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The Implications of Snyder v. Phelps

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THE IMPLICATIONS OF SNYDER V. PHELPS

by

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Abstract

Snyder v. Phelps, a recent U.S. Supreme Court Case, appears to have had a vast but infrequently discussed impact on First Amendment law. In particular, the case changed the way Intentional Infliction of Emotional Distress claims are decided. Snyder v. Phelps shifted the manner in which speech is analyzed away from the method of analysis present in Hustler Magazine, Inc. v. Falwell. Rather than focusing mainly on what the status is of the target of speech, Snyder requires one first, and possibly only, look to the dominant thrust of the speech. If the dominant thrust of speech is on a matter of public concern, the speech receives Constitutional protection regardless of who it was targeted at. This thesis will explore the Court's analysis and the broad implications of the Court's decision.

Table of Contents

The Implications of Snyder v. Phelps

I. Introduction

Snyder v. Phelps is a Supreme Court case which briefly weighed on the minds of many Americans. This case is fairly notorious, but that notoriety is based almost entirely upon the controversial nature of the Westboro Baptist Church (WBC) rather than on the inherent legal issues at work. While the facts of the case may be sensational, the decision is far more interesting. In my opinion, the Court made the wrong decision in this case by improperly dividing the relevant speech, mischaracterizing the speech at hand, and creating a faulty test for speech liability. The Court chose to rule on only one portion of the relevant speech. While I do not think that the plaintiffs, the Snyders, should have won on the basis of the defendant's funeral protest alone, the Court's analysis with only the protest in mind was still flawed.

The Court in *Snyder v. Phelps* mischaracterized the nature of case. The Court did not fairly deal with the targeted speech before it. This speech attacked an individual (targeted him) and thus the fact that much of the speech dealt with issues of public concern should not have been dispositive. This mischaracterization, in addition to the majority's choice made to not take the relevant internet post into account as part of the final verdict, led to an improper balance of speech on issues of public concern against speech that could bring rise to an Intentional Infliction of Emotional Distress (IIED) claim. The Court's opinion appears to allow a speaker to say anything about anyone as long as their speech ties back to matters of public concern; while speech on matters of public concern deserves the highest First Amendment protection, this heavy-handed form

of protection goes too far. Moreover, this simple balancing act is an improper test for speech; speech need not be treated as a lump sum. If speech is actionable on a piece by piece basis, many of the dangerous scenarios that this decision brings about would be null and void. This case turned away from prior court analysis and, in doing so, fundamentally changed the relationship between figure status and speech on matters of public concern. The change was a bad one. This case too far elevates public concern at the expense of the individual target of the speech.

A. Questions to Ponder

Discussing this decision with only the hard facts of the case and a general explanation of the possible dangers associated with the decision will not properly impress upon the reader the broad implications of this decision. In order to better translate my worries about the scope of the decision, I have included several scenarios that are worth keeping in mind throughout the rest of the reading.

Imagine a scenario in which a group demonstrates outside the place of employment of a former soldier. The group is in compliance with local law and follows police instruction. The group frequently protests the American military; they are a group advocating for an end to the American military and consider all military actions to be criminal. Among their signs, they display several calling the former soldier a "war criminal" and worse; they inform him that he is the problem in America and that he should suffer for it. They go into great detail as to how his personal actions as a soldier have damned him. They show up every day for a week and only leave when he takes a leave of absence from his office. Although the dominant theme of the protest is on matters of public concern, the former soldier is without question the target of this specific

protest. As a result of their demonstrations, the former soldier experiences clinical depression and lasting health effects stemming from the emotional injury. While the former soldier may have been able to collect on an IIED claim before the Snyder ruling, after it he would have no legal recourse.

While the scenario above is telling as to the scope of this decision, it bears some similarities to the facts of *Snyder v. Phelps*. To take a step away from Snyder itself, imagine a scenario where an individual is walking down the street in his or her home town. Across the street are several members of an ideological group. They spot the individual and, from across the street, begin berating the individual on the basis of some particular aspect of his or herself and explaining why they think that aspect is bad for America as a whole. This aspect could be religious beliefs (berating a member of the WBC for example), ethnicity (the speech leveled at Muslim men after the September 11th attacks), or even something like weight (in reference to the obesity epidemic in America). While this scenario is a bit less clear cut—the individuals might be disturbing the peace, they could be stalking the individual, etc.—*Snyder v. Phelps* protects speech of this nature. As long as the speaker keeps the dominant portion of their speech to issues of public concern, they are permitted to level this harmful speech at a truly innocent bystander.

To bring the matter a bit closer to home, think of the recent pro-life protests on campus. These protesters worked well within their established First Amendment rights. They followed state guidelines, followed university guidelines, and did not disturb the peace (at least not to a degree warranting police involvement). However, if they had targeted a particular individual walking by and aimed their protest at her, they would still

have been protected. If one of the protesters, many of whom are students at the University of Maine, had known of a classmate who had an abortion and spoke out about it while she was walking by causing her obvious and immediate distress, she, the girl who was the object of the speech, would have no recourse.

While the Court claimed that their verdict was a narrow one to be matched only to the facts of the case at hand, it appears to stretch much farther. Any individual could become the target of emotionally damaging speech; while an IIED claim is hard to satisfy normally, *Snyder v. Phelps* takes away any possibility of recourse under this claim when matters of public concern are brought into play.

B. Background of the Westboro Baptist Church

The Westboro Baptist Church was founded by Fred Phelps in 1955. The Church refers to itself as an "Old School (or Primitive) Baptist Church." They believe that the Bible instructs true believers to judge "righteously" in accordance with God's will (Westboro Baptist Church, 2010)[1]. They believe that God curses those who disobey him and that America is cursed (Westboro Baptist Church, 2010). They focus on spreading the message of God's hate as derived primarily from Leviticus 20:13 which the WBC believes lists rules of human conduct and bears the warning that god will "abhor" those who do not follow them. They also believe themselves to be those sent by God to deliver his words; this perceived duty is the inspiration for their public protests and displays (Westboro Baptist Church, 2010).

They spread their caustic message primarily through picketing; they picket both institutions and individuals and in recent years have staged at least two demonstrations a

[1] They claim to adhere to the teachings of the Bible and to try and teach the doctrines of grace iterated by John Calvin: the natural condition of total depravity, unconditional election, limited atonement, irresistible grace, and the perseverance of the saints (Westboro Baptist Church, 2010).

week ("Extremism in America," 2012). Within the past twenty years, the Westboro Baptist church has picketed over six hundred funerals many of which were for military personnel. They attempt with their inflammatory displays to spread their belief that God hates the U.S. for its tolerance of homosexuality, particularly homosexuality within the military. The WBC explains that they "bring it home to you specifically, around current events, such as the highly publicized funerals of soldiers and others who die by some notable calamity (where you appear in mass, for a public/media event, to worship the dead and demand of God that He bless you)" in which the "you" represents the American public (Westboro Baptist Church, 2010). They believe that funerals are ideal places for their demonstrations as the mind is already dwelling on mortality and the question of what might come after death. To demonstrate its beliefs, the church notoriously displays signs such as "God Hates Fags" (their signature), "Thank God for Dead Soldiers", and "America is Doomed" which is perhaps the most concise statement of their beliefs (*Snyder v. Phelps*, 2011).

C. Basic Facts of Case

On March 3, 2006, Lance Corporal Matthew Snyder was killed by an IED in Iraq. He was transported back to the United States for a traditional Christian burial at St. John's Catholic Church in Westminster, Maryland (Petition for a Writ of Cert., 2010). The funeral of Matthew Snyder had been listed (both time and location) in local newspapers although Albert Snyder did request a private funeral (Petition for a Writ of Cert., 2010). Phelps and his Church put out a press release stating that they were going to "picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder." (*Snyder v. Phelps*, 2011). They staged three protests that day at separate

locations, conveying a similar message and displaying predominantly the same signs at each demonstration (Salamanca, 2011) On the day of Matt's funeral, the founder of the Westboro Baptist Church, Fred Phelps along with six of his followers, all of whom are related to him, picketed the funeral of Marine Lance Corporal Matthew Snyder in Westminster, Maryland. They had notified local police in advance of their intention to picket. In compliance with local law enforcement instructions, their picketing took place on public land approximately 1000 feet from the St. John's Catholic Church where the funeral was held. None of the protestors entered church property or the cemetery itself. They displayed their signs peaceably throughout the duration of their picketing. They picketed for approximately a half hour before the funeral and ended the picketing as the funeral began. (*Snyder v. Phelps*, 2011) During the protest itself, Phelps and his followers sang bible hymns, recited Biblical verses, and abstained from shouting and spoken profanity (Salamanca, 2011).

Several days later, Westboro Baptist Church member Shirley Phelps-Roper, daughter of Fred Phelps, posted an online account titled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist to Help the Inhabitants of Maryland Connect the Dots" on the Church's official website containing pointed criticism of the deceased Mathew Snyder, his father Albert Snyder, and his mother, Albert Snyder's ex-wife (Salamanca, 2011). The Church colloquially refers to this document as the "Epic". Within the "Epic", the Church claimed that the Snyders had "taught Matthew to defy his creator", "raised him for the devil", and "taught him that God was a liar" (Salamanca, 2011).

Although the funeral procession passed within 300 feet of the picketers, Albert

Snyder, father of the deceased, did not see the writing on the signs although he did see the tops of the signs. He was not disturbed by the WBC during the funeral itself or before it and was not aware during the services that the demonstration was in any way related to his son or the funeral. The picketing directly disturbed the funeral proceedings only by forcing the funeral procession to be rerouted from the main entrance to a side entrance. Snyder initially became aware of the nature of the picketing at the private wake immediately following his son's funeral (Oral Argument, 2010). Several weeks later, Albert Snyder found the internet "Epic" after performing an Internet search of his son's name (Salamanca, 2011). These actions and facts brought rise to Petitioner Snyder's civil suit.

II. Treatment in Lower Courts

A. Five grounds on which state tort law claims were filed

Plaintiff Albert Snyder filed a law suit in the U.S. District Court against Phelps, his daughters, and his Church. Snyder alleged five Maryland state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The Intentional Infliction of Emotional Distress claim will be the main focus of this paper and the claim most affected by the Supreme Court's decision.

1) Intentional Infliction of Emotional Distress (IIED)

Intentional Infliction of Emotional Distress is a state tort that has four elements that must be met under Maryland law. In order to collect on an IIED claim, the plaintiff must show that the defendant acted intentionally or recklessly, that the defendant's

conduct was extreme or outrageous, and that extreme emotional distress is caused by this conduct (IIED, 1992). To recover under the tort of Intentional Infliction of Emotional Distress one must meet requirements that "are rigorous and difficult to satisfy" as established in *Harris v. Jones* (*Harris v. Jones*, 1977). A plaintiff must show that the conduct caused harm that was extremely severe; "recovery will be meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves" (*Harris v. Jones*, 1977). A plaintiff must also prove that the conduct of the defendant was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Harris v. Jones*, 1977). While this is a difficult tort to satisfy, it has been firmly established that speech can be the sole basis for the tort as in *Wilkinson v. Downtown* (*Snyder v. Phelps*, 2011).

The conduct of the defendants was intentional and reckless as well as extreme and outrageous. The defendants intended to harm Plaintiff Snyder and his family (*Snyder v. Phelps*, 2008 p.9). The actions and comments of the defendant have caused severe emotional and physical distress to the Plaintiff (*Snyder v. Phelps*, 2008, p.9). Albert Snyder was, according to the record, unable to separate thoughts of his deceased son from thought of the Westboro Baptist Church's picketing. He frequently became tearful, angry, and sometimes physically ill at the thought of it. Expert witnesses were called in to testify that the Church's interference in this personal affair had resulted in a severe depression and exacerbated pre-existing health issues (*Snyder v. Phelps*, 2011).

2) Defamation

Defamation is communication that causes those it refers to experience shame or ridicule, to be held in contempt by the community, or to suffer a damaged reputation (Friedman, 1995). It is governed by state law but restricted by the First Amendment. In order to qualify as a defamation claim, the injurious speech must involve a factually provable claim (Friedman, 1995). The Constitution protects statements of opinion on matters of public concern that are not provably true or false (Friedman, 1995).

Plaintiff Albert Snyder brought a claim of defamation against the WBC in response to numerous statements made by the Church. Plaintiff Snyder never committed adultery or taught his son to as the defendants claim. Albert Snyder did not raise his son Matt "for the devil" or in any immoral manner (*Snyder v. Phelps*, 2008 p.6). Albert Snyder also did not teach his son to "defy his creator, to divorce, and to commit adultery" (*Snyder v. Phelps*, 2008 p. 6). Phelps and his followers made no effort to investigate the veracity of their claims; these claims were made intentionally with no regard for the truth or falsity of the statements. Moreover, these statements were made with the knowledge that they would most likely harm the plaintiff (*Snyder v. Phelps*, 2008). These defamatory statements were also made publicly and intended to be made public.

3) Intrusion Upon Seclusion

Intrusion Upon Seclusion is an Invasion of Privacy tort. The tort of Intrusion Upon Seclusion occurs when a party intentionally intrudes upon the solitude of another or his private affairs or concerns and the invasion would be considered highly offensive to a reasonable person (Restatement of the Law, 1977). This form of invasion of privacy does not require any publication; it can involve a physical intrusion (as in forcing entry into

the person's hotel room against their will) or an unwarranted use of the privacy of another (e.g. spying on an individual and seeing that which they would have hidden).

The claim of intrusion upon seclusion was applied here because the defendants intentionally infringed upon the solitude and seclusion of the plaintiff and his family. Phelps also intruded upon the private affairs and concerns of the plaintiff. The personal affairs of Albert Snyder are not matters of public concern nor was the private funeral of Matthew Snyder (*Snyder v. Phelps*, 2008). This intrusion would be deemed extremely offensive to any reasonable person (*Snyder v. Phelps*, 2008).

4) Publicity given to private life

A person who publicizes a matter involving the private life of another is subject to liability for invasion of privacy under Maryland law if the matter they have publicized is a topic that would be "highly offensive to a reasonable person" and is not a subject of legitimate concern to the public (Restatement of the Law, 1977). The defendant's publicity given to private life in this case constitutes an invasion of privacy. The statements of the defendant would be highly offensive to any reasonable person and the actions and statements of the defendant were "not consistent with any legitimate concern to the public" (12, 8). The continued use of the website www.godhatesfags.com concerning the plaintiff is also outrageous and continues to publicize the private life of Snyder and his ex-wife (12.9).

5) Civil Conspiracy

A Civil Conspiracy is an agreement between two or more individuals to complete through their cooperation something unlawful or to complete a purpose that is lawful through unlawful means. This tort renders each participant in the conspiracy responsible

as a joint tortfeasor for all damages associated with the wrong regardless as to each participant's degree of direct involvement (Restatement of the Law, 1977).

The individual defendants agreed to travel from Kansas to Maryland with the express purpose of protesting Matt's funeral. Once there, they colluded to invade the privacy of and defame the plaintiff (12, 10). The individual defendants furthered their tortious acts by posting similarly invasive and defamatory content on their website (12. 10). These acts were, in accordance with the four torts previously discussed, unlawful and continue to be so.

B. Lower Courts

1) District Court

The United States District Court awarded the Westboro Baptist Church summary judgment on Snyder's claims of defamation and publicity given to private life; summary judgment is the term used for an instance of a court dismissing claims before going to trial. According to the District Court, the claim of defamation was unsatisfied because the only possibly defamatory speech was part of the "Epic" which was nothing more than Ms. Phelps-Roper's religious opinion and thus would not realistically expose the Snyder's to any bias from other individuals, an element of defamation claims that the District Court seemed to set up as the main test for defamation in this case. The claim of publicity given to private life was not met because the Defendant had not published any information that had initially been private. There were no specifics of the Snyder's lives other than their full names that were publicized by the Phelps (Salamanca, 2011).

A trial was thus held on the remaining three tort claims. On the remaining three

claims from the original grounds of the diversity petition (IIED, Intrusion upon Seclusion, and Civil Conspiracy), the jury found the Westboro Baptist Church liable for $10.9 million total in damages ($2.9 million in compensatory and $8 million punitive damages) (Salamanca, 2011). The Westboro Baptist Church challenged this verdict as "grossly excessive" and sought judgment as a matter of law on the grounds that the first Amendment fully protected its speech (*Snyder v. Phelps*, 2011 p. 5). The District Court reduced the punitive damages awarded but otherwise left the rest of the verdict intact. Westboro moved for summary judgment contending that the First Amendment insulated the Church's speech from tort liability.

2) Fourth Circuit Court of Appeals

The U.S. Court of Appeals for the Fourth Circuit reversed the original verdict on all claims, finding that the Westboro Baptist Church's statements were entitled to First Amendment protection because its statements dealt with matters of public concern, were not provably false, and were expressed solely through "hyperbolic rhetoric and figurative expression" (*Snyder v. Phelps*, 2011 p. 4). The decision was unanimous, although Judge Shedd did differentiate himself from the majority opinion. Snyder, according to the concurrence of the Court of Appeals opinion by Judge Shedd, had simply failed to provide sufficient evidence at trial to support the jury's verdict on any of his tort claims (*Snyder v. Phelps*, 2011).

C. Public Opinion

The judicial system in America is in place in part to protect individuals from the whim of the majority. This nation has a strong precedent of protecting the lawful views and actions of individuals even when they are unpopular or offensive to the majority.

However, there is certainly a real strain placed on judges when a case does fly in face of public opinion. Justice Oliver Wendell Holmes Jr. perhaps best stated the impact of cases that catch the public eye; "hard cases...are apt to introduce bad law." Great cases, like hard cases, also make bad law for "great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feeling and distorts the judgment" (Salamanca, 2011). *Snyder v. Phelps* was a hard case but it did not make bad law in the sense Holmes speaks of; there is an obvious and immediate interest in the compelling humanitarian claim Albert Snyder, the grieving father, presented. The public had a strong interest in seeing the Albert Snyder and the memory of his son vindicated. To the benefit of free speech, the Court did not make an error based on distorted judgment. The Court deserves credit in this case for adhering to law rather than "constructing an artificial category to sustain an otherwise desirable result" (Salamanca, 2011). While the Court did err in their final analysis, their error was not one of punishing a group for offensive speech.

The basic circumstances of this case play on the emotions: a grieving father, a son that gave his life for the country, and a religious group that took advantage of that horrible situation in order to express their outrageous message (Salamanca, 2011). While specific restrictions will be explored later, it is important here to note that broad protection is given to certain types of speech to ensure that the courts do not become "inadvertent censors" (*Snyder v. Phelps*, 2011 p.6). Attorney Sean E. Summers, representing Petitioner Albert Snyder, summed up the emotional response to the law in oral argument with "I would hope that the First Amendment wasn't enacted to allow

people to disrupt and harass people at someone else's private funeral" (Oral Argument, 2010 p.23).

III. Supreme Court Proceedings

A. Petition for Cert. and Brief in Opposition

1) Petition for a Writ of Certiorari

Petitioner Snyder brought three main questions before the Court. The first was whether *Hustler Magazine Inc. v. Falwell* could apply to a private person versus another private person concerning a private matter (Petition for a Writ of Cert., 2010). This question will hold the greatest relevance to the Supreme Court's analysis but unfortunately will not receive a clear answer. The second was whether the First Amendment freedom of speech tenet can trump the First Amendment Freedom of religion and peaceful assembly (Petition for a Writ of Cert., 2010)? This question was not examined by the Court; in order to answer this question, the Court would need to establish some sort of hierarchy to protected First Amendment freedom. The third, was whether an individual attending a family member's funeral would constitute a captive audience (Petition for a Writ of Cert., 2010)?

Snyder's main error was specifying in his petition for certiorari that his "claims arose out of Phelps's intentional acts at Snyder's son's funeral" to the exclusion of the Internet "Epic" (*Snyder v. Phelps*, 2011 p. 3). As discussed earlier in this paper, Phelps and his followers did not actually disturb the Snyders during the funeral. Moreover, they did not picket in the area during the actual funeral proceedings. The most obviously targeted, defamatory, and emotional injurious speech on the Phelps' part occurred later in the form of an Internet "Epic" that Snyder had failed to mention within his petition for

certiorari (Sacks, 2011). Based on the claims brought up in this petition for certiorari, the Court ruled that it did not have the "Epic" before it (*Snyder v. Phelps*, 2011). Thus the Court decided this case on the basis of Westboro's picketing alone, which consisted primarily of their less targeted speech.

2) Respondent Brief in Opposition

The Phelps' brief in opposition to the petition for certiorari mainly deals with the large claim that the Petitioner fails to present an issue worthy of the Court's consideration. Because the case deals with public rather than private matters which the Court has already established are protected, the case is not worthy of consideration (Brief in Opposition, 2010). It also does not, as Petitioners claim, deal with the question of a Captive Audience due to the distance of the picketers from the funeral and the lack of disruption caused (Brief in Opposition, 2010). Moreover, there is no split in the circuits relevant to the case at hand because the case does not directly deal with the Constitutionality of laws restricting funeral picketing (Brief in Opposition, 2010). The only law restricting funeral picketing relevant to this case was put in place in response to the picketing.

B. Supreme Court Majority Opinion

An eight-member majority ruled that the First Amendment precludes tort liability in this instance because the comments of the Westboro Baptist Church were on matters of public concern, not provably false, and expressed only through hyperbolic rhetoric (*Snyder v. Phelps*, 2011). Moreover, the Church's speech was not motivated by any private grudge against the Snyders and the protest occurred on public land rather than private property (Snyder v. Phelps, 2011). While the Court looked at several elements of

this case, this paper will focus on their analysis relevant to the IIED Claim.

The opening sentence written by Justice Roberts for the majority is really quite misleading. He states that a jury had held the Westboro Baptist Church liable for picketing near a soldier's funeral; in reality, the jury had held the Westboro Baptist Church liable for their inflammatory speech and the contents of the Internet "Epic"[2]. Although the Court looked at only a narrow view of the facts, the question before them was quite broad. Does the First Amendment shield members of the Church from tort liability for IIED? The answer to this question, according to the majority turned largely on the content of the speech, namely, whether the speech at issue was of public or private concern (*Snyder v. Phelps,* 2011).

1) Public or Private Concern

The Court attributed the signs displayed during the protest to the category of speech on issues of public concern. Speech on public concern is "the essence of self-government" and as such carries broad protection (Salamanca, 2011). While the boundaries of what is and is not a matter of public concern are not well defined and there is not a clear test, it is equivalent to the most protected form of speech within this nation. Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern in the community or when it is a subject of legitimate news interest (Salamanca, 2011). In order to determine when something is public or private speech, one needs to look at the "content, form, and context" as "revealed by the whole record" (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1985).

[2] While this may seem like a miniscule distinction, the lower courts dealt not with the act of picketing, but with the speech utilized during the picketing in connection with the speech employed within the "Epic".

a. *Connick v. Myers*

Myers, an assistant District Attorney for New Orleans, was informed by her boss District Attorney Connick that she might be transferred. Myers put a questionnaire into circulation regarding her possible transfer; the District Attorney terminated her employment upon learning of the questionnaire (*Connick v. Myers*, 1983). The issue at hand was whether the termination of Ms. Myers, the cause of action, was in violation of her First Amendment rights. The answer to this question rested on whether or not the questionnaire was a matter of public concern. Although one of Myers' questions was directly related to matters of public concern, the overall relation of her protest to public concern was extremely limited (*Connick v. Myers*, 1983). Thus, the Court ruled in favor of Connick calling the termination of Myers constitutional.

Whether or not the First Amendment prohibits holding the WBC liable in this case is, according to the Court, largely dependent on whether that speech is of public or private concern. Not all speech is of equal importance; when speech is of private significance only, there are far less rigorous First Amendment protections of it. The Court looked to *Connick v. Meyers* when balancing the importance of free speech against the need to protect individuals from unwarranted emotional injury; “speech on public issues occupies the highest rung of the hierarchy of First Amendment values” and as such is entitled to special protection (*Connick v. Myers*, 1983. p. 145). While the particulars of the Westboro Baptist Church's speech may have been extreme and offensive, much of their speech deals with matters of public concern.

Connick v. Myers is also relevant to Snyder v. Phelps because it puts a limit, a small one, on how far protections of matters of public concern should extend. Myers lost

her suit because the dominant thrust of her speech dealt with issues of private concern rather than public (*Connick v. Myers*, 1983). While the Westboro Baptist Church may have made comments dealing only with private concern (specific signs seeming to denounce Matt Snyder in particular), the overall thrust of their message did deal with matters of public concern.

b. *Hustler Magazine Inc. v. Falwell*

Hustler Magazine Inc. v. Falwell was a 1988 Supreme Court case. Petitioners Hustler Magazine and Flynt Publications had run a parody of an advertisement that portrayed the fundamentalist Protestant minister Jerry Falwell and his mother as immoral drunks and asserted that Falwell was a hypocrite who only preached when intoxicated although this caricature of Falwell was not the point of the ad (*Hustler Magazine, Inc. v. Falwell*, 1988). Falwell brought suit against Hustler Magazine seeking to recover damages for libel, invasion of privacy, and IIED. The question before the Supreme Court was whether public figures and officials can recover for the tort of IIED as delivered through publications. The Supreme Court held that public figures and public officials couldn't recover for damages from IIED by publication without also proving that the publication in addition included a false statement of fact made with "actual malice" (*Hustler Magazine, Inc. v. Falwell*, 1988)[3].

Although the state does have an interest in protecting public figures from IIED, this interest is not great enough to override the First Amendment protections for free speech. In order for public debate to be free, citizens must have some freedom in the method of their discourse on public figures and officials (*Hustler Magazine, Inc. v.*

[3] "Actual malice" as defined in *New York Times v. Sullivan*. A statement made with "actual malice" must be made with knowledge that the statement was false or with a reckless disregard as to whether it was true or false.

Falwell, 1988). While the ad run was certainly "outrageous" it was, as pointed out by the appellate court, reasonably believable and thus the original jury decision in favor of the Snyders was overly influenced by the outrageous content of the political speech (*Hustler Magazine, Inc. v. Falwell*, 1988). The case was decided unanimously[4]. Hustler was pivotal in placing a limit on when individuals can bring claims against speakers on the basis of their harmful speech. The limit appeared to only apply to public figures. The verdict of the Court in *Snyder v. Phelps* went much farther.

The real problem facing the Snyders was that the only other case the plaintiffs had that dealt with IIED from the Supreme Court is *Hustler v. Falwell*. *Hustler v. Falwell* clearly dealt with a public figure rather than a private one; however, the states and the Federal Courts have since interpreted *Hustler v. Falwell* as not applying to private figures (Oral Argument, 2010). Hustler establishes the rule that when matters of speech concern only private figures, First Amendment protections for the speaker are less rigorous (*Snyder v. Phelps*, 2011). The Supreme Court had not directly held, in Hustler or any subsequent case, on what the law should mean in this same scenario if a private figure is the target of the speech. The Court did not directly address the issue here although the scenario at play in *Snyder v. Phelps* is markedly similar to that in *Hustler Magazine Inc. v. Falwell* with the noted exception that Snyder does not deal with a public official or figure.

c. *San Diego v. Roe*

San Diego v. Roe tests the boundaries of public concern. A police officer, hereafter identified as John Roe, was terminated by his employer, the city of San Diego, for producing and selling videos of himself engaging in sexually explicit behavior (*San*

[4] This was an 8-0 decision as Justice Kennedy had recused himself from the case.

Diego v. Roe, 2004). The question before the Court was whether the termination of Officer Roe violated his First Amendment Rights. The Court held that the termination was valid and that Roe's rights had not been infringed. His speech was "detrimental to the missions and functions of the employer" and it was of no concern to the community (*San Diego v. Roe*, 2004)[5]. While most of the case dealt merely with internal workplace grievances, this strange case did help to clarify the boundaries of what constitute matters of public concern. An individual does not have absolute freedom of speech and cannot expect protection under the guise of a matter of public concern in instances where that speech does not actually add to the public debate.

The boundaries of what constitutes speech regarding matters of public concern are poorly defined. The Court has previously said that speech is of public concern when it can be "fairly considered as relating to any matter of political, social, or other concerns of the community" (*Hustler Magazine, Inc. v. Falwell*, 1988). It must be "a subject of general interest and of value and concern to the public" (*San Diego v. Roe*, 2004). This is of course, still a fairly broad categorization. *San Diego v. Roe* only proves that one cannot later claim that protecting the speech was of interest to the general public when the speech itself was not clearly related to public issues[6]. In Snyder, the content of the protest clearly relates to public concern about society's tacit acceptance of homosexuality within the military, the political and moral conduct of America, and the subsequent fate the Westboro Baptist Church believes America will face.

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[5] Officer Roe's uniform was displayed in several of his explicit videos and he was selling his old police uniforms under the same online alias (*San Diego v. Roe*, 2004).

[6] The Court of Appeals, whose decision the Supreme Court reversed in *San Diego v. Roe*, had concluded that Officer Roe's speech was on matters of public concern (despite his lack of political or social commentary) and made no attempt to explain the perceived matter of public concern in this particular instance (*San Diego v. Roe*, 2004).

d. Further Questions Raised

An interesting question does arise in relation to speech on public concern. While there are very broad ideas as to what constitutes a matter of public concern, there is less established regulation as to how speech becomes public. *Snyder v. Phelps* brings up the question of whether or not making any aspect of life known to the public is enough to enable that aspect to become the subject of public debate (Oral Argument, 2010). In this instance Albert Snyder was vocal about his sorrow over his son's death and his displeasure with current American foreign affairs. The Westboro Baptist Church claimed that this alone was enough to justify their protests. This then raises a further issue in that, under the Westboro Baptist Church's definition, every bereaved family member who provides information to a local newspaper for an obituary runs the risk of their deceased loved one being treated as a vehicle for public speech (Oral Argument, 2010). The WBC objects to this claim although, on its face, it appears to fit the logic the church employs. The Church claims that, in order to avoid tort liability, the speech in question must not be out of the blue, it must not be "up close" or confrontational, and the family member of the deceased must have a high level of involvement in the public eye (Oral Argument, 2010 p.37).

2) Content, Form, and Context

a. *Dun & Bradstreet, Inc. v. Greenmoss Builders*

Dun & Bradstreet, Inc. v. Greenmoss Builders, a 1985 case, was a case that covered much ground. Dun & Bradstreet, Inc., a credit-reporting agency, erroneously reported to five of its subscribers that contractor Greenmoss Builders had filed for bankruptcy. Dun & Bradstreet would not release information about the subscribers to

Greenmoss Builders, although it did issue a redaction of the bankruptcy claim (*Dun & Bradstreet, Inc. v. Greenmoss Builders*, Inc., 1974). Greenmoss Builders again requested information about the specific subscribers, in order to send their own mailing, and were again denied. Greenmoss Builders brought a defamation action against Dun & Bradstreet. The main question before the Supreme Court was whether or not the Gertz rule that the states could not impose punitive damages in defamation cases without a showing of actual malice, should still apply (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1974)[7].

Five of the Justices agreed that the prior rule should not apply when the defamatory statements do not deal with matters of public concern. This distinction was agreed upon using the rationale that liability should be determined by looking at the whole record of each individual case. Dun established that the Court must examine independently the "content, form, and context" of free speech cases. To put it more simply, Dun requires the court to evaluate for each individual case all aspects of the speech especially what was said, how it was said, and where it was said. While this case deals directly with defamation, it brought about the idea that all parts of the record for a case dealing with free speech must be examined.

b. Context: Funeral

As Mr. Summers had argued during oral argument, if context ever matters, it should regarding funerals (Oral Argument, 2010). Although this certainly appeals to the public's general concept of morality, it does not mesh with the laws of this nation. While

[7] *Gertz v. Robert Welch, Inc.* established the standard of First Amendment Protection against defamation suits. It allowed states to make their own rules to determine liability of defamatory statements made about private individuals. It also established that if the state standard is lower than actual malice, only actual damages may be awarded (*Gertz v. Robert Welch, Inc*, 1974).

it is certainly true that the Westboro Baptist Church could have chosen to stage their protest at countless other more relevant locations (the Pentagon or any of the more than 5,600 military recruiting stations around the country, for example), they are under no obligation to directly match the content of the protest to the location at which it is staged (*Snyder v. Phelps*, 2011). As Justice Scalia sought to establish in oral argument, a friendly protest within a certain distance of a funeral is not, at least not to the petitioners, the same as a protest within a certain distance of a funeral that defames a corpse (Oral Argument, 2010). It was the emotionally distressing nature of the protest that brought rise to the claim rather than the mere fact of the demonstration. Moreover, the claim for intrusion upon seclusion simply because this protest disrupted a funeral is itself a deceptive claim. Thus, the real complaint was not intrusion based on the location and time of the protest but instead a content-based objection on the personal attacks (Oral Argument, 2010). While context may matter, this case was concerned primarily with content.

c. *Frisby v. Schultz*

Sandra Schultz, an individual vehemently opposed to abortion, gathered a group of individuals together to picket in front of the home of a local doctor who performed abortions. The city of Brookfield, Wisconsin in response passed an ordinance that prohibited all picketing outside of residential homes (*Frisby v. Schultz*, 1988). The ordinance was put in place "for the protection and preservation of the home" (*Frisby v. Schultz*, 1988). The question that made its way to the Supreme Court was whether or not an ordinance prohibiting picketing in front of residential homes violates the First Amendment. The Court ruled with a vote of 6-3 that it does not. The area of the picketing, a public street, does constitute a traditional public forum, however that alone

does not guarantee protection. As long as a ban satisfies strict scrutiny, it can remain. In this case, the ban was content neutral, "leaves open alternative channels", and serves a legitimate government interest (*Frisby v. Schultz*, 1988).

The Court did point out that even protected speech is not equally permissible in all places at all times. Even protected speech can be subject to "reasonable time, place, or manner restrictions" (*Snyder v. Phelps*, 2011). The Westboro Baptist Church's choice of where and when to picket is subject to some regulation. In response to this case, Maryland has since enacted a law that restricts funeral picketing similar in essence to the law in question in *Frisby v. Schultz*. The Maryland law is not broad enough to have made a difference in this case had it been enacted pre- *Snyder v. Phelps*, but it does indicate a willingness on the part of the states to take action. These laws offer some protection for the individuals who find themselves the target of public displays. The majority in *Snyder v. Phelps* did not deny that the Phelps did harm to the Snyders; while the majority offers no recompense to the Snyders in this case, they do indicate that state laws could help to prevent against this sort of harm in the future.

d. Final Content and Context Analysis

The specific context of this speech gives rise to much of the public controversy in this case. While it is certainly inappropriate, the context of the Church's speech does not transform the speech. Phelps and his followers issued their venomous speech on public land next to a public street; they did not infringe on the private funeral or enter in any way the grounds of the church. The speech was not "contrived to insinuate a personal attack on Snyder"; the Westboro Baptist Church has been preaching on the same topic for years, and there is no real question as to whether the picketing accurately represented

their honestly held beliefs (*Snyder v. Phelps*, 2011). The specific content of this message reasserts its importance; while speech of mere private significance offers "no threat to public debate… [And] no interference with a meaningful dialogue of ideas" (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1985). Speech on public issues is pivotal to public debate. The importance of free speech on public issues has been reaffirmed on numerous occasions. *N.Y. Times v. Sullivan* spoke of the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*New York Times Co. v. Sullivan*, 1964)[8]. *Garrison v. Louisiana* went even farther defining speech on public issues as the "essence of self-government" (*Garrison v. Louisiana*, 1964)[9]. The signs that the church displayed spoke to numerous issues of public concern including homosexuality in the military, the political conduct of the United States, and the moral conduct of the United States and its citizens (*Snyder v. Phelps*, 2011). While several of the signs can be viewed as relating to a particular individual, the majority of the Courtbelieves that this does not change the fact that the dominant themes of the protest were public in nature.

3) Outrageous Speech

In order to discuss the outrageous nature of the WBC's speech, the Court looked to *Rankin v. McPherson*. Rankin, a data-entry employee in a constable's office, remarked in passing to another employee after hearing of a death threat against the president that

[8] *N.Y. Times v. Sullivan* dealt with an ad which had accused Alabama police of arresting Martin Luther King Jr. merely in an effort to limit his influence. Under Alabama law, city commissioner Sullivan could collect for libel as he claimed to be personally defamed. This case established that all statements said about public officials are permissible unless they are made with the knowledge that they are false (*New York Times Co. v. Sullivan*, 1964).

[9] *Garrison v. Louisiana* explored how far the *N.Y. Times v. Sullivan* ruling could be extended. Garrison, a Lousiania D.A. Criticized the work and work ethic of local judges. He was sued under Louisiana law which required no proof of ill will in concurrence with factually inaccurate speech about public officials. Garrison won the case and it was decided that the ruling from *N.Y. Times v. Sullivan* limits police power to issue criminal sanctions (*Garrison v. Louisiana*, 1964).

she hoped the individual did "get him" (*Rankin v. McPherson*, 1987)[10]. Her statement was made as part of a private conversation within a room not available to the public. She was fired by the Constable because of this statement. Rankin alleged that her termination was in violation of her First Amendment rights. The Supreme Court agreed as her statement was part of a larger conversation dealing with the President's policy, a clear matter of public concern (*Rankin v. McPherson*, 1987). Moreover, her statement was not tantamount to a threat on the President's life, speech that could be criminalized, but merely her opinion of an extremist action. More importantly, the extreme nature of this statement does not, according to the McPherson court, change the nature of the speech away from matters of public concern (*Rankin v. McPherson*, 1987).

Much of the controversy surrounding Snyder lies not in the actual legality, but instead in the offense taken by the public to the Church's message. The Westboro Baptist Church is inescapably controversial and emphasizes the controversial nature of their beliefs so as to garner more attention. Although it is not surprising that the public finds this offensive, legally it should be irrelevant. In *Rankin v. McPherson*, the Court had stated that the "inappropriate or controversial character" of a statement is "irrelevant to the question of whether it deals with a matter of public concern" (*Rankin v. McPherson*, 1987). Although this case is certainly controversial, dealing with a message of religious hate, this controversial character and the setting it was held in are not enough to contradict the nature of the speech itself. As established, this speech clearly relates to

[10] Rankin was not a peace officer and her opinions cannot fairly be attributed to the Constable's office in the same way that a statement made by an officer within his or her official capacity might. Rankin's job title heavily affectss this decision in that it renders complaints about possible harm done to the office by her comments moot (*Rankin v. McPherson*, 1987).

public concern on several dimensions.

4) IIED Dismissal

The jury verdict imposing tort liability on the Westboro Baptist Church for IIED must be set aside; while the speech was certainly offensive, it did not, according to the Court, unfairly target the Snyders and it dealt predominantly with matters of public concern. As it stands, it appears that the jury is merely punishing the Church for its views on matters of public concern when those views themselves should not be subject to regulation (*Snyder v. Phelps*, 2011). To stifle the voice of the WBC here would, according to the majority's analysis, be harmful to public debate. The Court also dismissed the Intrusion Upon Seclusion claim and the Civil Conspiracy claim.

C. Concurrence

Justice Breyer joins in the opinion of the majority although he does have a different interpretation of the case. Justice Breyer distinguishes his concurring opinion from that of the majority through his method of analyzing how picketing on matters of public concern should be judged. While the majority appeared to stop their analysis with the question of whether or not the actionable speech was on matters of public concern, Justice Breyer insists that there should be more to the debate than merely that one question. It has been established in *Frisby v. Schultz* that a State can regulate picketing on matters of public concern. It has also been recognized that there is no First Amendment protection for unlawful conduct even if the conduct was committed in order to further a message relating to issues of public concern (*Snyder v. Phelps*, 2011).

Justice Breyer appears to call for a balancing act between the majority opinion and Justice Alito’s dissent. While the question of whether or not the speech is of public

concern is important, it should be tempered by an interest in protecting the right of the States' to protect their citizens from extreme emotional harm. Justice Breyer points out that because the funeral itself was not disrupted and the emotional harm was rendered after the fact, it is not extreme enough to warrant further investigation (*Snyder v. Phelps*, 2011). Perhaps the most important difference to note between the majority opinion and Justice Breyer's concurrence is that Justice Breyer took pains to point out that while the Court's decision renders First Amendment protection for Westboro in this instance, this decision "holds no more" (*Snyder v. Phelps*, 2011). This statement seems to imply that, IIED claims might still hold water in cases involving matters of public concern if the facts of the case were different. If, for example, the facts of the case were the same with the sole exception of the WBC having disrupted the funeral proceedings (perhaps with signs clearly visible throughout the duration of the funeral), Justice Breyer may have been writing another dissenting opinion rather than a concurrence.

Justice Breyer also pointed out that this decision says nothing about how Internet postings should be dealt with and does not examine the effect of television broadcasts (*Snyder v. Phelps*, 2011). While this hardly packs the same punch as footnote 1 in the majority opinion, it does have a very important implication. By stressing that this decision should not hold sway over television broadcasts and Internet postings, Justice Breyer appears to imply that this type of speech may need to be judged differently.

D. Dissent

Justice Alito stood alone in dissent of the majority opinion. Alito favors a more restricted concept of free speech; the national commitment to free speech, according to Justice Alito, "is not a license for the vicious verbal assault that occurred in this case"

(*Snyder v. Phelps*, 2011 p. 1). Justice Alito stresses that the Church, like anyone wishing to air an opinion, has "almost limitless opportunities to express their views" from writing books, to circulating petitions, to peaceably protesting in numerous settings (*Snyder v. Phelps*, 2011 p. 2)[11]. However, these protections for free speech do not apply when the very narrow tort of IIED is brought forth in an instance where the speech in question makes no real contribution to public debate. A society in which "public issues can be openly and vigorously debated" does not require allowances to be made for "the brutalization of innocent victims" (*Snyder v. Phelps*, 2011 p.14).

Alito openly criticized what he perceived to be the three main reasons the majority had found the Westboro Baptist Church's speech to be protected under the First Amendment. The first reason, that the speech was dominantly on public issues, he simply labeled as an inaccurate portrayal. According to Justice Alito the First Amendment does and should allow recovery for "defamatory statements that are interspersed with nondefamatory statements on matters of public concern" (*Snyder v. Phelps*, 2011 p.10). Regarding the lack of a private grudge against the Snyders on the part of the Westboro Baptist Church, whether or not the Church hates the Snyders or merely America as a whole does nothing to "soften the sting of their attack" (*Snyder v. Phelps*, 2011 p.10). Regarding the location of the protest on public property, the location, although it would certainly weaken a claim of IIED, does not preclude IIED liability (*Snyder v. Phelps*, 2011).

Alito took offense to the way that the majority divided the Church's message. The majority dismissed the "Epic" because it was not properly brought before them within the

[11] The existence of alternative opportunities for speech is a question normally asked only for content-neutral expressions, according to Frisbee. This case deals with content-based expressions. Justice Alito appears to be applying the Frisbee analysis somewhat indiscriminately.

cert petition. Alito believes that the "Epic" should not have been dismissed because it was merely a relevant piece of evidence within the record. The Court, according to Alito, does not require that every factual piece of information be included within the Petition for cert. Under this interpretation, the "Epic" would be squarely before the Court. While the "Epic"

was posted later and was as such not a direct component of the initial protesting, it still stood on the record as part of the Church's message. It also made far more direct references to the Snyders which, for Alito, took this speech out of the realm of public concern (Shulman, 2011). Is it really logical to immunize actionable speech simply because it is interspersed with protected speech?

E. Possible Legislative Solutions in light of Supreme Court Decision

1) Current State Laws

In response to the WBC's picketing of Matthew Snyder's funeral, the state of Maryland enacted a law that prohibits picketing of all kinds within 500 feet of a funeral (Rutledge, 2008)[12]. This law was not in place at the time of the Church's protest and, interestingly, would not have actually prevented the Church from picketing. Over forty states have enacted content neutral time, place, and manner restrictions limiting picketing or demonstrations within some "specified distance from funeral services, processions, or cemeteries" (Brownstein & Amar, 2011). The laws differ only in the process they require in order to picket and the distance that picketers must stay away (Rutledge, 2008). The Constitutionality of these laws has not yet been dealt with. While dealing with this question would have been difficult if not inappropriate within *Snyder v. Phelps*, perhaps

[12] The distance was originally 100 feet but, on April 11th was unanimously voted to be raised to the new 500 ft. limit (Rutledge, 2008).

the Court should have chosen to hear a case dealing with the Constitutionality of laws restricting picketing near funerals as *Snyder v. Phelps* would have fallen under the umbrella of that topic (Brownstein & Amar, 2011).

2) Is more needed?

As Justice Ginsburg mentioned in Oral Argument, nothing out of place with the Maryland statute occurred in *Snyder v. Phelps* (Oral Argument, 2010). Justice Alito had asked if Mr. Summers believed that the Maryland legislature had intended to occupy the field of regulations of events that occur at funerals. Considering that they had not outright restricted protests or demonstrations occurring at funerals, it seems unlikely. Even the strictest restrictions do not go so far as to completely ban this sort of protest. The issue at hand regardless as to what level of government is imposing this sort of regulation is that the restriction be reasonable. Is it reasonable to try and enact a ban on funeral picketing entirely? One can interpret the right to mourn as a legitimate interest in need of protection, but the protection cannot be so extreme as to thwart the higher interest in protecting speech. While these small restrictions on funeral picketing (i.e. a 500 ft. minimum distance away) may prove to be constitutionally viable[13], would a larger restriction also pass the test of Constitutionality? At what point is it unreasonable to restrict picketing? While 300 feet may not protect funeral goers who must drive by the picketers, 1000 feet may be an excessive restriction. Some similar discussions have already been had in Courts; for example, the courts have already decided that a 300 foot restriction regarding picketing of an abortion clinic is too far. Although this may provide some blueprint for courts in the future, it is important to note that these emotionally

[13] The ongoing *Phelps-Roper v. Nixon* case questions the Constitutionality of a Missouri law which restricts picketing "on or about a funeral" and criminalizes picketing within 300 ft. of a funeral (Rutledge, 2008).

charged places may require special and distinct considerations even in comparison to one another.

Restrictions on speech must be content neutral. The question here is would a ban on funeral protests be content neutral in practice? As Ms. Phelps-Roper pointed out, there was another group demonstrating outside the gates of the church; the other demonstrating group was holding up American flags and voicing a message of God's love for America (Oral Argument, 2010). As Ms. Phelps-Roper accurately stated the real reason for this desire for a ban on demonstrations at or around funerals is not itself a content-neutral desire. The Snyders did not claim that those supporting America outside the church were intruding because they quite simply were not in an unwelcome way. Within oral argument, Justice Ginsburg questioned why specifically the First Amendment should "tolerate exploiting this bereaved family when you have so many other forums for getting across your message?" (Oral Argument, 2010, p. 30). Ms. Phelps-Roper responded by stating that the "principles of law...are without regard to viewpoint" in respect to its limitations (Oral Argument, 2010 p.30). While there are certainly content-neutral restrictions on when and where one can protest, there is no restriction based upon the clearly content based idea of "exploiting the bereavement"— even though that exploitation could easily cause emotional distress— nor is there even a principle of law that falls under that title.

IV. What does this decision really mean?

At face value, this case could be seen as little more than the application of settled doctrine to difficult facts. The Court has repeatedly recognized that the Constitution

protects discourse on matters of public concern even when the speech is “disagreeable”, “outrageous”, “misguided”, or “stirs people to anger” (Salamanca, 2011). There is little argument within the courts over the need to protect speech even when that speech flies in the face of public opinion. However, the method by which the Court read the facts of the case and the questions they asked in order to determine whether or not the Westboro Baptist Church's speech should be protected were unexpected to say the least.

A) How narrow was this decision?

The Court directly states within the majority opinion that the holding in this case is a narrow one (*Snyder v. Phelps*, 2011). They cite the maxim put down in *Florida Star. v. B.J.F.* “the sensitivity and significance of the interests 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” (*Snyder v. Phelps*, 2011 p.14). While a narrow holding in accordance with the judicial restraint advocated in *Florida Star v B.J.F* may have been what the Court intended, in practice the verdict of *Snyder v. Phelps* appears to play a very different role. While the decision was tailored to the narrow facts of the case, it was created by invoking a vast change to the order of questions that must be asked to determine if speech receives First Amendment protection. This vast change is displayed below in figures 1.1 and 1.2.

Figure 1.1 (Post Hustler v. Falwell)

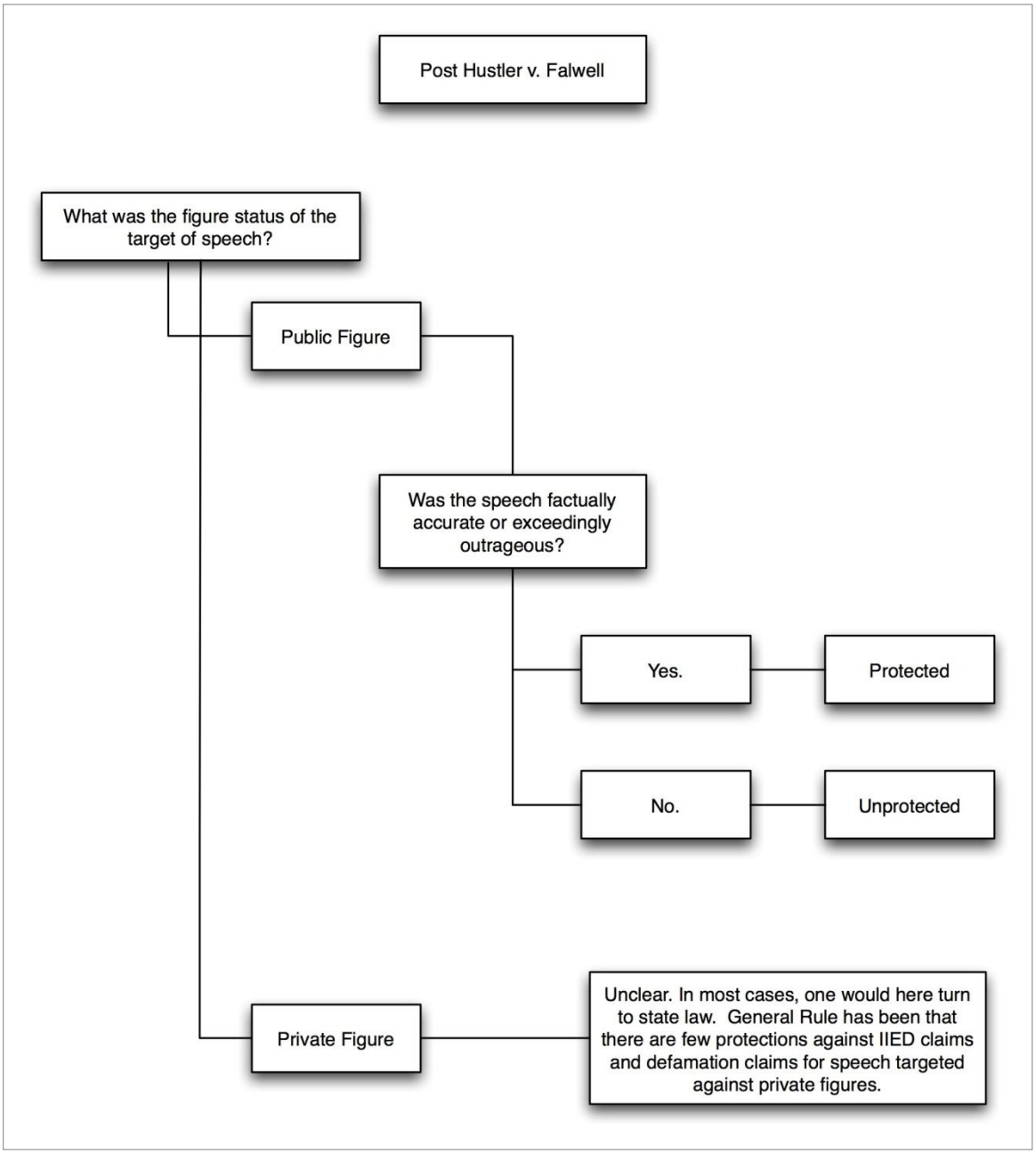
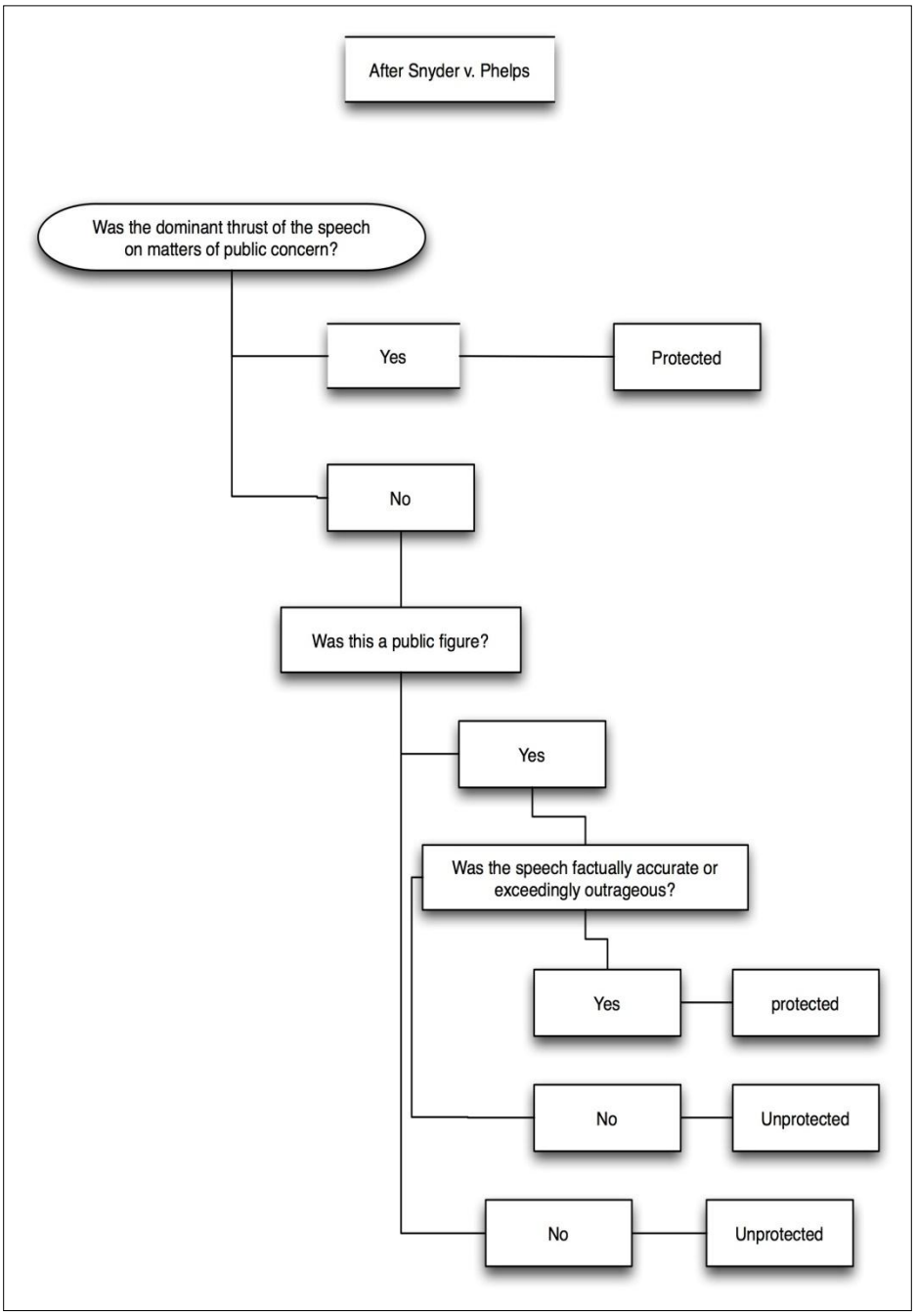


Figure 1.2 (Post Snyder v. Phelps)



While these two cases deal with slightly different issues in that *Snyder v. Phelps* deals primarily with matters of public concern while Hustler deals with how speech on a public figure should be treated, these two cases are closely related. The Hustler case has

been treated since its beginnings as a sort of blueprint for First Amendment free speech protection in the context of the IIED tort. Hustler directly established that speech that targets public figures and officials should be protected as long as it is not factually inaccurate or excessively outrageous (*Connick v. Myers*, 1983). While it is not stated within the case, the courts interpreted the case to mean that private figures should be treated differently. While speech about public figures requires little to be protected, speech about private figures was interpreted to require a much more difficult hoop to jump through.

Snyder v. Phelps seems to differ from *Hustler Magazine, Inc. v. Falwell* in that it shifts the focus to the status of the speech at issue rather than the figure status. Although the Court referenced Hustler numerous times, the ruling in Snyder seems to have no bearing on it. If one was to apply the seemingly important public versus private figure status differentiation present in *Hustler Magazine Inc. v. Falwell* to the facts of *Snyder v. Phelps*, it might have supported a holding against the church as Matt Snyder was, to a common sense analysis, a private citizen rather than a public figure although the Court's decision seems to indicate otherwise (Salamanca, 2011). No member of the majority argued that the Snyders were public figures, yet they found this speech against them permissible. Either the different treatment awarded on the basis of status in Hustler has been greatly weakened by the Court or America has been operating for years on a misreading of the Courts intentions in Hustler.

B) Similarities to the 4th Circuit Ruling

Justice Kagan brought up an interesting point in oral argument concerning *Hustler v. Falwell*. Hustler puts forth the idea that "'outrageousness' in the area of political and

social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the juror's tastes or views, or perhaps on the basis of their dislike of a particular expression" (Oral Argument, 2010, p. 22). That problem of subjectivity still stands if the logic is applied to private figures instead of public. The 4th Circuit seemed to be exploring this same idea to worrisome ends. While the majority did not display similar analysis, they also did not dismiss the analysis of the 4th Circuit. Thus, the 4th Circuit's analysis, though troublesome, may remain a viable method for ruling on these cases.

The 4th Circuit observed that some of the signs displayed during the protest could be construed as referring personally to Matthew Snyder. Despite this observation, the 4th Circuit labeled the protest as protected speech. While in theory this speech would have been actionable, the 4th Circuit claimed, "no reasonable reader would interpret the signs as anything but hyperbolic rhetoric" (Shulman, 2011)[14]. This interpretation seems patently flawed. If this is accepted, then a victim of personally abusive speech has no legal remedy. The 4th Circuit thus directly applied the logic utilized in *Hustler Magazine Inc. v. Falwell* (in relation to public figures) to private individuals. While this is a logical, albeit unfortunate for the public figure, necessity in Hustler to bolster public debate, it serves no such purpose here. Under this strange logic, a speech-based claim of emotional injury would only be acceptable if the defendant had been objectively reporting facts.

One might argue that the 4th Circuit attempted to extend free speech protections too far in this case; by making incredibly offensive speech dependent upon reader

[14] While hyperbole and outrageousness are normally very distinct ideas in that outrageousness refers to the necessary element of an IIED claim while hyperbole is merely a claim that speech is not believable, the 4th circuit in this instance attributed all the speech that the Snyders and the lowers court cited as elements of outrageousness as hyperbolic.

interpretation, they created a roundabout protection for the type of speech that the Westboro Baptist Church participates in. If one makes overtly offensive and hyperbolic claims under the 4th Circuit's ruling, they have guaranteed their own First Amendment protection despite the emotional injury it may have caused the target. Justice Roberts noted the same issue; some of the signs could be viewed as containing messages that referenced the Snyders. However, rather than falling down the 4th Circuit's rabbit-hole, he dismissed the specific signs in favor of the overall broad public issues theme (Shulman, 2011). Roberts does not appear to dismiss the idea of targeting entirely, merely to negate its relevance in the context of this case because of the small percentage of targeted language in comparison to the large percentage that dealt with matters of public concern.

C) Was the case mischaracterized?

The Court was clear in their dismissal of targeting as an aspect of the picketing. While they concede that several of the signs may be reasonably construed to refer to Matt Snyder, the signs are not direct enough to bring rise to a claim of targeting and, more importantly for this analysis, the dominant thrust of the speech would still have been on public issues. While the Justices agree that certain signs may be reasonably construed to refer to Matt Snyder, they dismissed the overall claim. I would argue that this dismissal amounted to a mischaracterization of the case. While I agree that the signs alone retain enough generality to escape the charge of targeting, the signs cannot be looked at in isolation. While, as Justice Alito pointed out, the "Epic" is certainly a targeted document, the press release put forth by the Westboro Baptist Church is just as damning. Within the press release that announced when, where, and why the Church would be picketing, the

Westboro Baptist Church claimed that "God Almighty killed Lance Cpl. Mathew Snyder. He died in shame, not honor—for a fag nation cursed by God...Now in Hell—sine die" (*Snyder v. Phelps*, 2011 p.6). The majority made no references to the press release at all.

It is also worth noting that had this case been characterized as one of targeting by the trial court, the claims of defamation may also have held water. Once we allow that the protest and, subsequently the signs displayed, did target Matthew Snyder, the signs that make more overt claims are worth exploring. Numerous signs were displayed which referenced homosexuality such as "Semper Fi Fags", "Fag Troops", and one depicting homosexual acts. A reasonable person would conclude from these signs that the church was suggesting that Matthew Snyder was gay, a false claim (*Snyder v. Phelps*, 2011). While this certainly is not the most inflammatory claim, given his history in the military, an argument could be made that this sort of accusation would be harmful enough to the reputation of the deceased to qualify as a defamatory claim. Although the case as the Court examined it was not incredibly defamatory, dismissing claims of defamation was an excessive gesture.

1) Is this case even about targeting?

As it was decided, this case is not about targeting. The question of targeting is barely discussed and the ruling is delivered without a clear assessment of what targeting means. However, an argument can be made that this lack of clarity on the role of targeting is directly related to the lack of clarity associated with the decision itself. If the Court had ruled that the case was about targeting, the nature of the speech might have changed. The Court has previously determined that the First Amendment does not shield speech that amounts to "no essential part of any exposition of ideas, and are of such slight

social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (*Snyder v. Phelps*, 2011 p.4)[15]. While the context and content of the Church's speech is afforded First Amendment protection because it deals primarily with matters of public concern, that assessment of exactly how much of the speech is public in nature rather than private was made without accounting for targeting. If this speech is a targeted direct attack on a private individual, it seems likely that its relevance to issues of public concern decreases. Attacking the nation for its supposed tolerance of homosexuality is not the same as attacking individuals for their own (assumed) sexual preferences and the latter was not, before *Snyder v. Phelps*, afforded the same protection. Were these comments characterized as targeted, the question would be whether or not they constitute personal abuse (*Snyder v. Phelps*, 2011). While this may not have changed the Court's holding, it would affect the balance of the speech; one of the big questions leaving *Snyder v. Phelps* is what exactly constitutes a "dominant theme"? How much of one's speech can be of only private significance and still be awarded protection?

2) Does the individual the speech is directed at/about matter?

A very important question was brought up in oral argument that affectss the nature of this decision. Chief Justice Roberts questioned if it makes a difference "that Mr. Snyder was selected not because of who he was, but because it was a way to get maximum publicity for your client's particular message" (Oral Argument, 2010 p.38)? There is little question that the Snyders were chosen with the intent of maximizing the publicity of the Westboro Baptist Church's message; while this may sound like a harsh assessment, it is unfortunately a simple fact that neither party and none of the Justices

[15] This determination arose in *Chaplinsky v. New Hampshire*.

deny. This important question should be distinguished from the question of the status of a figure. While it is related tangentially in that *Hustler Magazine Inc. v. Falwell* indicated that it was acceptable to use a celebrity as a platform for one's speech, this question seems to go beyond that mere distinction. The Hustler case only went so far as to render speech immunizable when the topic of discourse was a public figure.

What should happen, regardless of status, when the target of the speech is selected simply in order to gain more publicity for whatever the topic of discourse may be? The Westboro Baptist Church itself has stated that military funerals are where the "eyes, ears, hearts, and minds of the nation are focused; that is the audience" (Brief in Opposition, 2010 p.5). As Justice Alito states in his dissenting opinion, staging a protest at Mathew Snyder's funeral was merely another step in the Church's "well-practiced strategy for attracting public attention" (*Snyder v. Phelps*, 2011 p.4). Ms. Phelps-Roper insists that this motive for "maximum exposure, which every speaker pines for...does not change the legal principle at play" (Oral Argument, 2010 p. 38).

It is true that currently there is nothing in the law that forbids or even restricts choosing a target of one's speech merely for exposure. However, from a moral standpoint, it seems as if there should be. One can argue that a moral debate has little place in a document of this nature; that assessment, I believe, overlooks the purpose of law. If the target of the speech has done nothing to warrant the speech, particularly in the case of harmful speech, there should be greater protection offered them. Why should the Court protect the use of an individual as a pretense under which to air their speech when that speech could just as easily be voiced without having included the innocent party? The WBC frequently protest outside of government buildings without targeting private

figures; these protest receive significant publicity and, due to their location, serve as an appropriate and effective venue for airing grievances. The majority stated that in this case, the "applicable legal term—emotional distress—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief" (*Snyder v. Phelps*, 2011 p.10). By what logic should random chance (there were many funerals that Phelps could have chosen to picket that would have served the same purpose) allow this type of emotional injury to be sustained with no legal recourse for the victim?

Even in the case of speech that is not offensive, it seems strange to claim that there is a right to use a third party as the vehicle for your protest. For example, with the abortion debate at full force in the nation, would there be a protection for airing a pro-life or pro-choice protest with a nurse as the platform for the speech? The Court took pains to explain that the Westboro Baptist Church's speech was acceptable because they were not disguising a personal attack on Matthew Snyder or his family under the guise of a public concern debate. The Court did not describe any instance in which using an individual as a platform for public speech might exceed the protections afforded public speech.

Ms. Phelps-Roper and the Westboro Baptist Church claim that it is only the content of the speech itself that matters. As long as the speech is on matters of public concern, it should be protected. The majority opinion seems to affirm this stance. However, one must question how far this can really go. With matters of public concern as the sole hurdle to jump through in order to obtain First Amendment Free Speech protection, this seems to open the door for a speaker to berate an individual for any aspect of their person (Oral Argument, 2010)[16]. While Justice Alito used race as an example,

[16] The speech would still have to be otherwise lawful in regards to police compliance and compliance with state law although neither of those restrictions are very arduous.

weight is perhaps a more appropriate example considering there is no legislation in place protecting individuals from derogatory speech based on weight. Should there be a protection for an instance in which a speaker chooses to use an obese individual as a platform for their speech about the looming obesity crisis in America? There is certainly a relation between the topic and the individual; however, the individual has done nothing to interject himself or herself into public debate. As Justice Alito pointed out, with a standard like this in place, there would be an incentive in the form of greater publicity garnered for using the most innocent and removed person from the issue (Oral Argument, 2010).

D) Why did the Court not address public figure status?

Justice Sotomayor asked an important question during oral argument: "does it make a difference if I am directing public comments to a public or private figure" (Oral Argument, 2010 p. 16). The Court utterly abandoned the usual approach of looking at the plaintiff's status as a public/private figure in addition to looking at the nature of speech. Throughout the majority of the oral argument and the entirety of the majority opinion, the Court looked only to the nature of the speech. To answer Justice Sotomayor's question, Mr. Summers attempted to relate the topic to similar logic applied to defamation cases. He specifically referenced the Rosenbloom and Gertz decisions. The Supreme Court dismissed these cases because they deal directly and only with defamation. Mr. Summers claims that public speech, if directed to a private person, should be treated differently under the law; however, as Justice Sotomayor pointed out, there is no direct theory of the First Amendment under which to do that (Oral Argument, 2010). Moreover, the Court demanded an existing Supreme Court case that would stand for this proposition.

Unfortunately for Mr. Summers and the Snyders, there are none.

With the dominant theme of the case focusing on public issues, logically *N.Y. Times v. Sullivan* should have played a large role. *N.Y. Times v. Sullivan* questioned whether Alabama's libel law infringed upon First Amendment rights by not requiring petitioners to provide proof of harm and by dismissing statements made about a public official due to factual errors (*New York Times Co. v. Sullivan*, 1964). The Court held that First Amendment protects all statements, including false statements, made about a public figure as long as no actual malice is involved[17]. The verdict in *Snyder v. Phelps* is consistent with *N.Y. Times v. Sullivan* regarding the breathing space allowed the speaker. It was established in N.Y. Times that it is necessary to protect some false statements of fact in order to allow for free discourse and public debate (Sacks, 2011). *Snyder v. Phelps* appears to stand by this reasoning and strays from Sullivan only in that Snyder applies the same logic to a private figure rather than a public one.

E) Are there limits to speech on issues of public concern?

N.Y. Times v. Sullivan was heavily utilized regarding the statement that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (*New York Times Co. v. Sullivan*, 1964). The majority seemed to take the idea of uninhibited debate on public issues quite literally. There is a question that the Court failed to address concerning speech on issues of public concern; when issues of public concern are entangled with matters of private concern, should their partial standing in the realm of public concern

[17] Actual malice is making a statement with "knowledge of falsity or reckless disregard as to truth or falsity" (*New York Times Co. v. Sullivan*, 1964). This bears litte relation to the common English term 'malice' referring to evil intent and the desire to inflict harm or suffering on others based on one's hostile impulses.

protect them fully? The Court seems to indicate that partial standing should fully protect speech when discussing the "dominant thrust" of the speech being public. However, it is worth questioning the logic of this judgment. If a restriction was placed merely on bringing up the private matters of private individuals in the context of matters of public concern, would that truly violate the protections *N.Y. Times v. Sullivan* provides for speech? It is not speech on matters of public concern that would be restricted, but speech on matters of private concern being entered into a debate on public concern. It would stand as a mere preventative measure for conflating the two.

Albert Snyder had argued that the church members had launched a personal attack on him and his family and merely attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality" (*Snyder v. Phelps*, 2011 p.9). The Court did not share Snyder's concern on the topic for several reasons, one of which raises interesting implications. The Court noted as partial explanation for their lack of concern that "there was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter" (*Snyder v. Phelps*, 2011 p.9). Although this is certainly an accurate observation for, as Albert Snyder testified, he knew little about the church before the events transpired, it seems like a strange observation to include in this discussion. A lack of pre-existing conflict would only serve as evidence against speech on issues of solely private concern if a pre-existing conflict were somehow necessary for a private individual to verbally attack another.

With this in mind it seems that the Court built into their ruling in *Snyder v. Phelps* a small test of the veracity of a claim for immunization on the basis of speech on matters

of public concern. While the Court here created a very broad protection for speech on matters of public concern, they do make it clear in this section that this should not be used as a pretext for settling a grudge or spreading hate-speech. While, as noted, pre-existing conflict does not automatically exclude immunization for speech on matters of public concern, it should be cause for further analysis of the specific facts of each case. While this is a license for speech that may often be harmful, it is a not a free pass for all types of speech.

V. Where could this case have gone?

This case has been referred to offhandedly as "half an opinion"; this title is very apt considering what the Court chose not to look at (Sacks, 2011). As referenced earlier, Plaintiff Snyder learned of the Church's actual message and reason for protesting through the internet 'Epic' that was hosted on the Church's official website. This colloquially titled 'Epic' made specific references to Matt Snyder, Albert Snyder, and Mrs. Snyder; these references were incredibly offensive and provably false (Shulman, 2011).

A) The "Epic"

1) Why wasn't it included?

The "Epic" was not included in the majority's analysis because it was not properly brought before the Court. The "Epic" was submitted to the jury and discussed in the lower courts but it was neither mentioned in Mr. Snyder's petition for certiorari nor in his response to the Phelps' statement in opposition to certiorari (*Snyder v. Phelps*, 2011). The only reference Snyder made to the "Epic" was a single paragraph in his opening merits brief. While this rationale for excluding the "Epic" is acceptable, there may have been

other interests at work in the Court's decision not to take the "Epic" into account. The Court arguably chose not to factor the "Epic" into their analysis because, to quote Chief Justice Roberts directly, "an Internet posting may raise distinct issues in this context" (*Snyder v. Phelps*, 2011 p.3).

2) How should the Courts deal with Internet Postings?

Although the "Epic" was swiftly dismissed by the Court within the majority opinion, it was referenced numerous times within the oral argument. These references and the discussion they sparked, give clues to where the justices stand and help to map out a rough guideline of where these issues might go in the future. Justice Scalia was the first to reference the "Epic" when questioning if the "Epic" alone would have been enough to support the cause of action of intrusion upon seclusion that the Snyders asserted. Mr. Summers claimed that it would; however, if that's true, there remains an issue of choice. As Justice Scalia pointed out, "it's his choice to watch them, but if he chooses to watch them he has a cause of action because it causes him distress" (Oral Argument, 2010, p. 5). Can something possibly be an intrusion upon seclusion if one must first actively seek it out and, once found, choose to further view it? Faulty logic must be at work if something can be sought and then stand as an intrusion.

While the "Epic" would have done little to support a claim of intrusion upon seclusion, it may have had a different affect on a claim of IIED. The "Epic" involved numerous distressing statements that were arguably willfully malicious. There are no rules for IIED claims concerning how the distressing material need be brought to the subject's attention. Albert Snyder effectively proved that the emotional distress he experienced as a direct result of the actions of the defendant was extreme and has caused

lasting physical and psychological harm. Few contest that the conduct of the WBC is outrageous and that it went beyond the boundaries of decency. The question of intent or recklessness is harder to satisfy regarding the "Epic"; once again, there are no clear rules established for how to deal with speech posted on the internet. If internet postings can be treated the same way as material publicized through other media, then the "Epic" does display intent on the part of the defendants; the "Epic" contained statements directed at the Snyders and, throughout the most offensive sections, was written as if it was meant for that specific audience.

Justice Breyer was very insistent in oral argument on the need for some clarity as to how similar issues should be dealt with when they are communicated over non-traditional mediums. In a hypothetical instance where the defendant has said on television or on the Internet "something outrageous...and you show that it was intended to and did inflict serious emotional suffering. You show that any reasonable person would have known that likelihood" and the defendant says that they did say these intentionally outrageous things but "in a cause". At that point, is it really in line with a just interpretation of First Amendment free speech rights for this type of speech to be protected? Instances of that nature, according to Breyer, are those which require a rule which tells us "how the First Amendment...will enter and force a balancing act" (Oral Argument, 2010 p. 21). Interestingly, this hypothetical that Breyer established does not sound too different from the case at hand, at least not with the "Epic" in mind.

3) Should the "Epic" have been included?

The question of whether or not the "Epic" should have been included in the Court's final analysis of the case depends on whether or not one considers the "Epic" to

be a distinct claim. If the "Epic" is distinct from the claims that Snyder properly raised, then the "Epic" was rightfully cast aside. However, the "Epic", rather than bringing up different topics is merely a continuation of the conduct that the Westboro Baptist Church was engaged in. Its main purpose in the case would be only to clarify the position the Westboro Baptist Church held rather than to change the nature of their protest. While the Court certainly has the right to ignore parts of the record that are not properly placed before them, they have discretion over such decisions. Moreover, the Court did look at some things also not properly brought before them. If the Court truly only wanted to examine that which was properly brought before them in cert, why would they bring up irrelevant protests by the Westboro Baptist Church as evidence of their long term commitment to their cause (*Snyder v. Phelps*, 2011)?

One must ask if the Court intentionally avoided answering the unaddressed question in *Hustler v. Falwell*. Is speech on a matter of public concern addressed at a private figure actionable? (Shulman, 2011) Perhaps the Court as a whole dealt only with the facts of the case absent the "Epic" in order to appease individual justices. Although the Court dealt with the case as reviewed with relative ease and agreement, it is doubtful that that same level of concordance could have been met if the "Epic" had been dealt with. Justice Breyer perhaps could not have been swayed considering he already feared that the Court's conflation of public and private speech "unreasonably limits liability for intentional infliction of emotional distress" (Shulman, 2011). Frankly, had the "Epic" been included, the Court might not have been able to achieve a majority for a categorical assessment of the message as a private or public concern (Shulman, 2011). While the Court had good reason to exercise their right to exclude the "Epic" in these

circumstances, had it been included the Court would have been forced to define at what point a personal attack involving public issues creates so much of a hardship for an individual as to overcome First Amendment protection for matters of public concern (Oral Argument, 2010).

The importance of the "Epic" as part of the record is as a tool of clarification. Some of the signs displayed during the picketing are of an arguably targeted nature. The "Epic" serves to clear up the nature of these signs. The specific signs in question said "You're Going to Hell" and "God Hates You". There were also signs specifically for the Marines, the military branch Matthew Snyder had been a part of (Oral Argument, 2010). In oral argument, Justice Ginsburg rejected that these might constitute targeting as the "you" could be interpreted, as the Westboro Baptist Church claims it should be, as referring to the whole society (Oral Argument, 2010). However, from the perspective of Albert Snyder, these signs, including the "Thank God for Dead Soldiers" signs displayed, would certainly not appear to be about the whole society but rather solely in reference to his son; as Mr. Summers fairly pointed out, Matthew Snyder was the only deceased marine at the funeral (Oral Argument, 2010). Any reasonable person would have assumed a connection between the messages displayed and the deceased (*Snyder v. Phelps*, 2011). Although it would not later become a part of the majority opinion, Justice Alito's argument on this topic was of special interest. Alito argued that the "Epic" was relevant here in that it acts as an explanation of some of these arguably ambiguous signs. If the "Epic" is fully excluded from the record, ambiguity exists regarding who the real target of the church's message is; ambiguity that the church heavily benefits from in this case. However, it is erroneous to make the claim that these signs are realistically ambiguous

when another document put forth by the same group clearly states who the "you" is. The "Epic" concisely states that the church believes Matthew Snyder is going to hell and hated by God. If the Court was truly to look at the whole record of this case, the "Epic" must be included. If included, the "Epic" discredits the argument that "you" refers to a larger group rather than pointedly targets Matthew Snyder (Oral Argument, 2010).

B) Protecting the Tort:

This case was in essence a tug of war between tort claims of IIED and protections afforded to public speech. Tort claims without a shadow of a doubt lost this battle. However, perhaps this case could have been resolved so as to protect free speech on matters of public concern without throwing all limitations by the wayside. As Justice Breyer indicated, "the First Amendment does not stop State tort laws in appropriate circumstances...and emotional injury deliberately inflicted could be one" (Oral Argument, 2010 p.46). However, one must draw a line in such instances to avoid unnecessary censoring. Justice Breyer suggested several different avenues by which the Court could have protected both the speaker and the platform of the speech. The question of whether or not it is actually important for a speaker to interfere with the emotional life of an individual is not resolved by this case and indeed can lead to a harsh interpretation of this verdict. Justice Breyer had suggested having a judge, rather than a jury, decide whether or not it was reasonable for a speaker to have determined that it was important to interfere with an individual (Oral Argument, 2010). Would this pose an undue burden on public speech?

C) Should Funerals constitute unique events?

Much of the case turns on the simple idea that there should be no unique

protections afforded based on context. As has been stressed numerous times, the law must remain neutral. This case was thrown into the public eye because of the well-established idea to the lay-public that funerals are special occasions steeped in custom that demand a certain level of respect. Funerals, especially for the family of the deceased, are emotionally turbulent events that constitute their last meaningful interaction with the deceased. As such, using a funeral as a method of garnering public attention for one's own political or social agenda is tantamount to denying the bereaved their final private moments (*Snyder v. Phelps*, 2011). It's clear that funerals are important private events. The question then is whether the minor restriction to First Amendment free speech rights that restricting protests at funerals would amount to actually outweighs the emotional damage visited upon the bereaved by these protests. I would argue that public debate would not be stifled by a content neutral restriction on funeral picketing although one could not have in good faith arisen from this case.

The majority seemed to argue that there was no place for claims of IIED at funerals when the speech at issue dealt with matters of public concern. They place special emphasis on the way that Congress and the State legislatures had stepped in and enacted content neutral (although some of that neutrality is currently up for debate in the lower courts) time, place, and manner restrictions. The Court seemed to claim that although there are real wounds inflicted by speech such as that which the WBC inflicted upon the Snyders, it is not the place of the Court to restrict freedom of speech so as to prevent such wounds from landing in the future. Instead, the Court suggested that these neutral laws passed within each state could serve the purpose of mitigating some of the harm that the WBC and similar groups intended to inflict. However, this claim can be countered

immediately. While Maryland did enact a new statute after the picketing of Matthew Snyder's funeral, the WBC was in compliance with even this new statute. If content neutral funeral picketing restrictions are not enough to even mitigate the harm of vicious speech, then they clearly do not obviate the need for IIED protection in such instances (*Snyder v. Phelps*, 2011).

VI. Relative importance of case

Even without the "Epic", this case centers on an important question: what protection should be afforded speakers who make "a private party the unwilling instrument of their public message"? (Shulman, 2011). This topic was explored within Justice Sotomayor's line of questioning during the oral argument. She began by referencing *Cantwell v. Connecticut* which specifically stated "personal abuse is not…communication of information safeguarded by the Constitution" (Shulman, 2011). *Cantwell v. Connecticut* involved two Jehovah's Witnesses who traveled door-to-door and approached individuals on the street in order to distribute religious materials (*Cantwell v. Connecticut*, 1940). Although all of those involved with the case were willing listeners, two individuals were enraged by the anti-Roman Catholic message they heard and called for the arrest of the Jehovah's Witnesses. A local ordinance was in place requiring a permit for solicitation without which one was considered in breach of the peace (*Cantwell v. Connecticut*, 1940). In order to arrest the Jehovah's Witnesses, the police had to label their speech solicitation. The Court found that this violated the First Amendment right to free exercise.

That case is certainly distinguishable from *Snyder v. Phelps* in that Cantwell

sought to persuade only willing listeners yet the speech that would constitute a breach of the peace holds some relevance. *Cantwell v. Connecticut* established that speech that breaches the peace consists of "profane, indecent, or abusive remarks directed to the person of the hearer" (Shulman, 2011). While the speech during picketing does not fit this definition, the speech found within the "Epic" appears to. Cantwell also relates to Snyder in that both cases deal with the idea that although maintaining public order is important, it cannot be done at the expense of free communication of ideas (*Cantwell v. Connecticut*, 1940).

Within defamation cases personally targeted speech is protected only when the conduct of the plaintiff is of legitimate public concern. The defendant must be able to credibly argue there is some aspect of the plaintiff that provides the defendant's speech with special protection. Can the Westboro Baptist Church make this showing for Matthew Snyder or his father? Unless they are trying to claim that all military personnel should be considered public figures, the church appears to instead be claiming that the private lives of private individuals are related to matters of public concern (Shulman, 2011). In essence, the Court appeared to create a category of absolutely protected speech within the public forum (Sacks, 2011). With this ruling in mind, what aspect of our private lives cannot be made a gratuitous part of someone's public discourse? At what point is speech claiming to be on a matter of public concern of so personal a nature that it loses public import? Is there even a point where speech on a matter of public concern can lose this protection? What Constitutional rule might apply to speech that crosses this type of line? Moreover, what does this mean for claims of IIED?

On a more positive note, the case also turned the tide on the growing reach of the

Captive Audience Doctrine (Salamanca, 2011). *Snyder v. Phelps* nudged the doctrine back into its proper place. If someone in a public place is subjected to speech that they find offensive, they are ordinarily expected to look or walk away. The simple word "captive" clearly demonstrates the idea that one cannot claim to have been made a member of a captive audience as long as they possessed a reasonable avenue to escape that message.

A) Half an opinion

The unexplored question directly coming out of *Snyder v. Phelps* is whether speech posted on the Internet associated with political picketing receive the same level of protection as speech delivered through a traditional medium regardless as to how personal, distressing, or far from the nature of the picketing the speech may be? While the speech is associated with picketing in this case, this question really stands for any sort of Internet posting. No information on the topic comes out of *Snyder v. Phelps*. The big question mark for free speech is in how our rights and restrictions translate online. One state, in an attempt to erase the question, has passed an incredibly broad law dealing with speech online. Arizona's new bill would criminalize speech delivered through "any electronic or digital device" considered "obscene, lewd or profane language or . . . suggest[ing] a lewd or lascivious act if done with intent to 'annoy,' 'offend,' 'harass' or 'terrify.'" (Turley, 2012). While this law certainly erases questions, it seems overly broad and would be unlikely to stand up to Constitutional challenges. While online material may be treated differently than traditionally broadcast speech, the difference cannot reasonably be this great.

Will the public or private figure status of the plaintiff be considered as part of a

speech tort when the invasive speech is delivered through a non-traditional medium? Should the figure status of the plaintiff even be considered as part of a speech tort when the invasive speech is delivered through any medium? One of the main issues at hand in this case was that the rule the Petitioners were "stuck with" (to quote Mr. Summers) was that from *Hustler v. Falwell*. Even Hustler is a strained fit to the facts of this case considering Falwell was a public figure while the Snyders are not (Oral Argument, 2010). Arguably, *Snyder v. Phelps* remained narrow in the areas it did because of the Court's hesitance to abandon, or even distinguish these facts, from the legacy of Falwell. The real question is why the Court was so hesitant in this regard. Several of the Justices pressured Mr. Summers to provide an example of a Supreme Court case that hinted that this distinction should matter. Although Mr. Summers could provide relevant cases from the Court dealing with defamation, the Court rejected them. The Court also swiftly dismissed the examples he provided from lower courts (Oral Argument, 2010).

Can extremely personal and private speech ever lose First Amendment protection from tort liability if it is relevant to public issues? The Court appeared to indicate that "merely hitching speech on a matter of public concern to someone else's wagon, without more, does not exclude it from protection (Salamanca, 2011). In the new information age there is a clear need to draw a line on when personal and private speech loses First Amendment protection, but there are no real guidelines for how or where it should be drawn.

If any of the unexplored questions had been answered, even in a narrow sense, this case could have been truly revolutionary.

B) Fundamental change to the way IIED is viewed

Snyder v. Phelps tests the boundaries for IIED. Although the majority opinion did dance around this topic, the most clear statements as to where IIED claims now fall appear to be within the oral argument. The majority of Ms. Phelps-Roper's defense is spent teasing out where she thinks these claims still hold water. The very narrow grounds she establishes are not directly contradicted by any of the justices within the oral argument and no clear statement against them is made within the majority opinion. Although her claims may be somewhat extreme, they do seem representative of the Court's verdict.

Ms. Phelps-Roper argues that any speech related to issues of public concern should be routinely protected; however, she does attempt to provide exceptions in the form of "any non-speech activity, like stalking, following, importuning, and being confrontational" (Oral Argument, 2010 p. 27). As long as a viewpoint on public issues is voiced, outrageous speech is protected. Moreover, Ms. Phelps-Roper claimed that the First Amendment never allows a claim for IIED based on speech unless the speech can be true or false and that this should not fall under an "inherently subjective standard" with adverse emotional impact as the only claim (Oral Argument, 2010 p. 31).

Ms. Phelps-Roper also took pains to separate claims of IIED from claims of Fighting Words. Fighting Words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (*Chaplinsky v. New Hampshire*, 1942). This form of speech is not consider essential to the sharing of ideas and thus has minimal social value; "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (*Chaplinsy v. New Hampshire*, 1942). While the

Court has narrowed the scope of Fighting Words in the past, they have never overturned this initial definition. Fighting Words, according to Ms. Phelps-Roper, require imminence, proximity, and a lack of context within a broad political or social speech (Oral Argument, 2010). Justice Scalia questioned this definition; he seemed to be looking for a more broad definition of Fighting Words. This raises the question: could the Fighting Words doctrine take up some of the slack left behind by this new, narrow, criterion for claims of IIED. If Fighting Words do not require an actual fight or even proven potential for a fight, then it is possible that language such as that which the Phelps' used could, if delivered more directly, fall under the doctrine of Fighting Words. In his dissent, Justice Alito attempted to parallel this case to those involving defamation and Fighting Words although he did not claim Fighting Words directly. The majority responded to this with a single footnote: "no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or 'Fighting Words'" (*Snyder v. Phelps*, 2011). It is interesting to note with this in mind that Ms. Phelps-Roper took pains to point out to the Court that "no element of the torts under which liability attached included Fighting Words" (Oral Argument, 2010 p.30).

Snyder v. Phelps certainly changed the dynamic of free speech law. What once appeared to be a broad protection for private individuals from cruel and intentionally harmful speech is now significantly more narrow. If the Court did indeed intend to hollow out the shell of IIED claims, is it likely that they now offer no recourse for victims of this sort of distressing speech? While little has been said by the Court to indicate an answer to this question, it seems, based predominantly upon discussion during oral

argument, that the Court did see the problem inherent in reducing the scope of claims of IIED. I would posit that in the coming years, the Court will overcome these issues by offering more limitations on the boundaries of free speech in another realm. Perhaps, Fighting Words will fit that bill.

As Justice Scalia points out, there is a great degree of subjectivity to how Fighting Words are defined. While one needs a physical manifestation of their emotional injury in order to collect on a claim of Intentional Infliction of Emotional Distress, one only needs to have been angered to a degree that they would be willing to fight in order to bring forth a claim under Fighting Words (Oral Argument, 2010). Anger is of course not directly equivalent to emotional distress, yet, in the cases where both anger and emotional distress interact, there might be some recourse in Fighting Words. As it stands now, Fighting Words have been applied to only a very narrow category and have never been applied in a case where only emotional injury was sustained.

C) Where Does this Case Leave the Law Now?

The relative importance of this case can only fairly be judged by looking at how it would affect the ruling in different instances. Some sample instances were provided in oral argument that are worth exploring now that a verdict has been delivered. Other sample instances are provided in order to either explore the issues the Court chose to avoid or to examine further the vast scope of this decision regarding the protections it affords speakers when matters of public concern are brought into play.

Figure 1.3—Hypothetical Cases

Hypothetical	*Hustler Magazine. Inc. v. Falwell* (Pre-Snyder)	*Snyder v. Phelps*
Marine serving in Iraq is, upon returning home to the	Protected-while he would not fall under the public figure	Protected-broadened protections offered to speech

States, being harassed and told he is "perpetuating the horrors of the American experience".	category, there would not be enough to serve as a claim—not clearly outrageous speech.	on matters of public concern and the speech itself is still not outrageous enough to bring about a claim.
Demonstrations involving hate speech outside a person's home and work and calling them a "war criminal" and worse.	Actionable- would have claim as the individual is not a public figure and attacking an individual on the basis of his or her work outside their home exceeds protections offered.	Questionable- If the speech is not presented in a broader context (i.e. you're a war criminal because it is criminal to wage imperialist war), it would be actionable. If it were presented as part of a broad commentary on matters of public concern, the speech would receive protection.
Harassing the grandmother of a soldier killed in Iraq and describing to her the method of his death and the desire of the speaker to have witnessed it. The grandmother has not done anything to put herself in the public eye (Sacks, 2011).	Actionable-this woman is not a public figure, these facts are not so hyperbolic as to be unbelievable, and the speech is certainly intended to cause emotional distress.	Questionable-The speech here might be actionable merely because the speaker did not adequately tie the speech into matters of public concern. If something involves public debate it is protected. This specific instance does not appear to. However, if the speaker also discusses why he or she approves of the death of her grandson and the death of soldiers in general, the Snyder ruling requires some unknown balancing act to be made. If the "dominant theme" of the speech is public in issue, the speech would be protected even if the speech was only leveled at the grandmother.
Coming up to a person on the street and berating them on a specific aspect of his or herself in reference to how that aspect is bad for individuals to have and bad for America as a whole.	Actionable- If the stranger accosted is a private individual, common interpretation of Hustler indicates that the speech would be actionable.	Protected- There is a clear tie to matters of public concern in this instance. The individual is being targeted but the Court's lack of answer on the topic implies that this sort of targeting is permissible.
A parent of a deceased soldier puts out an obituary	Actionable- Expressing a sense of patriotism in relation to an	Protected- The church is dealing with matters of public

notice and says to the paper "I'm proud of my son because he died in the service of our country." The Westboro Baptist Church pickets his funeral.	event of purely private significance does not transform the grieving parent into a public figure. Thus the speech would be actionable.	concern and, that simple statement of pride because of service to the country brought the parent into the public debate and created a discussion for the WBC to enter into.
Outrageous Speech over the internet or on TV with intent to inflict serious emotional suffering in the name of a cause.	Questionable- If the speech dealt with a public figure and was extremely outrageous, it would not support a claim. If it dealt with a private figure a claim might be supported.	The question is entirely dependent upon how internet/television broadcasts are to be treated. The Snyder ruling has no impact on this example.
If the facts of this case had been characterized as targeted speech?	Actionable-Would have been able to collect as the Snyders are private individuals. Hustler provides no protection for the targeting of private individuals.	Protected- The case before the Court arguably was targeted. The question according to the Court if targeting was there would still have been what the dominant theme of the case was. The dominant theme, according to the Court's analysis, was on matters of public concern.

VII. Conclusion

Snyder v. Phelps is a fairly perplexing case. It was initially incredibly notorious and has since slipped from the public eye. America as a whole seems to have ignored this case since a decision was reached. This decision was not as harmless or as narrow as the Court implied. As an individual, I worry about what this case could mean for me in the future. We all run the risk of becoming the target of speech. Now we run a risk with no preventative measures to take. Under Snyder, it does not matter if you've done nothing to bring yourself into the public eye. The target of the speech is of minimal significance to the Court. While my reading of the majority opinion does not indicate that targeting is truly irrelevant, it appears to have been demoted to a secondary concern, if that. While the nation does highly value speech, it now appears to value speech more than it values

individuals.

This case was improperly characterized as one not dealing with targeted speech. I stress this mischaracterization not because I believe it would have changed the verdict of the Court, but instead because I don't know what the impact of this may be. Of the many questions left behind in the wake of *Snyder v. Phelps* is the question of what the dominant thrust of speech really means. If the case had been characterized as targeting and the targeted signs had been taken into account, would the balance of the speech change significantly to the Court? If the dominant thrust of speech means simply that more of the speech must be about matters of public concern than about an individual and their private life, the case would likely have the same outcome.

However, perhaps the Court really did intend this decision to be narrow. If that was truly their intention, perhaps the narrow aspect of the decision is to be found under the "dominant thrust" requirement. My extensive discussion of the "Epic" has similar intent; the most obviously targeted speech of the WBC is found within the "Epic". While I do not argue that the Court made a wrong decision in exercising its right not to hear something improperly brought before them in cert, I think they made a bad choice. While the targeted speech within the protest itself may not be significant enough to really test out the boundaries of the "dominant thrust" term, the "Epic" might be able to do so.

As the case stands, the only clear thing is that this case greatly emphasized the importance of matters of public concern. Most can agree, and this nation has a long history of protecting this idea, that matters of public concern deserve the highest protection as they are the backbone of free debate. However, in this instance the Court has gone too far in protecting speech on matters of public concern. In doing so, they have

asked individuals to sacrifice too much. While the nation certainly has a vested interest in allowing the WBC to speak out on matters of public concern, there is no such vested interest in protecting targeted speech or in preventing an individual from attempting to turn to the courts for redress against those who have intentionally caused them emotional harm.

I argue that public debate would not be stifled by permitting the Snyders to bring an IIED claim against the Westboro Baptist Church. Matters of public concern can be voiced easily without engaging in the type of speech the WBC utilizes. More importantly, the Snyders did not bring an IIED claim against the WBC because of their speech on matters of public concern, they did so because of the WBC's speech in relation to their son. A reasonable person is able to separate out speech on matters of public concern from speech that is targeted and deals with the private lives of individuals; the Court does not make the same distinction that a reasonable person would. As long as the "dominant thrust" of the speech deals with matters of public concern, harmful speech is protected.

While I normally would side with a decision broadening the scope of free speech, I fear this decision does so at too great a risk. The trade-off for living in a nation that protects your right to speak is that you will sometimes have to hear things you consider crude or offensive. However, the cost of free speech should not be that an individual must endure speech targeted at them so as to intentionally cause them harm. This sort of speech does not deserve such high protection. The Court may not have purposefully given speech that intentionally inflicts emotional distress this protection, but by banning an IIED claim on these grounds they have done so. The Court seems to have created a license to target and to inflict emotional injury; I personally want this license to be

revoked.

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