology makes it easy for offensive speech to continue to injure plaintiffs around the clock, and since the idea of the permanency of the injury has already been recognized within the defamation context, there is no good reason why IIED should not be taken seriously. In fact, when science and psychology have shown that emotional damages may be far worse and harder to deal with than physical injuries, the argument for IIED is even stronger.[274]

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disturbance on issues of public concern is never enough, standing alone, to justify abridging that speech, even when the infliction . . . is intentional."); David Kohler, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Self Help, the Media and the First Amendment*, 35 HOFSTRA L. REV. 1263, 1293-94 (2007) ("[T]he unrestrained application of a cause of action for [IIED] to a magazine was held to be incompatible with the First Amendment because its relatively broad and undefined boundaries might permit the punishment of unpopular or controversial views.").

271. Citron, *supra* note 247, at 1808-14; *see infra* notes 273-79 and accompanying text.

272. Citron, *supra* note 247, at 1813-14.

273. *Id.* at 1851.

274. The Delaware Supreme Court concluded seventeen years ago that the "nature of a mental injury does not make it less deserving of coverage," in worker compensation claims, and that an "impairment of a worker's mental faculties can be just as disabling as a physical injury." State v. Cephas, 637 A.2d 20, 25 (Del. 1994);

Many, like Professor Smolla, might counter that even though emotional harms may be real, the Court has never allowed recovery in tort solely for the emotional impact, and that other torts like defamation, right of publicity, and false-light invasion of privacy actions concern more interests than just emotional harm.[275] Further, those in this camp would add that the First Amendment allows compensation for defamation because there is "no constitutional value in false statements of fact," and that similarly, incitement may be prohibited because "it poses a clear and present danger of lawless action."[276] Additionally, the logic follows, all areas of law that allow speech to be regulated, including "fighting words, commercial speech, symbolic speech, and obscenity" may be regulated only if the government meets a heavy burden by showing that "abridgment is required to prevent some palpable species of social harm," which

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Geoffrey C. Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 122 (2010) ("Bullying can lead to severe emotional distress and sometimes even suicide."); Nachshon Goltz, *ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Boarders" – The Advisable Regulations In Light of Foreseeable Damages,* 11 U. PITT. J. TECH. L. & POL'Y 2, (2010) ("Physical injuries like suicide are a result of emotional injuries . . . ."); *"Psychological Harm Just as Bad as Physical Injuries", Says Head of Red Cross Reference Centre for Psychological Support"*, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, http://www.ifrc.org/en/news-and-media/news-stories/europe-central-asia/denmark/psychological-harm-just-as-bad-as-physical-injuries-says-head-of-red-cross-reference-centre-for-psychosocial-support/ (last visited Oct. 22, 2012) ("Disasters, epidemics and conflicts cause severe psychological wounds and disrupt social ties. Although invisible, this harm is just as real as physical injuries and often takes for longer to overcome.").

275. Smolla, *supra* note 215, at 440-42. To be fair, I am convinced that Smolla believes that there are instances of IIED that might be worth compensating for, as he stated:

> In announcing its holding in Hustler, the Court was quite careful to limit the decision to public officials and public figures. The intellectual challenge posed by Falwell's suit is not how to construct a convincing rational for rejecting his claim, but rather how to articulate limits on that rational that will permit suits for emotional distress inflicted through speech in other contexts to survive. This challenge must be faced and resolved, for one can easily conjure up examples of emotional distress inflicted solely because of the content of speech in which something less than absolute First Amendment protection is clearly warranted.

Id. at 427.

276. *Id.* at 441-42.

these critics argue is nonexistent when speech only generates emotional disturbance.[277] In fact, as Professor Smolla pointed out, *Sullivan* "and its progeny. . .reveal this cardinal principle: the power of speech to generate severe emotional disturbance on issues of public concern is never enough, standing alone, to justify abridging that speech, even when the infliction of emotional disturbance is intentional."[278]

The fundamental flaw with this argument, however, is that it merely assumes there is no social harm in emotional injuries caused by speech, or that free speech interests are stronger and more valid than these emotional harms. Using, maybe unfairly, Professor Smolla as an example, he reiterated what the Court has long said about defamation—that there is "'no constitutional value in false statements of fact.'"[279] The same argument, however, can be applied to Westboro's speech. What is the constitutional value in hate speech, particularly Westboro's speech communicated at a private funeral about private individuals, in this case hateful statements about parents of a dead soldier and the dead soldier himself? The Court in *Snyder* even remarked that "Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible."[280] In the same vein, what could possibly be the "constitutional value" in speech that perpetuates "systematic discrimination and oppression of minority groups?"[281] It remains true that it may be extremely difficult to define hate speech, much less regulate it without censoring otherwise protected public speech, but that still does not justify ignoring the real damage hate speech like Westboro's has on society and private individuals which are the targets of Westboro's speech. As a nation, we should reconsider the idea that there is value in speech that systematically discriminates, oppresses, and emasculates minority groups.

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277. *See id.* at 427 ("[T]he emotional disturbance generated by the content of the speech will never by itself be sufficient to provide that justification.").

278. *Id.* at 440.

279. *Id.* at 441 (citing Gertz v. Welch, Inc., 418 U.S. 340 (1974).

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

281. Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1117 (2010) (discussing the regulation of hate speech and arguments for and against, noting that this is one possible definition of hate speech).

Furthermore, the idea that there is no legitimate reason to regulate speech that causes IIED ignores the real harm Mr. Snyder suffered. Like the state has an interest in regulating incitement because it is likely to cause imminent lawless action, it similarly has an interest in combating discrimination and prejudice and increasing awareness and tolerance. As one scholar has noted, "the equality values of the Fourteenth Amendment must not be sacrificed in the name of the First Amendment."[282] Indeed, plaintiffs are now able to bring civil rights claims for workplace discrimination, among other things, and if the state and the federal government have an interest in protecting citizens for civil rights violations, then the First Amendment should not completely trump the state's interest in protecting its citizen's from hurtful hate speech that promotes discrimination and oppression.

Moreover, it is impossible to ensure that tort law does not infringe on speech rights unless the tort system is completely dismantled and juries are taken entirely out of the equation.[283] Because that is not going to happen, we ought to at least consider the fact that "[w]hen, in the interest of free speech, compensation is denied to those whose . . . physical [and] emotional security is invaded, it is the victims who bear the cost of free speech."[284] As Professor Schauer remarked in an article published in the *Columbia Law Review*, "that the cost of a constitutional right is being borne disproportionately by victims of its exercise ought at least to occasion more thought, especially in the First Amendment area, than it has to date."[285] Indeed, while those who disfavor recovery in tort for claims of IIED caused by speech claims may have some legitimate concerns, the overall status of IIED cases involving speech

> should be arrived at forthrightly, by conscious decisions to sacrifice values like reputation and privacy in the interest of free speech, and not by a progression of decisions that ostensibly preserve tort law

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282. *Id.*

283. Anderson, *supra* note 14, at 775-79 (explaining that speech will always be deterred to some degree as long as the tort law system exists and that victims of harmful speech are disproportionately bearing the costs for those who benefit from free speech).

284. *Id.* at 778.

285. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1357 (1992).

while immobilizing it in a straightjacket of constitutional rules, as has happened with the law of defamation.[286]

IV. *HUSTLER MAGAZINE V. FALWELL* TAKEN TOO FAR

A. Why Falwell *Does NOT Apply*

One fundamental problem with the majority's decision to deny Mr. Snyder recovery and protect Westboro's speech is that it cites *Falwell*[287] for the broad proposition that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for [IIED].'"[288] The problem, however, is that while *Falwell* did hold that the First Amendment protected Hustler from damages sought by Jerry Falwell for speech causing IIED, its facts are entirely different and completely distinguishable from *Snyder's*, making the majority's characterization of *Falwell* inaccurate and its application to *Snyder* troubling. While the Court refused to allow the plaintiff to recover, *Falwell* is much narrower than the majority admits.[289] In fact, *Falwell* actually stands for the proposition that public figures and officials may not recover for IIED where the speech at issue is public in nature and involves political parody, unless the public official can show actual malice and factual falsity.[290] One scholar has noted that *Falwell* "tells us almost nothing about whether the Constitution protects outrageous communications that are disseminated rather than displayed in the pages of a nationally distributed magazine, or whether it protects outrageous communications that are designed to hurt or embarrass private figures."[291] Thus, *Falwell* contains two key facts that the majority in

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286. Anderson, *supra* note 14, at 824.

287. Hustler Magazine v. Falwell, 485 U.S. 46, 46 (1988).

288. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("The Free Speech Clause of the First Amendment—'Congress shall make no law . . . abridging the freedom of speech'—can serve as a defense in state tort suits, including suits for [IIED]." (citing Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988).

289. Battles, *supra* note 215, at 268 ("Thus, the ultimate rule emerging from *Falwell* . . . is a narrow one, and has been criticized as offering little guidance beyond the particular circumstances of the case.").

290. *Falwell*, 485 U.S. at 52.

291. Robert C. Post, *The Constitutional Concept of Public Discourse:*

Snyder fails to mention—namely, that the First Amendment will act as a defense to IIED when (1) the plaintiff is a public figure, *and* (2) when the speech at issue is political parody, a unique type of public speech that has a rich history and tradition in our country and which the *Falwell* Court made clear our nation's "political discourse would have been considerably poorer without."[292]

Falwell involved Jerry Falwell, a nationally known religious and political figure, who sued for IIED after Hustler published an off-color ad parody claiming Falwell had his first sexual encounter while drunk with his mother in an outhouse.[293] The jury awarded Falwell $100,000 in compensatory damages and $50,000 in punitive damages from both Larry Flynt and Hustler for Falwell's emotional distress claim ($200,000 total).[294] On appeal, the Fourth Circuit affirmed the jury award, refusing to apply *Sullivan's* "actual malice" standard to Falwell's emotional distress claim.[295] "Given the importance of the constitutional issues involved," the Supreme Court granted certiorari, explaining that the case presented "a novel question involving First Amendment limitations upon a State's authority to protect its citizens from" IIED, and framing the issue as "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most."[296]

In denying recovery, the Court declared that "public figures and public officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice . . . .'"[297] In doing so, the Court made clear that key to its decision were Falwell's prominence as a national figure and

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Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 615 (1990); *see also* Calvert, *supra* note 38, at 61-62; *see also* Hopkins, *supra* note 235, at 174.

292. *Falwell*, 458 U.S. at 54-56 (discussing the history and importance of political cartoons and political satire).

293. *Id.* at 47-48.

294. *Id.* at 48-49.

295. *Id.* at 49.

296. *Id.* at 50.

297. *Id.* at 56.

the political parody's public nature and rich historical tradition dating back to the beginning of the country.[298] The Court stated:

> Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer of the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.[299]

Accordingly, the Court required Falwell to prove factual falsity and actual malice—which he could not do—not only because of his status as a national public figure, but also because political parody has a deep-rooted history and tradition in our nations "political discourse" and therefore demands First Amendment protection.[300] Furthermore, the Court limited its holding to IIED claims involving public figures when the speech is political parody, specifically stating that Falwell's IIED claim could not "form a basis for the award of damages *when* the conduct in question is the publication of a caricature such as the ad parody involved here."[301] In his article in the *Harvard Law Review*, Professor Robert Post summed this point up nicely when he stated that "*Falwell* is drafted quite narrowly and holds only that the nonfactual ridicule is constitutionally privileged from the tort of [IIED] if the

298. *Id.* at 54.

299. *Id.* at 55.

300. *Id.* at 54-57.

301. *Id.* at 56-57 ("[P]ublic officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue . . . the publication of a caricature such as the ad parody involved here.").

plaintiff is a public figure or public official, and if the ridicule occurs in 'publications such as the one here at issue.'"[302]

In *Snyder*, by contrast, the speech at issue is hardly on par with political satire or parody, nor is it deeply rooted in our nation's history or the type of speech "that our political discourse could have been considerably poorer without . . . ."[303] Even the majority in *Snyder* remarked that Westboro's speech was "particularly hurtful," that "its contribution to public discourse may be negligible," and that the phrase "emotional distress" did not even begin to describe the nature and effect of Westboro's speech.[304] Moreover, as the dissent pointed out, Mr. Snyder is unquestionably a private figure.[305] Thus, using *Falwe*ll as a justification for protecting Westboro's speech is misplaced.

Clay Calvert, John & Ann Curley Professor of First Amendment Studies and Co-Director of the Pennsylvania Center for the First Amendment at the Pennsylvania State University,[306] explained in a recent article that the Court

> only considered whether constitutional protection should be applied when the plaintiff was either a public official or a public figure; it failed to consider whether the limitations on IIED recovery that apply to public-figure and public-official plaintiffs would similarly apply to private-figure plaintiffs when the matter in question involves a matter of public concern.[307]

Addressing the same point, Professor Post asserted that "[i]t 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 communication do not contain false factual statements," since the Court limited its holding to

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302. Post, *supra* note 291, at 662 (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)).

303. *Falwell*, 485 U.S. at 55.

304. Snyder v. Phelps, 131 S. Ct. 1207, 1217-18, 1220 (2011).

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

306. At the time this article was written, Calvert was a visiting professor of law at Pacific McGeorge Law School.

307. Calvert, *supra* note 38, at 61.

public officials and political parody.[308] In addition, First Amendment scholar Diane L. Bordon has opined that Falwell's mother would have won on an IIED claim as a private person, because although the Court did not specifically address how its ruling would impact private persons, "if the Court's logic were to be consistent," she explained, "a private person would be required to meet a lower standard of fault than would a public person."[309]

Whether one agrees with Professor Borden's logic or not, it is absolutely undisputed that the Court's two justifications in *Falwell* for protecting the political parody and refusing to allow Falwell to recover, i.e., his status as a public figure and the unique nature of political parody, are completely absent from *Snyder*. Yet, the majority cited *Falwell* in Westboro's defense, declaring:

> "Outrageousness," however, is a highly malleable standard with an "inherent subjectiveness about it, which would allow a jury to impose liability on the basis of the jurors' tastes or views, perhaps as a basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55.... Such a risk is unacceptable; "in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment. What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.... [W]e cannot react to the pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[310]

Falwell demonstrates, however, that the majority's conclusion is not entirely accurate. As a nation, we have *not* chosen "to protect

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308. Post, *supra* note 291, at 662.

309. Borden, *supra* note 1, at 314; *see also* Hopkins, *supra* note 235, at 179-80 (discussing Borden's point in her article on *Falwell*).

310. *Snyder*, 131 S. Ct. at 1219-20 quoting *Falwell*, 485 U.S. 46, 55 (1989)) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

even hurtful speech on public issues,"[311] but rather, the Court has used the "actual malice" standard and other evidentiary tailoring devices as tools to balance the First Amendment with state tort interests.[312] And, in certain cases—including *Falwell*—the Court has placed that balance in favor of First Amendment protections when the speech at issue involves *public speech and public officials*, in order to provide "breathing space" for "uninhibited, robust, and wide-open" public debate.[313] To add insult to injury, after *Falwell*, this "breathing space" still allowed recovery for plaintiffs able to prove actual malice and factual falsity. Yet, *Snyder* seems to preclude even this option by making the only important determination whether the speech is on public or private matters, effectively allowing defendants such as Westboro more First Amendment protection from IIED claims than the *Falwell* Court intended. Accordingly, even if critics agree with *Snyder's* holding, using *Falwell* as a basis for protecting Westboro's speech in this case is unpersuasive, as the issue of whether private plaintiffs have a claim for speech causing IIED was left undecided by the Court in *Falwell*.[314]

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311. *Snyder*, 131 S. Ct. at 1207, 1220.

312. Sacks, *supra* note 14, at 204; *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964)(requiring public figures to meet the "actual malice" standard in a claim for defamation); *Gertz,* 418 U.S. at 344-52 (refusing to require private plaintiffs in defamation to prove actual malice because of the state's greater interest in protecting private individuals); *see generally Dun & Bradstreet,* 472 U.S. 749 (creating the test for determining whether the speech at issue in defamation is public or private in nature).

313. *Falwell*, 485 U.S. at 56

We conclude that public figures and public officials may not recover in tort . . . without showing . . . that the publication contains a false statement of fact which was made with 'actual malice,' . . . This is not a mere 'blind application' of the New York Times Standard, it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment. (internal citations omitted);

Sullivan, 376 U.S. at 270 ("Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Calvert, *supra* note 38, at 61-62; Post, *supra* note 291, at 615.

314. Calvert, *supra* note 38, at 62.

B. Addressing a Critic for Fun and Games

Although there may be an endless amount of critics to respond to, this section addresses only Professor Clay Calvert's recent article on *Falwell* and IIED claims by private individuals.[315] In this part I set forth a counter argument to a recent argument he made in his 2008 article, "War and [Emotional] Peace: Death in Iraq and the Need to Constitutionalize Speech-Based Claims Beyond Hustler v. Falwell," published in the *Northern Illinois University Law Review*.[316]

In that article, Professor Calvert argued that the standard from *Falwell* should be applied to private plaintiffs in IIED cases where the speech relates to matters of public concern.[317] Calvert's article discusses this argument in light of *Read v. Lifewaver*, which involved an IIED claim brought by parents who lost their son in the war in Iraq against an anti-war advocate who printed t-shirts with the slogan "Bush Lied, They Died."[318] To be fair, then, it is important to note that Calvert's article makes the claim that *Falwell*'s standard of factual falsity and actual malice should be extended to the private figure parents in that case only, and not in all private figure plaintiff cases involving speech causing IIED.[319] Yet, *Snyder* and *Read* are

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315. *See id.* at 62-63 (arguing that *Falwell*'s holding should be extended to private individuals when the speech, in any form, is on public issues).

316. Calvert, *supra* note 38, at 61-62.

317. *See* Calvert, *supra* note 38, at 72

If the courts considering the Reads' IIED claim against Dan Frazier chose to extend to him, as this article has argued and contended in Part II that they should, the same constitutional protection granted to Larry Flynt in Falwell, then Frazier should be able to successfully defend the lawsuit filed against him. Why? The reason is simple: The antiwar t-shirts make no false assertions of facts about the plaintiffs or anyone else. Instead, the t-shirts make a general statement of political opinion not directed at any individual at all, but rather targeting a government policy.

Professor Calvert's overall conclusion is that the Read's IIED claim should be denied because of the logic from both *Falwell* and the Arizona Supreme Court's logic in *Citizens Publishing Co.*, but I have decided to address his article only in the context of *Falwell*. *Id.* at 77 & nn.129-30.

318. *Id.* at 63 (discussing the plaintiffs' complaint in Read v. Lifeweaver, LLC, No. 2:08-CV-116 (E.D. Tenn. Apr. 22, 2008), *dismissed* by Read et. al v. Lifeweaver, LLC. et. al, No. 2:08-CV-116 (E.D. Tenn. May 25, 2010)).

319. See *id.* at 71-72 (2008) (contending that *Falwell's* standard should extend to *Read v. Lifeweaver* because the speech is public in nature and does not contain

very similar in nature, as they both concern speech causing IIED claims brought by parents of dead soldiers against war protesters.[320] Further, Calvert's article certainly implies that claims of IIED brought by private figures for speech related to public issues should be subjected to the *Falwell* standard generally, particularly because his article: (1) stresses the importance of political speech; (2) states that "[a] strong argument can be made that [*Falwell's*] protections should indeed apply in *Read* and, by extension, to similar cases in which the speech at issue is both political and relates to a matter of public concern;" and (3) concludes that at the heart of *Falwell*'s standard is the belief that "political speech is 'at the core of what the First Amendment is designed to protect.'"[321] It would seem that Professor Calvert would similarly apply his article's logic to *Snyder* and conclude that it was decided correctly because the speech at issue involved matters of public concern (according to the majority opinion) and the speech did not contain any provably false assertions but rather only political opinions on the military's "Don't Ask Don't Tell" policy and America's foreign involvement in Iraq and Afghanistan.

Yet, even if this article's conclusion is wrong, if this logic does apply to *Snyder*, then the only thing the Court got wrong was that they should have made it clear that Mr. Snyder was a private figure and clarified that *Falwell*'s standard of factual falsity and actual malice applied anyway.[322] In simpler terms, assume that Professor Calvert would extend the exact same logic from his article to *Snyder*, or that: (1) both *Falwell* and *Snyder* center on harm allegedly caused by

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any provably false factual statements, and further, that it only targets a government policy and not a private individual).

320. *Compare* Snyder v. Phelps, 131. S. Ct. 1207, 1213-14 (2011), *with* Read et. al v. Lifeweaver, LLC. et al, No. 2:08-CV-116 (E.D. Tenn. May 25, 2010).

321. Calvert, *supra* note 38, at 77 (quoting Morse v. Frederick, 551 U.S. 393, 403 (2007)).

322. If you are not comfortable assuming that Calvert believes this for the sake of argument, then be comforted by the fact that others clearly believe that private persons should not be able to recover for IIED when the speech at issue relates to public issues and public debate. *See, e.g.,* Hopkins, *supra* note 235, at 180 ("Some authorities argue that to ensure robust and open debate, the First Amendment should bar damage awards in cases of [IIED] when the issues involved are matters of public concern."); Battles, *supra* note 215, at 274-75 (arguing for greater protections of public speech in IIED cases even when the plaintiff is a private individual).

speech; (2) the medium on which speech is conveyed does not make a difference, so that all public speech on public issues in any form should be covered by *Falwell*'s standard in IIED cases; and (3) the central justification for protecting Hustler's speech about Falwell—that public speech on public issues is at the "heart of the First Amendment's protections,"—should similarly apply to *Snyder* because Westboro's speech related to public issues.[323]

First and more broadly, one argument in response that has been articulated quite persuasively by Professor Rodney A. Smolla in his article on *Falwell* is that the "actual malice" standard is absolutely "nonsensical when applied mechanically to emotional distress claim[s]" like Falwell's.[324] This is so, because, as Smolla contends, "one cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decisionmaking process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication. . . ."[325] Although Professor Smolla's point is well taken, I am hesitant to push that narrow part of his argument, as the "actual malice" standard provides a balance that this article argues for by providing some "breathing space" for public speech about public officials. Further, although Smolla may be logically correct, the standard still appears valuable (to me and perhaps Professor Smolla as well), as he stated that "[d]espite the fact that the [*Sullivan*] standard cannot be mechanically plugged into the emotional distress tort, the [*Sullivan*] holding is not irrelevant. Rather, [*Sullivan*] remains useful as part of

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323. Calvert, *supra* note 38, at 63-65. Calvert also applied the reasoning from the Arizona Supreme Court's decision in *Citizen Publishing Co. v. Miller*. *Id.* at 73-77. But I have decided to not to discuss that piece of his argument, because doing so does not take his argument out of context. Even if it did, this section is making other assumptions about Calvert's argument in order to make a point.

324. Smolla, *supra* note 215, at 439.

325. Hopkins, *supra* note 235, at 171

It is not clear that the actual malice rule was the best choice for achieving that goal. It is a test that requires a statement of fact rather than a statement of opinion. That is, there can be neither—knowledge of falsity nor reckless disregard for the truth without the establishment of a statement that is, indeed, false, as the Court noted when it established in 1986 that libel plaintiffs involved in matters of public concern must prove falsity. Actual malice, therefore, would appear to be inappropriate for the statements expressed in the Hustler Parody, which were not subject to a test of truth or falsity.

the broader universe of First Amendment cases that provide guidance concerning the relative weights of the competing interests posed in the emotional distress context."[326] And, since it is the standard articulated in *Falwell*, which the Court is unlikely to overturn due to its strong commitment to stare decisis principles, this piece makes no attempt to refute Smolla's well-taken point.

The two apparent responses, beyond Smolla's argument, to Calvert's position are that (1) not all public speech is the same, and (2) public and private figures are not the same. Addressing the contention that not all public speech on public issues is the same, Calvert asserts emphatically that "the medium on which speech is conveyed should not make a difference," arguing that political speech on clothing should be protected by *Falwell*'s standard in IIED cases even though it is not in the form a political ad parody.[327] Professor Calvert's argument is tempting. In theory, if public speech, that is speech on publically debated issues whose form, content, and context relate to broader public issues, is at the core of the First Amendment's protections, then why would it matter how the public speech is communicated or characterized?

First, it matters because the Supreme Court said it matters. Calvert's premise is appealing, but if the Supreme Court agreed with it, it likely would not have spent a considerable amount of time discussing the history of political parody in the form of political cartoons, nor would it have stated that "[f]rom the viewpoint of history it is clear that our political discourse would have been considerably poorer without them."[328] Of course, just because the Court says something does not make it "right." But, there is something to be said for the difference between political cartoons that have been part of our culture since our Revolution, and speech like Westboro's disgraceful remarks about the lesbian, gay, bisexual, and transgender ("LGBT") community and a dead soldier's parents at the soldier's funeral. That aside, the problem is that if we start making value judgments about what political speech is okay and what is not, then we open the door to widespread censorship based on a ruling majority's views, which the First Amendment's Free Speech Clause

326. Smolla, *supra* note 215, at 440.

327. Calvert, *supra* note 38, at 65.

328. Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

certainly did not intend. So, adding to this thought experiment once again, let's assume for the sake of argument that Calvert's position is correct, and that the medium does not matter.

Even assuming that political speech, in any form, should be granted strong First Amendment protections, our analysis cannot stop there. Public officials and figures are not the same as private individuals. If there can be any doubt about this conclusion, take a look at the Court's opinion in *Gertz* that roundly rejected the plurality's rule from *Rosenbloom*, where the Court thought the "actual malice" standard should extend to all plaintiffs regardless of their status as long as the speech related to public matters.[329] Calvert appears to assume that even though private figures are not covered by *Falwell*'s standard, allowing less protection for public speech about private individuals "cuts deep to the core of political expression."[330] Professor Calvert explains that if the Court's "forty-four-year-old pronouncement that there is a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open' is to take on renewed and reinvigorated meaning in 2008, then . . . political protest merits constitutional protection." [331] But this argument leaves out the Court's decision's following *Sullivan*, namely *Gertz*, which explicitly recognized that even amidst the overriding principle that "debate on public issues should be uninhibited, robust, and wide open," the "actual malice" standard only "define[d] the level of constitutional protection appropriate to the context of defamation of a public person." Consequently, "the state interest in compensating injury to . . . private individuals requires that a different rule should" apply.[332]

Stated another way, *Gertz* reiterated our nation's strong "commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," and upheld the "actual malice" standard in public figure defamation cases. Yet, it still articulated a new rule for private figures because it recognized that "it is often true

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329. Gertz v. Welch, Inc., 418 U.S. 323 (1974); O'Conner, *supra* note 204, at 513.

330. Calvert, *supra* note 38, at 72.

331. *Id.* at 71-72 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

332. *Gertz*, 418 U.S. at 342-43.

that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority."[333] As this article discusses more thoroughly in the next section, *Gertz* specifically refused to apply the "actual malice" standard to private figure defamation cases precisely because private figures are different than public officials and public figures.[334] Indeed, *Gertz* recognized that "public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and "that public officials and public figures have voluntarily exposed themselves to increased risk of injury from" speech.[335] Additionally, the Court also noted that public figures and officials have greater access to the media to counter the damaging speech at issue.[336] Accordingly, *Gertz* recognized that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[337] Professor Calvert's premise, however, ignores this distinction as well as the fact that *Rosenbloom*'s rule was overruled, both of which the Court did amidst the backdrop of strong free speech principles.

To claim that public speech should be protected even against private individuals runs counter to the Court's conclusion made just ten years after *Sullivan* and upheld in *Falwell*—although our nation has a strong commitment to public debate, public debate about public figures deserves the strongest protection while public speech about private individuals deserves less protection. As this article mentioned *supra* concerning *Falwell*, it makes complete sense that public speech about public issues deserves the most protection since public speech about publically debated issues usually arises in the context of public officials and public figures who lead this country and have a considerable impact on the outcome of public issues. As a result, public speech on public issues deserves the most protection if our nation is serious about public discourse and public debate. But the same justification does not hold true for public speech about private

333. *Id.* at 344, 361-62 (Brennan, J., dissenting).
334. *Id.* at 344.
335. *Id.* at 345.
336. *Id.* at 344.
337. *Id.* at 345.

figures, as private figures have a limited impact on public issues and public discourse.

Furthermore, consider Professor Calvert's claim that private plaintiffs are not remediless, as he stated that the parents are "free to fight it out, verbal blow for verbal blow . . . by engaging in their own speech that honors their son. In particular, they can create t-shirts with messages such as 'They Died as Heroes' or 'Honor Our American Heroes' emblazoned on the top of the names of soldiers killed in Iraq."[338] To support this claim, Professor Calvert notes that Larry Flynt and Jerry Falwell, after the Supreme Court resolved their contentious litigation . . . went on to debate each other at venues throughout the country."[339] Calvert commented that, "[t]he debate between the counterposed litigants of Flynt and Falwell represented a great illustration of counterspeech and the type of debate essential for a democratic society. One can envision similar debates between [defendants and private plaintiffs], bringing their controversy to the American public rather than to the judicial system."[340]

However, this example completely ignores the differences between public officials/public figures and private individuals recognized by the Court in *Gertz*. On one hand, it assumes that private individuals have the same access to the media that Flynt and Falwell had, which is simply untrue. On the other hand, it assumes that private figures want to be a part of the debate about issues that have caused these plaintiffs severe emotional injury. Public figures would obviously want to take part in the debate since the nature of their very job demonstrates their willingness to engage in the public arena on public issues to help shape our public discourse. However, private figures may not want anything to do with the public spotlight, as this only could subject them to more verbal ridicule and scorn on the same issues that caused their emotional distress in the first place. Moreover, even assuming that a private figure such as Mr. Snyder would want to debate the Phelpses, the problem is that Westboro's speech is fairly characterized as hate speech,[341] and it is at least

338. Calvert, *supra* note 38, at 77.

339. *Id.* at 78.

340. *Id.*

341. Although many definitions of hate speech exist, for purposes of this article, hate speech is speech that "invokes enmity against a recognizable,

arguable that "hate speech itself does not promote the exchange of ideas because it does not convey its message through rational argument, nor can it be refuted through rational argument."[342] Thus, debating Westboro might likely prove of little value to our nation's commitment to public debate and public discourse and leave private plaintiffs without a valid remedy.

V. NO BOOTSTRAPPING ALLOWED: WHY THE DEFAMATION ANALOGY SUGGESTS DEFENDANTS SHOULD NOT BE ALLOWED TO BOOTSTRAP PRIVATE HURTFUL SPEECH WITH PUBLIC SPEECH

A. Snyder's Bootstrapping Effect: Justice Breyer's Hypothetical

One of the most troubling implications of the Court's decision in *Snyder* is the ability for defendants to "bootstrap" hurtful private speech with public concerning speech. This bootstrapping effectively uses the public speech protection articulated by the majority to immunize otherwise private hateful and hurtful speech that would presumably be actionable. This scenario, pointed out by Justice Breyer in his concurrence and Justice Alito in his dissent, is now a real possibility. As Justice Alito explained, the majority's

> holding unreasonably limits liability for [IIED]—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause severe emotional decision. [343]

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subordinated group . . . . Hate speech achieves its effects by reminding the target of her vulnerability by virtue of her status as a group member." Taylor, *supra* note 281, at 1127. Furthermore, "hate speech also assumes that specific words, symbols, and propositions acquire, over time, uniquely potent status as signifiers of exclusion, persecution, and degradation." *Id.* Examples include "burning crosses and words such as 'nigger,' 'kike,' and 'fag.'" *Id.* Moreover, hate speech for purposes of this article also includes speech where: (1) the message is one of inferiority based on a certain group's characteristics; (2) "[t]he message is directed against a historically oppressed group"; and (3), "[t]he message is persecutory, hateful, and degrading." *Id.*

342. *Id.* at 1131.

343. Snyder v. Phelps, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring) (discussing Justice Alito's dissent).

Although Justice Breyer was quick to dismiss this possibility, stating the majority "does not hold or imply that the State is always powerless to provide private individuals with necessary protection,"[344] his optimistic characterization misses the point. Indeed, it is true that the state is not always completely powerless (as the plaintiff may have facts that allow the use of the fighting words doctrine, or incitement, or even criminal assault statutes). However, when a plaintiff such as Mr. Snyder is hurt by a defendant's speech that inflicts severe emotional and physical harm, and the speech was communicated in public, peacefully, and contains speech whose "overall thrust and dominate theme" relates to public issues, the state is in fact powerless to protect a plaintiff after *Snyder*.[345]

Stated another way, the Court in *Snyder* has set a dangerous precedent that allows defendants to "bootstrap" hateful and hurtful private speech with public speech in public, and if the private individual whom the speech is directed towards is severely injured by the private speech, the state will be powerless to protect that individual, unless the facts allow that individual to use assault statutes or other free speech doctrines (incitement, fighting words, defamation, obscenity) to counter the defendant's First Amendment defense. Accordingly, *Snyder* is setting new precedent: hateful and hurtful speech directed at a private individual on matters of private concern, when communicated in public peacefully, is now immunized by the First Amendment if the private speech is combined with speech related to general public concerning matters.

B. The Defamation Analogy: How Defendants may not Bootstrap Private Individuals and make them Public Figures through their Defamatory Conduct, and Similarly, why Defendants should not be able to Bootstrap Private Concerning Speech with Public Speech in IIED claims

This bootstrapping effect in *Snyder* cannot be squared with a similar concept in defamation law, where defendants may *not* use their defamatory conduct to bootstrap a private individual into the spotlight

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

345. *See id.* at 1217-18 (majority opinion).

in order to transform the plaintiff into a public figure.[346] If this were possible, it would effectively give defendants the ability to benefit from their own wrongful conduct by raising plaintiffs' evidentiary burdens in the case.[347] The defamation jurisprudence demonstrates that several factors influence whether a plaintiff is a public figure, including the plaintiff's name recognition nationally, fame or notoriety, access to the media, and whether the plaintiff has voluntarily assumed his or her prominence or role.[348] Note that it is the *plaintiff's* conduct that is dispositive.

While it is possible for private plaintiffs to obtain limited-purpose public figure status, this generally requires private plaintiffs to "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[349] In fact, a key factor for courts when determining whether a private individual is a public figure for purposes of evidentiary tailoring in a defamation suit is the extent to which the plaintiff, through his or her own conduct, has played a dominant role in the defined public controversy.[350] In order to be deemed a public figure, plaintiffs "must have achieved a special prominence in the debate," and they "must have been purposefully trying to influence the outcome or could realistically have been expected, because of [their] position in the controversy, to have an impact on its resolution."[351] Accordingly, it is generally the plaintiff's own conduct—not the defendant's conduct—that is determinative in assessing whether a plaintiff should be held to a higher evidentiary burden as a public figure.[352]

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346. *See* Gertz v. Welch, Inc., 418 U.S. 323, 344-45 (1974) (discussing public figures and how they assume the risk of "closer public scrutiny," enjoy greater access to the media to defend themselves, and how it is almost impossible to for a plaintiff to become "a public figure through no purposeful action of his own," because "the instances of truly involuntary public figures . . . [are] exceedingly rare.")

347. *See id.*

348. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1295 (D.C. Cir. 1980).

349. *Gertz*, 418 U.S. at 345.

350. *Waldbaum*, 627 F.2d at 1297.

351. *Id.*

352. *See id.* at 1300 ("Looking at the overall picture, we conclude that Waldbaum was a public figure . . . [and] because Fairchild concededly did not act

C. Why Defendants Should not be able to Bootstrap Private Concerning Speech with Public Speech in IIED claims

The defamation jurisprudence that precludes defendants from turning a private individual into a public official in order to gain more First Amendment protections makes complete sense, as defendants should not receive greater protections under the First Amendment through their own potentially actionable conduct that is specifically at issue in a particular case. Similarly, this type of analysis—what is effectively an "anti-bootstrapping rule"—should apply in Breyer's hypothetical discussed *supra*, and in future speech/IIED cases similar to *Snyder*. This is because courts should be unwilling to allow defendants such as Westboro to gain more protection under the First Amendment by insulating their hateful and hurtful speech on matters of purely private concern with public concerning speech. Allowing this result effectively permits Westboro and other defendants to benefit from their potentially actionable conduct at issue in the case. In other words, their potentially actionable injury-causing private speech would be immunized through the very same speech at issue, simply because the speech also included some related public issues. In effect, the implication is that Westboro and other potential defendants may exploit private individuals by attacking them on purely private matters and inflicting, "severe and lasting emotional injury on an ever growing list of innocent victims," while being immunized by the very same speech that caused the severe injury simply because it included public issues.[353]

Critics who question this premise or think that the "anti-bootstrapping" rule from defamation cases have nothing to do with *Snyder* should consider the two following hypotheticals. Assume for purposes of argument that a white supremacist group—Group WP—exists in a small town of about 20,000 people somewhere in Middle America. Group WP periodically holds peaceful and lawful white

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with 'actual malice,' it was entitled to summary judgment.").

353. Justice Alito points out and persuasively defends this idea in his dissenting opinion in *Snyder*. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222-29 (2011) (Alito, J., dissenting) (explaining that verbal assault on private individuals regarding private concerning speech should not be immunized from tort liability by the First Amendment simply because some of the speech can be connected to general public issues that exist within the current realm of public debate).

power rallies in the town (assume that the rallies occur on public land and that Group WP has a right to be where they protest), which everyone knows about but which most just generally ignore. Suppose a few members of Group WP decide to lynch a young black man—Mr. Victim—to prove their loyalty to the group. After they kidnap, beat, torture, castrate, lynch, and murder Mr. Victim, the family and community hold several gatherings to mourn the loss of Mr. Victim. (Sometime in the future, those responsible are criminally convicted for their terrible crime.)

Suppose further that Group WP continues to peacefully protest in public areas where they have a right to be, but just a day after the horrible crime makes national news, some of the signs not only include those relating to black inferiority and white power and supremacy in general, but they now include signs that read "Thank God for Lynched Niggers," "God Hates Lynched Niggers," and "Niggers Like Him Belong Six Feet Under." Assume Mr. Victim's parents never come into contact with Group WP, and Group WP always holds peaceful, lawful rallies in public areas where they may lawfully stand. However, because the tragic crime makes national news, Mr. Victim's father sees the news that broadcasts one of the protests. Mr. Victim's father views the protest, including the general signs related to white supremacy and the specific signs related to Mr. Victim. During the week following, Mr. Victim's father experiences extreme emotional disturbances, including extreme mood swings, severe anguish and grief, and extreme depression. These emotional symptoms exacerbate his diabetes and heart disease for weeks. Eventually, he has a heart attack. Though he lives, he remains permanently impaired as a result, both physically and mentally.

The Victim family now sues for IIED. Experts at trial objectively verify what the family reports—that Mr. Victim's father was an absolute wreck after viewing the news broadcast and that his emotional distress over the two weeks led to his heart attack. Group WP argues their speech is protected by the First Amendment, citing *Snyder* and claiming that the "overall thrust and dominant theme" of their signs relates to broader public issues—namely black crime rates and drug addiction, black incarcerations rates (both used to suggest black inferiority) and reverse discrimination in the workplace. In fact, on the day in question, Group WP had some 30 signs, all relating to these issues, except for the four signs relating to Mr. Victim.

Applying *Snyder* to the facts of this hypothetical, Group WP has a fairly strong argument that their speech should be immunized from tort recovery by the First Amendment, because their speech (1) concerned matters of public issues, (2) it was communicated peacefully, and (3) they had a right to be where they were.[354]

Assume the exact same facts as the prior hypothetical, except that Group WP now generally holds rallies concerning "the sin of homosexuality," "gays in the military," and the Catholic Church. Additionally, this time Mr. Victim is a white male who is part of the LGBT community. In this hypo, members kidnap, rape, torture, castrate, lynch, and murder Mr. Victim. In the days following the

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354. Maybe in this case, however, the word "Nigger" might be treated differently after the Supreme Court's decision in *Virginia v. Black*, where the Court upheld the constitutionality of a Virginia statute that banned cross burning with the intent to intimidate, because of the history of slavery and black oppression in our nation, and because historically cross burning was used to intimidate blacks. *See generally* Virginia v. Black, 538 U.S. 343, 343-346 (2003). Either way, this hypo raises serious questions about *Snyder's* public speech standard, mainly that peaceful speech communicated in public whose "overall thrust and dominant theme . . . speaks to broader public issues" is protected by the First Amendment. *Snyder*, 131 S. Ct. at 1217. At what point is a public issue no longer a public issue, e.g., black inferiority was a major public issue prior to the Civil Rights Movement, The Voting Rights Act, and integration (and in many respects continues to be for an unfortunate amount of racist individuals living among us). One could argue that de facto Jim Crow laws still exist, in that the black community still experiences severe explicit and de facto discrimination. L. Darnell Weeden, *The Black Eye of Hurricane Katrina's Post Jim Crow Syndrome is a Basic Human Dignity Challenge For America*, 37 CAP. U. L. REV. 93, 96 (2008) ("Jim Crow is deeply rooted in American history and is alive and well today despite America's continuing denial of the existence of Jim Crowism."); Linda Green, *Jim Crowism in the Twenty-First Century*, 27 CAP. U. L. REV. 43, 45 (1998) (arguing Jim Crow is a complex set of "institutions and practices" that still exists today). While this is probably true, science has at least demonstrated over the past few decades that racial inferiority is no longer a debatable issue. *See generally* ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH, THE FALLACY OF RACE (1997) (arguing that race is largely a social construction and providing a history of how this argument has gained traction during the twentieth century). Indeed, anyone who takes Anthropology 101 in the University setting knows that "race," meaning the color of one's skin, can no longer serve as a legitimate justification for the argument that some "races" are inferior to others, or that "race" even exists. Indeed, I question even the point of ever distinguishing between "races." Can we now conclude, then, that black inferiority is no longer a public issue demanding heightened or "special" First Amendment protections?

lynching, Group WP holds their generally scheduled rallies, but this time they include several signs that read, "Thank God for Lynched Faggots," "God Hates Lynched Fags," and "Fags Belong Six Feet Under." If Mr. Victim's father again suffers severe emotional and physical harm as a result of viewing the protest on the news, would he be unable to bring a claim for IIED? After *Snyder*, it appears quite possible that Mr. Victim's father would be denied recovery and Group WP's speech would be protected by the First Amendment and *Snyder*.

Although extreme, these hypotheticals demonstrate the type of First Amendment protection hate groups like Westboro potentially maintain after *Snyder*. At some point, as a society we must ask ourselves if this is the type of conduct the First Amendment is meant to protect.

VI. CONCLUSION AND POLICY RECOMMENDATIONS

A. Conclusion

The Court in *Snyder* ignored all competing interests by using the First Amendment and the justification for public speech to trump and trample on the rights of Mr. Snyder. It did this by ignoring the fact that Mr. Snyder is a private individual, a status that historically has been used to justify greater protections for plaintiffs in speech/tort cases.[355] The Court justified its decision based on an erroneous application of *Falwell*'s standard, where the Court required actual malice and factual falsity and denied recovery for IIED because the plaintiff was a public figure and because the speech at issue—public parody—had a deep rooted history and tradition in our nation since its birthplace and which our nation's "political discourse would have been considerably poorer without . . . ."[356] Yet here, Mr. Snyder and future plaintiffs are not even given the chance to prove actual malice or any other heightened standard that might give them a chance to

355. Gertz v. Welch, Inc., 418 U.S. 323, 342-50 (1974) ("Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.").

356. Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ("From the viewpoint of history it is clear that our political discourse would have been considerably poorer without [political cartoons, parody, political satirists, and cartoonists].").

recover for severe injuries resulting from IIED. Rather, Mr. Snyder and future plaintiffs are victimized by groups like Westboro as well as the Supreme Court's public speech trump card. Finally, *Snyder* creates a dangerous possibility for bootstrapping, whereby Westboro and others may now assault private victims with purely private concerning speech and be immunized by the First Amendment as long as the private hurtful speech also contains public speech communicated in public peacefully.

As the dissent rightly pointed out, "our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[357] Allowing private figures to recover for speech causing IIED does not have to harm our national commitment to "uninhibited, robust, and wide-open" debate on public issues because only private hurtful speech would effectively be actionable, which has no relation to public speech and public debate. That is why, on the facts of *Snyder*, and the facts of the two hypotheticals just mentioned, I must agree with the dissent: the First Amendment should not shield Westboro's speech on Matthew and Mr. Snyder's private life simply because it was embedded in other speech on public issues.[358] The First Amendment should provide protection for public speech on public issues concerning public figures. However, "it should not be construed as a license to harm private individuals intentionally . . . because to do so" tramples on the rights of private individuals.[359] As one scholar aptly noted, "[t]o not provide a remedy for psychologically injurious speech truly would be to sacrifice one set of rights for another."[360]

B. Policy Recommendations

Although I ultimately agree with Justice Alito's conclusion, I have several policy recommendations that courts could use to strike a proper balance between the First Amendment's free speech interests and the states' right to protect its citizens from IIED. As such, I have listed four categories below—(A) Public Figure/Public Speech, (B)

357. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).
358. *Id.* at 1227.
359. Sacks, *supra* note 14, at 213.
360. Shulman, *supra* note 2, at 342.

Public Figure/Private Speech, (C) Private Figure/Public Speech, (D) Private Figure/Private Speech—to discuss how courts could balance these interests in different cases. (These categories are meant to apply only in cases where other First Amendment doctrines, such as incitement, fighting words, etc. do not apply, or situations where the facts are similar to *Snyder* or the hypotheticals discussed above.)

First and foremost, punitive damages should only be allowed in category D, or when the plaintiff is a private individual and the speech concerns only private matters, and only when the speech can effectively be characterized as subordinating a "discreet and insular minority."[361] "Disallowing punitive damages" in all but the most limited cases—which effectively include only those with hate speech—allows tort victims compensation for their injuries "without punishing their speech any more than is necessary to strike a fair balance between the need for compensation and the social value in protecting speech."[362] Second, courts should require plaintiffs to prove the elements of IIED by clear and convincing evidence, as this "would limit the number of plaintiffs who will be able to establish their claims and offer "enhanced protection of speech . . . ."[363] These recommendations are meant to encompass the spirit of the balancing factors laid out by this article (and Professor Sacks), which have been historically applied by courts—(1) the nature of the plaintiff, (2) the nature of the speech, and (3) the nature of the injury—and courts faced with each of the following categories should make an effort to always balance these three factors.[364]

1. Public Figure/Public Speech

When confronted with a claim for IIED, if the court determines that the plaintiff is a public figure and that the speech at issue is public speech, *Falwell*'s standard should apply. That is, a public figure or

361. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .").

362. Sacks, *supra* note 14, at 214.

363. *Id.*

364. *Id.* at 204.

official should not be able to recover damages for IIED when the speech involves only matters of public concern without proving factual falsity and actual malice.[365] Indeed, when public speech involves public officials, the protections of the First Amendment should be at their strongest. Although Professor Smolla makes a good point that the "actual malice" standard makes no sense when applied to IIED cases,[366] the standard still acts as a needed tool to protect public speech about public figures by making it the most difficult for plaintiffs to recover in this situation for IIED. Punitive damages should never be allowed in this category, and all elements should be held to a clear and convincing standard.

2. *Public Figure/Private Speech*

In this category, courts should allow public figures to pursue claims for IIED when the speech at issue is entirely private in nature. Thus, a public official would have to meet all the elements of IIED, and the court would have to determine that the speech involved purely private matters. Although public officials normally need less protection in the defamation context, this is often because they have access to the media and can easily counter any defamatory factual assertions, thus protecting their reputation. However, in the IIED context, the injury involves actual injury to the individual and not just his or her reputation. Therefore, the general justification for providing less protection to a public official is inapplicable.

Nevertheless, although actual malice would not provide an equitable balance, some extra element beyond the general elements of IIED may be justified here, as public officials assume the risk, to a certain degree, that they will be the subjects of attacks (albeit attacks that relate to their public office or status as a public figure).[367] Accordingly, courts considering cases in this category could focus more on the nature of the injury, and thus require that the injury

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365. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)

366. *See* Smolla, *supra* note 215, at 439 and accompanying text.

367. Gertz v. Welch, Inc., 418 U.S. 344 (1974) ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.").

include severe emotional harm that has "objectively verifiable physical manifestations."[368] This might provide an equitable balance for a public figure's right to recover for severe emotional harm by recognizing that they have likely assumed some risk and thus need to show "objectively verifiable physical manifestations" of severe emotional harm to recover in tort.

3. Private Figure/Public Speech

Here, if the speech at issue is absolutely public in nature, then the speech should be given greater protection by the First Amendment. However, this category presents the "bootstrapping" opportunity discussed *supra*, whereby defendants could potentially assault private individuals with hurtful private concerning speech combined with public speech. Therefore, courts should be very precise with the "content, form, context" test from *Dun & Bradstreet* to be sure that the speech at issue truly involves public matters.[369]

If the court determines that the speech at issue is truly public speech (meaning it contains no private speech imbedded with public speech), then private figures should still have the opportunity to pursue an IIED claim, but only if they can show that the defendant communicated the speech with "actual malice" (i.e. knowledge of falsity or reckless disregard for the truth or falsity).[370] The "actual malice" standard has always been an "instrument to foster 'public debate,' and not as an inevitable outgrowth of defamations essence."[371] Indeed, the rule was founded against a backdrop of "a profound national commitment to the principle that debate on public

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368. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible*, 67 WASH. L. REV. 1, 13-14 & n.64-69 (1992)

[M]ost jurisdictions require the plaintiff in either a bystander or direct action to plead and prove some physical injury as a manifestation of emotional distress inflicted. Although requiring some manifestation of physical injury does not ensure genuineness of a claim, courts tend to agree that it helps. This view is based on the belief that serious emotional distress is likely to manifest itself in physical symptoms.

369. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 761 (1985).

370. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

371. Stern, *supra* note 36, at 6.

issues should be uninhibited, robust, and wide-open."[372] Moreover, the "actual malice" standard has been used as a tool to promote "the idea that speech on public matters lies at the heart of the First Amendment" and has been "invoked to overturn restrictions based on a variety of rationales."[373] Thus, the standard seems fitting in this category even though the individual is private in nature. In addition, to protect public speech and public discourse, this category should also require physical manifestations of emotional injury similar to Mr. Snyder's injuries.[374]

Note that this does not mean that I agree completely with Calvert's premise that "actual malice" should be applied to private plaintiffs seeking IIED when the speech is public in nature.[375] There, he addressed a t-shirt that said "Bush Lied, They Died," which was clearly public speech.[376] What I am advocating for is that "actual malice" should apply in those situations only where it is clear that the speech is entirely public in nature (meaning there is no private speech interlaced with public speech). If the speech clearly has some private speech imbedded with public speech, then the private plaintiff should be able to separate out the private speech and sue for IIED. In that scenario, the private plaintiff should have to prove the elements of IIED and evidence of physical manifestations of emotional distress, all by clear and convincing evidence.

Courts should nevertheless recognize that private figures deserve more protection, as they do not assume the risk of public ridicule, scorn, or public satire that generally is reserved for public figures.[377] Yet, the very nature of truly public speech must be given greater protections to ensure state tort law avoids chilling our commitment to national debate on public issues. Notice, however, that this category,

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372. *Sullivan,* 376 U.S. at 270; Stern, *supra* note 36, at 6.

373. Stern, *supra* note 36, at 6.

374. Davies, *supra* note 367, at 13-14 & n.64-69.

375. Calvert, *supra* note 38, at 63.

376. *Id.* at 52.

377. Gertz v. Welch, Inc., 418 U.S. 344 (1974).

> Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater . . . An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny that might otherwise be the case.

which arguably might fit with the majority's analysis in *Snyder*, still differs in that *Snyder* immunizes Westboro's public speech outright, while I am suggesting that the "actual malice" standard provides a more equitable balance by taking into account more than just the nature of the speech, which the Court has, at least until *Snyder*, been more willing to do.[378] Accordingly, private individuals are still able to pursue IIED claims; they simply have a greater evidentiary burden to overcome, which provides some "breathing space" for public speech.[379] Again, no punitive damages should be allowed in this category, and plaintiffs should be required to prove all elements by clear and convincing evidence.

4. Private Individual/Private Speech

In this category, private figures should be allowed to pursue IIED claims. Here, the state's interest in protecting its citizens from IIED is the strongest, and the First Amendment interests are arguably at their weakest. However, in order to avoid the possibility of chilling private speech that may somehow contribute "to the nation's political discourse,"[380] plaintiffs should still be held to a clear and convincing

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378. Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to special protection under the First Amendment . . . For all these reasons, the jury verdict imposing tort liability on Westboro for [IIED] must be set aside."); *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (creating a rule that still allows public figures to recover, but only if they can show falsity and actual malice, thus providing a balance between free speech interests and the interest of states to protect its public officials from injury to reputation); *see also Gertz*, 418 U.S. at 347-48 ("This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."); *Sullivan*, 376 U.S. at 280 (refusing to create a categorical approach in defamation); *see also* Sacks, *supra* note 14, at 204 ("The Court's opinions indicate that all competing interests should be considered and, taken together, point to three primary balancing factors to determine the level of constitutional protection for tortious speech . . . .").

379. *Falwell*, 485 U.S. at 52.

380. Mattingly, *supra* note 178, at 768-69 (arguing that private speech as determined by the Court under the public-concern test from *Dun & Bradstreet* can still contribute to public debate and thus the public-concern test may actually inhibit

evidence standard. Moreover, private plaintiffs should only be able to recover punitive damages in the very narrow instances where defendants' speech involves: (1) purely private matters, (2) speech that humiliated and subordinated a particular group; (3) speech that targeted a group that has traditionally been discriminated against or otherwise could be defined as a "discreet and insular minority"[381]; and (4) speech intended to harm the particular group and perpetuate the group's inferiority.

Although hate speech is outside the scope this paper, punitive damages could be used as a tool against hate speech in situations where the plaintiff is a private individual and the speech involved purely private matters. This would alleviate the fear that hate speech regulation could lead to broad censorship and limit the free exchange of ideas by instead only allowing punitive damages in narrow situations where the speech has nothing to do with public discourse, public issues, and public debate, but rather was meant to subordinate a particular group that has been traditionally discriminated against.[382]

One of the strongest arguments against regulating hate speech is the slippery slope argument, i.e., "that allowing the government to suppress a particular view point, even one that is unequivocally condemned by a majority of the population, opens the door for further government censorship" and inevitably chills public debate on public issues.[383] Indeed, those against the regulation of hate speech believe it is better "to protect all speech and expect that in the long run, hateful ideas will die a natural death in the marketplace of ideas."[384] Nevertheless, punitive damages in a very limited set of IIED claims could offer the solution to these fears while still providing a check on hate speech: punitive damages would act as a tool to counter hateful speech on purely private matters, which injures private plaintiffs, without actually opening the door to overbroad and vague regulations.[385] If one believes the proposition that "hate speech itself

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First Amendment protections of free speech.).

381. United States v. Carolene Products Co., 304 U.S. 144 n.4 (1938).

382. Taylor, *supra* note 281, at 1127-33 (discussing those in support of and opposed to hate speech regulation and the justifications for both camps).

383. *Id.* at 1118.

384. *Id.* at 1134.

385. *Id.* at 1133-34 ("Moreover, even assuming that it would be desirable to

does not promote the exchange of ideas because it does not convey its message through rational argument, nor can it be refuted through rational argument,"[386] then a check against it when it contains purely private issues aimed at private plaintiffs truly minimizes any fear that regulating hate speech discourages the free exchange of ideas. Thus, the possibility for punitive damages in this category provides a fair balance between those in favor of broad First Amendment protections and those who believe that "regulating hate speech follows logically from a serious commitment to equality."[387]

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suppress hate speech, civil libertarians worry that any regulations drafted with this goal in mind would chill speech that the First Amendment should protect, either because the regulations would be vague, or because they could be enforced discriminatorily.").

386. *Id.* at 1131.

387. *Id.* at 1130.