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SNYDER V. PHELPS, PRIVATE PERSONS AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: A CHANCE FOR THE SUPREME COURT TO SET THINGS RIGHT*

W. WAT HOPKINS*

Thirty-two students and faculty members at Virginia Tech were murdered on April 16, 2007, according to the Westboro Baptist Church, because of their “proud sin.” Six members of the church showed up in Blacksburg, Virginia, one week before the third anniversary of the killings to express that message, and the message that “God sent the killer.”¹ Church members also targeted Morgan Harrington, a Virginia Tech student who was kidnapped and murdered in 2009.² The protest came one day after they demonstrated at services for twenty-nine coal miners who were killed in an explosion at the Upper Big Branch Mine near Charleston, West Virginia.³

Such shenanigans are not unique for the church, which has been using demonstrations since 1991 to spread its message that

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1. Upcoming Picket Schedule, Westboro Baptist Church Web page, <http://www.godhatesfags.com/schedule.html> (last viewed Apr. 7, 2010) (on file with author) [hereinafter Picket Schedule].

2. See Tonia Moxley, *Protesters Greeted by Crowds in Blacksburg*, ROANOKE TIMES, Apr. 10, 2010, available at 2010 WLNR 7455110; Rex Bowman, *Parents: Morgan Harrington Likely Died Quickly*, ROANOKE TIMES, Jan. 28, 2010, available at 2010 WLNR 1803026.

3. News Release, Westboro Baptist Church, WBC Will Picket West Virginia’s Worship of Dead Miners in Raleigh County, Thurs., Apr. 8 at 10:00 AM (Apr. 6, 2010), <http://downloads.westborobaptistchurch.com> (enter verification code provided; follow “Downloads” hyperlink; follow “Flier Archive” hyperlink; follow “20100406_West-Virginia-25-miners-dead-in-mine-explosion.pdf” hyperlink).

tragedies like those at Virginia Tech and the Upper Big Branch Mine and the deaths of American soldiers are God's will to punish the United States for its toleration of the gay lifestyle.⁴ Legal efforts to stop the picketing, for the most part, have been met with mixed results,⁵ but the church is now facing a different type of counter assault.

During its current term, the Supreme Court of the United States is expected to decide whether the church should face liability for intrusion and intentional infliction of emotional distress. *Snyder v. Phelps*⁶ drew some attention while it made its way through the lower courts,⁷ but the *certiorari* grant caused more than a few Court watchers to raise their eyebrows.⁸ It seemed to be an unlikely candidate for the high Court's attention for several reasons. First, the United States Court of Appeals for the Fourth Circuit gave Westboro a resounding victory on First Amendment grounds,⁹ and the case focused on issues that seemed to be relatively settled — intrusion and intentional infliction of emotional distress. Westboro's foes ask the Court, for example, to invoke a relatively

4. See *id.*; About Westboro Baptist Church, <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> (last visited Sept. 11, 2010); News Release, Westboro Baptist Church, WBC to Picket The Memorial of Morgan Harrington, Virginia Tech Student Missing Since October! (Feb. 2, 2010), <http://downloads.westborobaptistchurch.com> (enter security code provided; follow "Downloads" hyperlink; follow "Flier Archive" hyperlink; follow "20100202_Morgan-Harrington-Dead-VA-Tech-Student-Memorial-Mass-Feb-5.pdf" hyperlink).

5. See *infra* note 38 and accompanying text.

6. 580 F.3d 206 (4th Cir. 2009), *argued*, No. 09-751 (U.S. Oct. 6, 2010).

7. See, e.g., David L. Hudson, *Funeral Protests: Overview*, FIRST AMEND. CTR. (Oct. 2009), http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral_protests (discussing Westboro's involvement in protests and court cases on the topic including *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008), *overruled by* 580 F.3d 206 *rev'd*, 580 F.3d 206 (4th Cir. 2009), *argued*, No. 09-751 (U.S. Oct. 6, 2010)).

8. See, e.g., Howard Wasserman, *Solove on Westboro*, PRAWFSBLAWG (Mar. 16, 2010, 8:54 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/03/solove-on-westboro.html> ("Why did the Court grant cert in this seeming one-off case in which the First Amendment claimant prevailed?").

9. *Snyder*, 580 F.3d at 226. See also *infra* note 14 and accompanying text (summarizing the facts and holding of the case).

novel approach to intrusion, that is, to find that a person's seclusion can be intruded upon even when the person is in public.¹⁰ Intrusion is generally thought to occur when a person has a reasonable expectation of privacy and there is an intrusion of a physical space or of private affairs.¹¹ Similarly, the Court's last tussle with intentional infliction of emotional distress, *Hustler v. Falwell*,¹² resulted in a ruling that greatly inhibits the effectiveness of the tort

10. See Daniel Solove, *Snyder v. Phelps: Funeral Picketing, the First Amendment, and the Intrusion Upon Seclusion Tort*, CONCURRING OPINIONS (Mar. 16, 2010, 10:58 AM), <http://www.concurringopinions.com> ("Generally, intrusion doesn't involve speech. It involves invasive actions—snooping, surveillance, trespassing. Where was the intrusion in this case?"). The claim is tied in large part to the accompanying argument that funeral attendees make up a captive audience. There is some support for the proposition. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-68 (2004) ("Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. . . . Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." (citing 16 ENCYCLOPEDIA BRITANNICA 851 (15th ed. 1985) (citation omitted); 5 ENCYCLOPEDIA OF RELIGION 450 (1987) (citation omitted))); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." (quoting *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980))); *Phelps-Roper v. Strickland*, 539 F.3d 356, 366 (6th Cir. 2008) ("[J]ust as a resident subjected to picketing is 'left with no ready means of avoiding the unwanted speech,' mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service." (quoting *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citation omitted))); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 590 (2007) (stating that "the captive audience concept may provide one of the best rationales in support of funeral picketing laws . . ."); Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 332 (2008) ("Targeted picketing of a funeral is analogous to the targeted picketing of a home."). While this topic may be worthy of further investigation, it is outside the scope of this article. Similarly, this article does not confront the issue of picketing at or near funerals.

11. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

12. 485 U.S. 46 (1988).

claim, especially when it relates to public officials or public figures.¹³

Second, the Fourth Circuit's opinion in *Snyder* seemed to securely entrench the First Amendment right of Westboro Baptist Church to demonstrate at funerals and use highly offensive language to attack private people.¹⁴ The Supreme Court has ruled that the First Amendment provides protection for the use of despicable expressive attacks against public figures, but the Fourth Circuit's ruling appears to extend that protection to attacks on private persons. The Fourth Circuit, then, satisfied calls from some First Amendment advocates for the expansion of the high Court's protection in tort actions related to reputation or emotional distress.¹⁵

13. See, e.g., Alicia J. Bentley, Comment, *Hustler Magazine v. Falwell: The Application of the Actual Malice Standard to Intentional Infliction of Emotional Distress Claims*, 49 OHIO ST. L.J. 825, 839 (1988) (noting that the majority's decision "clearly diminished the possibility of successful emotional distress claims by public figures"); Heather Berger, Note, *Hot Pursuit: The Media's Liability for Intentional Infliction of Emotional Distress Through Newsgathering*, 27 CARDOZO ARTS & ENT. L.J. 459, 467-68 (2009) (noting the Supreme Court's willingness to allow the First Amendment to be considered more important than the tort); James R. Laguzza, Note, *Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism*, 16 PEPP. L. REV. 97, 108 (1988) (discussing the Supreme Court's refusal to "impose an outrageousness standard in the realm of public and political discussion").

14. See, e.g., Associated Press, *4th Circuit Nixes \$5 Million Verdict Against Funeral Protesters*, FIRST AMEND. CTR., Sept. 25, 2009, <http://www.firstamendmentcenter.org/news.aspx?id=22120> (summarizing *Snyder v. Phelps* and the Fourth Circuit's holding); Douglas Lee, *4th Circuit Affirms Protection for Repulsive Speech*, FIRST AMEND. CTR., Sept. 30, 2009, <http://www.firstamendmentcenter.org/commentary.aspx?id=22138> (discussing the Fourth Circuit's decision to defend outrageous speech in *Snyder v. Phelps*).

15. See Clay Calvert, *War & [Emotional] Peace: Death in Iraq and the Need to Constitutionalize Speech-Based IED Claims Beyond Hustler Magazine v. Falwell*, 29 N. ILL. U. L. REV. 51, 63 (2008) (discussing whether defendants should have the same protection in suits brought by private figure plaintiffs as in suits brought by public-figure plaintiffs); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 425-27, 440 (1988) (calling for protection against

Finally, only a year earlier, the Supreme Court denied *certiorari* in another case favoring the free speech rights of Westboro Baptist Church.¹⁶ The Court refused to hear the appeal of an Eighth Circuit ruling that prohibited the enforcement of a law restricting demonstrations near funerals.¹⁷ Members of the church brought the original action, claiming the law restricting demonstrations violated their First Amendment rights.¹⁸ The Eighth Circuit Court of Appeals did not rule on the constitutionality of the law but found in favor of the church, holding it unlikely that the law would survive constitutional scrutiny.¹⁹ No wonder eyebrows were raised when the Court granted *cert* in *Snyder v. Phelps*.

On the other hand, maybe the issues were not as clear-cut as Court watchers seemed to think. Indeed, the Fourth Circuit advanced some questionable propositions, possibly prompting the Supreme Court's decision to hear the case.²⁰

intentional infliction of emotional distress suits to be extended to some speech against private-figures).

16. *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2865 (2009).

17. *Id.*

18. *Id.* at 689 (Phelps-Roper of Westboro Baptist Church brought a claim under 42 U.S.C. §1983 seeking a declaratory judgment, an injunction enjoining enforcement of the law restricting demonstrations, and an award of costs and attorneys fees.).

19. *Id.* at 694.

20. See Tony Mauro, *Federal-Protest Case to Test Boundaries*, FIRST AMEND. CTR., Mar. 9, 2010, <http://www.firstamendmentcenter.org/analysis.aspx?id=22689> (writing that the Court's taking of the case "could be a signal that it views unwelcome speech in the intensely private setting of funerals—especially military funerals—as 'beyond what they are willing to protect'" (quoting University of Kansas law professor Stephen McAllister)). See also Brief for Petitioner at 21, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010); Brief for the State of Kansas et al. as Amici Curiae Supporting Petitioner at 30, *Snyder v. Phelps*, No. 09-751 (U.S. Jun. 1, 2010) (calling the Fourth Circuit's interpretation of prior case law "dramatically misread"); Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 314 (2010), http://www.cardozolawreview.com/index.php?option=com_

SNYDER V. PHELPS

The lawsuit was filed by Albert Snyder against Fred W. Phelps Sr., Westboro Baptist Church, and some of the church's members, specifically Phelps's daughters, Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis.²¹ Phelps founded the church in 1955 and has been its only pastor.²² Fifty of the church's sixty or seventy members are Phelps's children, grandchildren, or in-laws.²³ Members of the church express the belief that God hates homosexuality and is punishing America—particularly the military—for its tolerance of gays.²⁴

In 1991, church members began picketing funerals in order to assert these beliefs. Since then, they claim to have protested more than 44,000 times in opposition to “the homosexual lifestyle of soul-damning, nation-destroying filth.”²⁵ Initially, the picketing

content&view=article&id=150:shulman2010313&catid=21:funerals-fire-and-brimstone&itemid=24 (criticizing the Fourth Circuit's decision in *Snyder v. Phelps*).

21. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569 (D. Md. 2008).

22. *Id.* at 571. See also About Westboro Baptist Church, <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> (last visited Oct. 31, 2010) (describing the history and philosophy of the church).

23. *Snyder*, 533 F. Supp. 2d at 571. See also *America's Most Hated Family*, BBC NEWS MAG., Mar. 30, 2007, http://news.bbc.co.uk/1/2/hi/uk_news/magazine/6507971.stm (last visited Oct. 31, 2010) (interviewing Loius Theroux, who directed a documentary on the Phelps family).

24. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 359 (6th Cir. 2008) (“Because God is omnipotent to cause or prevent tragedy, [church members] believe that when tragedy strikes it is indicative of God's wrath.” (quoting the complaint)); *Snyder*, 533 F. Supp. 2d at 571.

25. About Westboro Baptist Church, *supra* note 22. The number of protests grows rapidly. On Aug. 20, 2010, for example, the church had announced twenty-two upcoming pickets through Oct. 5, 2010. Often multiple pickets are staged within a single community, each lasting less than an hour. See Picket Schedule, *supra* note 1. The Oct. 5 picket was at Arlington National Cemetery, which, the church reported, “is the mother lode of dead soldiers for this nation's death watch and worship of rotten dead carcasses. That cemetery,” the church continued, “is full of dead reprobates [sic] crooks, cowards[,] and whoremongers (and thanks to the lazy brutes that run ANC, many of those rotting carcasses now lie in a dog park with poo adorning their

took place at funerals of persons who may have been gay or who had beliefs with which the church members objected. The church first gained national notoriety in 1998, for example, when members protested at the funeral of Matthew Shepard, a man who had been tortured and murdered after he made it known that he was gay.²⁶ Church members began picketing at military funerals in 2005,²⁷ and since the conflicts in Afghanistan and Iraq, they primarily picket funerals of persons who served in the military.²⁸ They readily admit that they choose military funerals because of the heightened publicity caused by the protests.²⁹ Over the years, however, church members have picketed organizations as diverse as the Southern Baptist Convention, the ACLU, and the Billy Graham Evangelistic Association, and persons as diverse as Coretta Scott King, Ronald Reagan, William Rehnquist, and Fred Rogers.³⁰ They also target Jews, who, they claim, have never repented for killing Jesus, and mainstream churches that do not adhere to the narrow beliefs of Westboro Baptist Church.³¹ The church has been listed by the Southern Poverty Law Center as one of six hate groups in Kansas,³²

graves.)” *Id.* The church also reported that it was on the road to the Supreme Court, which had scheduled oral arguments in *Snyder v. Phelps* for Oct. 6. *Id.*

26. See Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 159 (2008).

27. See *id.* at 159-60.

28. See *id.* at 160; McAllister, *supra* note 10, at 575; *The Most Hated Family in America* (BBC television broadcast Apr. 7, 2007), <http://topdocumentaryfilms.com/the-most-hated-family-in-america>.

29. See *Snyder*, 533 F. Supp. 2d 567, 578 (D.MD. 2008); Mauro, *supra* note 20. In its brief on the merits, the church reports that it pickets at funerals because they are highly publicized events with extensive media coverage. Brief for Respondent at 4, *Snyder v. Phelps*, No. 09-751 (U.S. Jul. 7, 2010).

30. See Rutledge, *supra* note 10, at 302-03.

31. See *An Open Letter to the Elect Jews*, http://www.godhatesfags.com/letters/20090512_open_letter_elect_jews.html (last visited Oct. 31, 2010) (on file with author); About Westboro Baptist Church, *supra* note 22.

32. Southern Poverty Law Center, Hate Map, <http://www.splcenter.org/get-informed/hate-map#s=KS> (last visited Oct. 31, 2010). The six groups include one Ku Klux Klan group, one Racist Skinhead group, and three Neo-Nazi groups. *Id.*

and by the Anti-Defamation League as one of nineteen extremist groups in the United States.³³

While Phelps remains the church's pastor, he has turned over much of the day-to-day operations to his daughter, Shirley Phelps-Roper, who is an attorney.³⁴ Indeed, eleven members of the Phelps family are attorneys, following in the footsteps of the family patriarch, who was disbarred in Kansas in 1979 for alleged misconduct.³⁵ He continued to practice in federal courts until 1989 when, after a complaint by nine federal judges, he agreed to give up that privilege in exchange for judicial authorities allowing family members to continue to practice.³⁶

Almost entirely because of the activities of the church, Congress and a number of states have adopted statutes restricting or prohibiting the picketing of funerals.³⁷ The church has challenged some of the statutes with mixed results.³⁸

But Albert Snyder took a different approach to the activities of Westboro Baptist Church. He is claiming that by picketing the funeral of his son, church members invaded his

33. Anti-Defamation League, *Extremism in America—Westboro Baptist Church: About WBC*, http://www.adl.org/learn/ext_us/WBC/default.asp??LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=WBC (last visited Oct. 31, 2010).

34. See Picket Schedule, *supra* note 1.

35. Anti-Defamation League, *supra* note 33 (saying that Phelps was disbarred for misrepresentations in a motion for a new trial); John Blake, 'Most Hated,' *Anti-Gay Preacher Once Fought for Civil Rights*, CNN, <http://edition.cnn.com/2010/US/05/05/hate.preacher/index.html?hpt=C2> (May 14, 2010) (saying that Phelps was disbarred for alleged witness badgering).

36. See Anti-Defamation League, *supra* note 33.

37. See McAllister, *supra* note 10, at 579, 614-19; Wells, *supra* note 26, at 153, 156; Hudson, *supra* note 7.

38. See, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685, 688 (8th Cir. 2008), *cert. denied* 129 S.Ct. 2865 (2009) (reversing a district court's denial of injunctive relief for the church on grounds of the likely success of the church's First Amendment claim); *Phelps-Roper v. Strickland*, 539 F.3d 356, 373 (6th Cir. 2008) (holding a funeral protest provision to be constitutional because it was content neutral and narrowly tailored, because the state had a significant interest in protecting funeral attendees, and because there were alternative channels for the church's communication).

privacy by intrusion and intentionally inflicted upon him severe emotional distress.³⁹

The case began when members of the church demonstrated at the funeral of Snyder's son, Marine Lance Corporal Matthew A. Snyder, at St. John Catholic Church in Westminster, Maryland.⁴⁰ Snyder had been killed in the line of duty in Iraq.⁴¹ Members of the church carried signs specifically chosen for the picket: "Semper Fi Fags," "Pope in Hell," and "Maryland Taliban."⁴² Members also brought a sign displaying a stylized image of two males engaging in anal sexual intercourse.⁴³ In addition, the church posted on its website an "epic," titled "The Burden of Marine Lance Cpl. Matthew Snyder." In the epic, the church alleged that Snyder's parents "raised him for the devil" and taught him to defy God.⁴⁴ Church members had never met Snyder or his family.⁴⁵

39. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569-70 (D. Md. 2008).

40. See *Id.* at 569-70.

41. See *Snyder v. Phelps*, 580 F.3d 206, 211-12 (4th Cir. 2009) (quoting *Snyder*, 533 F. Supp. 2d at 569-70).

42. Petition for a Writ of Certiorari at 4, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23 2009). Petitioners alleged that the specific signs were added to the signage arsenal of the church because church members knew that a funeral service for a Marine was being held at a Roman Catholic Church in Maryland. *Id.* Other signs displayed during the protest were "America is doomed," "God hates America," "You are going to hell," "God hates you," and "Thank God for dead soldiers." *Snyder*, 533 F. Supp. 2d at 570. See also Brief for Respondent, *supra* note 29, at 8 (describing the signs Westboro Baptist Church brought to the protest). There is dispute over whether church members also displayed a sign bearing the slogan "Matt in Hell." Petitioners claim the sign was present. Petition for Writ of Certiorari at 4, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009). Church members, on the other hand, deny displaying that particular sign, but argue that, even if they did, the sign was not aimed at Matthew Snyder, but at Matthew Shepard, a gay man who was tortured and murdered apparently because of his sexual orientation. See Brief in Opposition to Petition for Writ of Certiorari at 1-2, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

43. See Petition for Writ of Certiorari, *supra* note 42, at 4.

44. *Snyder*, 533 F. Supp. 2d at 572. The epic also reported:

God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach His words to the

Phelps testified that members of the church learned of Snyder's death and issued a press release announcing their intention to travel to Westminster to picket the funeral.⁴⁶ Albert Snyder asserted that the church members turned the funeral into a "media circus for their benefit."⁴⁷ They had notified law enforcement officials in advance, he alleged, indicating their recognition that their picketing would draw attention and might cause a disturbance.⁴⁸ There was no disturbance, however, and Albert Snyder was unaware of the pickets until he saw an evening news program.⁴⁹

Snyder filed suit in federal court for the District of Maryland for intentional infliction of emotional distress, intrusion upon seclusion, defamation, publicity given to private life, and civil conspiracy.⁵⁰ The district court granted summary judgment for the defendants on the defamation and publicity claims.⁵¹ The district court held that the statements made by the defendants consisted of "religious opinion and would not realistically tend to expose Snyder to public hatred or scorn."⁵² In addition, no private information had been made public.⁵³ The jury found in favor of Snyder on the remaining three claims — intrusion, intentional infliction of emotional distress, and conspiracy — and awarded him \$2.9 million in compensatory and \$8 million in punitive damages.⁵⁴ On a post-verdict motion by the church, the district court reduced punitive

U.S. Naval Academy at Annapolis, the Maryland legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

Lee, *supra* note 14.

45. *Snyder*, 533 F. Supp. 2d at 570.

46. *Id.* at 571.

47. *Id.* at 572.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 572-73.

53. *Id.* at 573.

54. *Id.*

damages to \$2.1 million.⁵⁵ The defendants had also asked the district court to overrule the verdict, but the court found the evidence sufficient to support the jury's verdict on each of the three claims.⁵⁶

The district court rejected the claim of Phelps and his church that the funeral was a public event and that Matthew and Albert Snyder became public figures because the father placed an obituary notice in newspapers.⁵⁷ Albert Snyder did not invite attention, the court held, and the increased interest in the funeral was primarily the doing of Phelps and his followers.⁵⁸ They had contacted law enforcement officials, the court noted, because of past problems caused by their protests, and, indeed, their presence resulted in increased police presence and media coverage.⁵⁹ "Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Matthew Snyder was a public figure,"⁶⁰ the court held.

The court also found that Albert Snyder's testimony provided the jury with "sufficient evidence . . . to conclude that [he had] suffered 'severe and specific' injuries,"⁶¹ and that those injuries were caused by the "extreme and outrageous" conduct of Phelps and his followers.⁶² In addition, the court found that there had been intrusion on Snyder's seclusion because of the protest and the posting on the website of the video about Matthew Snyder: "[W]hen Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the Defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion."⁶³ The video, the court held, invaded Snyder's privacy "during a time of

55. *Id.* at 571.

56. *Id.* at 582.

57. *Id.* at 577.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 580-81.

62. *Id.* at 581.

63. *Id.*

bereavement.”⁶⁴ Finally, because there was evidence that the members of the Phelps family joined to accomplish unlawful acts, there was evidence of conspiracy.⁶⁵

The Fourth Circuit Court of Appeals reversed, finding that the speech of Westboro Baptist Church was protected by the First Amendment, primarily because the speech was opinion⁶⁶ or rhetorical hyperbole⁶⁷ about matters of public concern.⁶⁸ In making its ruling, the court did not specifically address the torts alleged by Snyder but lumped them together, finding that the First Amendment granted virtually absolute protection “when a plaintiff seeks damages for reputational, mental, or emotional injury. . . .”⁶⁹

The court focused on the “context and general tenor of [the] message”⁷⁰ and, in so doing, found *Milkovich v. Lorain Journal Co.*,⁷¹ a libel case, to be “a crucial precedent.”⁷² “[N]o reasonable reader,” the court held, “could interpret any of the signs as asserting actual and objectively verifiable facts about Snyder or his son,” and “they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.”⁷³ Similarly, the Web posting is protected because “a reasonable reader would understand it to contain rhetorical

64. *Id.*

65. *Id.* at 581-82.

66. *Snyder v. Phelps*, 580 F.3d 206, 219-20 (4th Cir. 2009), argued, *Snyder v. Phelps*, No. 09-751 (U.S. Oct. 6, 2010).

67. *Id.* at 220.

68. *Id.* at 222-23. The court explains that speech “which cannot reasonably be interpreted as stating actual facts” falls into two categories: speech about “matters of public concern that fail to contain a ‘provably false factual connotation,’” *Id.* at 219 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)) and rhetorical statements, *Id.* at 220. The court offers protection for Westboro’s speech because it falls within both categories, either of which alone would be sufficient for First Amendment protection. *Id.* at 222-23.

69. *Id.* at 218.

70. *Id.* at 219.

71. 497 U.S. 1 (1990).

72. *Snyder*, 580 F.3d at 218.

73. *Id.* at 223.

hyperbole, and not actual, provable facts about Snyder and his son.”⁷⁴

The Fourth Circuit was critical of the district court for its focus on issues raised by Snyder that were addressed in *Hustler Magazine v. Falwell*⁷⁵ and *Gertz v. Robert Welch, Inc.*⁷⁶ The district court erred, the Fourth Circuit held, by basing its determination on whether Snyder was a public or private figure and whether the funeral was a public event.⁷⁷ The district court “focused almost exclusively on the Supreme Court’s opinion in *Gertz*, which it read to limit the First Amendment’s protections for ‘speech directed by private individuals against other private individuals.’ The court therefore assessed whether Snyder was a ‘public figure’ under *Gertz* and whether Matthew’s funeral was a ‘public event.’”⁷⁸

The public or private status of the plaintiff, the Fourth Circuit held, was irrelevant to the case.⁷⁹ The focus, rather, should have been on the nature of the speech.⁸⁰ Therefore, the Fourth Circuit held, the district court should have focused on a line of Supreme Court cases that afford protection to certain types of speech and “[do] not depend upon the public or private status of the speech’s target.”⁸¹ The court continued:

[E]ven if the district court (as opposed to the jury) concluded that Snyder and his son were not “public figures,” such a conclusion alone did not dispose of the Defendants’ First Amendment contentions. In focusing solely on the status of the Snyders and the funeral, and not on the legal issue concerning the nature of the speech at issue, the court failed to assess whether the pertinent statements could

74. *Id.*

75. 485 U.S. 46 (1988).

76. 418 U.S. 323 (1974).

77. *Snyder*, 580 F.3d at 222.

78. *Id.* (quoting *Snyder v. Phelps*, 533 F. Supp. 2d 567, 577 (D. Md. 2008)).

79. *Snyder*, 580 F.3d at 222.

80. *Id.*

81. *Id.*

reasonably be interpreted as asserting “actual facts” about an individual, or whether they instead merely contained rhetorical hyperbole.⁸²

The Fourth Circuit seems to be making the point that *Gertz* doesn’t apply to the case because it is about defamation, and *Hustler* doesn’t apply because it is about public figures.⁸³ The Fourth Circuit, however, was advancing a proposition that the Supreme Court had clearly shunned.

The proposition that the First Amendment requires a heightened burden of proof in tort actions related to matters of public concern despite the public or private status of a plaintiff is contrary to the holdings of the Supreme Court. In *Gertz*, the Court issued two holdings directly applicable to *Snyder v. Phelps*. First, the Court rejected the proposition that private person libel plaintiffs need to prove actual malice when their lawsuits grow from debate over matters of public concern.⁸⁴ Second, the Supreme Court defined public figures — that is, those persons required to prove actual malice in defamation cases.⁸⁵

The Fourth Circuit, however, by focusing on the nature of the publication rather than the status of the plaintiff, appears to be reviving the matters-of-public-concern rule for intentional infliction of emotional distress, contrary to *Gertz* and *Hustler*. The Supreme Court, in holding that the Rev. Jerry Falwell was a public figure, distinguished between public and private persons and left intact the burden of proof delineated for private persons in cases of intentional infliction of emotional distress.⁸⁶ *Hustler*, then, was as much about private persons and intentional infliction of emotional distress as about public persons. Instead of determining whether Albert Snyder was a public figure, however, and subject to a heightened burden of proof, the Fourth Circuit focused on whether

82. *Id.*

83. See Solove, *supra* note 10 (making the same point).

84. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). See *infra* notes 99-104 and accompanying text.

85. *Id.* at 345. See *infra* note 103 and accompanying text.

86. See RESTATEMENT (SECOND) OF TORTS § 46 (1977). See also *infra* notes 218-19 and accompanying text.

the language employed by Westboro in its demonstration and its Web posting consisted of provable statements,⁸⁷ even though truth or falsity is clearly irrelevant to an action for intentional infliction of emotional distress.⁸⁸

Gertz and *Hustler*, therefore, in tandem, provide precedential guideposts for cases of intentional infliction of emotional distress brought by private persons.

PRIVATE PERSONS FROM *GERTZ* TO *HUSTLER*

Gertz v. Welch is probably the Supreme Court's second most important libel case, only to *New York Times Co. v. Sullivan*.⁸⁹ In that case, *Gertz*, the Court reaffirmed the protections the First Amendment provides for critics of public figures who are involved in public controversies.⁹⁰ Often overlooked, however, is the fact that the Court's holding concomitantly provided a degree of protection for private persons who are attacked without voluntarily entering what has been called "the rough and tumble of the American ideological marketplace"⁹¹ and unwittingly become targets. Those persons are not required to confront the heightened burden of proof in tort actions.

Attorney Elmer Gertz represented a family in a wrongful death action against a Chicago police officer and was criticized for doing so in *American Opinion*, an outlet for the John Birch

87. See *supra* notes 66-69 and accompanying text.

88. See Smolla, *supra* note 15, at 430 ("The emotional distress tort . . . has nothing to do with truth or falsity."); Brief for Petitioner, *supra* note 20, at 42 ("The cause of action does not depend on whether the speech involved in the tortious conduct is fact or opinion or whether it is true or false."); Brief of the American Center for Law and Justice as Amicus Curiae in Support of Neither Party at 8, *Snyder v. Phelps*, No. 09-751 (U.S. Jun. 1, 2010) ("Falsity is not an element of the torts of intentional infliction of emotional distress (IIED) or intrusion upon seclusion."); See also *infra* notes 142-44 and accompanying text (discussing necessity to prove a statement false, and the Court's analysis of the differing elements of falsity and intentional infliction of emotional distress).

89. 376 U.S. 254 (1964). See Kyu Ho Youm, *Defamation, in COMMUNICATION AND THE LAW* 110 (W. Wat Hopkins ed. 2010).

90. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974).

91. Smolla, *supra* note 15, at 427.

Society.⁹² A federal district court jury awarded him \$50,000, but the judge overruled the verdict on grounds that an appellate court would likely find that Gertz was required to prove actual malice.⁹³ In *Times v. Sullivan*, the Supreme Court had established the rule that in order to win their cases, public official libel plaintiffs are required to prove actual malice, that is, that an offending publication was made with knowledge of falsity or with reckless disregard for its truth.⁹⁴ Three years later, in *Curtis Publishing Co. v. Butts*,⁹⁵ the Court extended the rule to public figures, though it did not fully delineate public figure status.⁹⁶ In the 1971 case of *Rosenbloom v. Metromedia, Inc.*⁹⁷ the actual malice rule was expanded again.⁹⁸ Writing for a plurality, Justice William Brennan, who had written the opinion of the Court in *Sullivan*, held that private persons involved in matters of public concern must also prove actual malice in libel cases that grow from those issues.⁹⁹ Gertz appealed the district court's holding, and the Seventh Circuit Court of Appeals affirmed, finding that Gertz failed to prove actual malice.¹⁰⁰

The *Gertz* Court overruled *Rosenbloom*. The Court reaffirmed that public debate is important and, therefore, some falsehood must be protected "in order to protect speech that matters."¹⁰¹ It rejected the *Rosenbloom* rule, however, holding that the First Amendment does not require private people to prove actual malice, even when involved in matters of public concern. Each state, the Court held, so long as it does not impose liability

92. *Gertz*, 418 U.S. at 325-26.

93. *Id.* at 329.

94. 376 U.S. at 279-80.

95. 388 U.S. 130 (1967).

96. *Id.* at 155.

97. 403 U.S. 29 (1971).

98. *Id.* at 52. *See also* *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964) (expanding the actual malice rule to public officials involved in cases of criminal libel).

99. 403 U.S. at 43-44.

100. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

101. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

without fault, should determine the private-person fault standard for libel plaintiffs.¹⁰²

In reaching its holding, the Court addressed the issue of public and private persons in two ways. First, filling in a gap it had left in *Curtis Publishing Co.*, the Court delineated three types of public figures for purposes of libel actions: public figures for all purposes, that is, persons who have widespread fame or notoriety; public figures for limited purposes, that is, persons who inject themselves into ongoing public controversies in an effort to affect the outcomes of those controversies; and involuntary public figures, an “exceedingly rare” category of persons who become public figures through no actions of their own.¹⁰³

More importantly for purposes of intentional infliction of emotional distress, however, the Court also affirmed that the First Amendment does not require private persons to confront the same burden of proof that it requires of public figures — at least in defamation actions. Public figures, the Court held, have “greater access to the channels of effective communication,” making it easier for them to take advantage of “the first remedy” available to persons attacked by false defamations¹⁰⁴ — rebutting speech with speech.¹⁰⁵ “Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”¹⁰⁶ In addition, public figures, like public officials, voluntarily expose themselves to a greater risk of criticism by entering the public sphere; they invite public scrutiny and run the greater risk that accompanies such scrutiny.¹⁰⁷ A private person, on the other hand, “has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury.”¹⁰⁸ Therefore,

102. *Id.* at 347-48.

103. *Id.* at 345.

104. *Id.* at 344.

105. *See* *Dennis v. United States*, 341 U.S. 494, 503 (1951).

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

107. *Id.* at 344-45.

108. *Id.* at 345.

the “public or general interest” test was inadequate in serving the interests at stake.¹⁰⁹

The Court re-emphasized that holding two years after *Gertz* in *Time, Inc. v. Firestone*,¹¹⁰ rejecting arguments that Mary Alice Firestone was a public figure because she was involved in a “cause célèbre.”¹¹¹ “Were we to accept this reasoning,” the Court held, “we would reinstate the doctrine advanced [in *Rosenbloom*],” which was repudiated in *Gertz* because the rule would unacceptably abridge a legitimate state interest.¹¹² Subject-matter classifications, the Court held, often result in an improper balance. “It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test.”¹¹³ And nine years later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹¹⁴ the Court repeated the proposition: “In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*.”¹¹⁵

There was no dispute that Elmer Gertz was involved in an issue that caused considerable public interest.¹¹⁶ He had brought an action against a Chicago police officer who had been convicted of shooting and killing a young man.¹¹⁷ Gertz, however, was embroiled in the controversy only because of his decision to represent a particular client rather than to advance some agenda related to the controversy, thereby satisfying the requirements of neither the all-purposes nor limited-purposes public figure test.¹¹⁸ And, significantly, he was not held to be an involuntary public figure.¹¹⁹

109. *Id.* at 346.

110. 424 U.S. 448 (1976).

111. *Id.* at 454.

112. *Id.* at 454.

113. *Id.* at 456.

114. 472 U.S. 749 (1985).

115. *Id.* at 756. The Court also repeated the proposition that “private persons have not voluntarily exposed themselves to increased risk” and “lack effective opportunities for rebut[al],” so states still possess a strong interest in protecting them. *Id.*

116. *Id.*

117. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

118. *Id.* at 351-52.

119. *Id.*

The dispute in *Hustler Magazine v. Falwell*¹²⁰ also involved matters of public concern,¹²¹ and—as in *Gertz* — the Court distinguished between public and private figures, leaving private figures with a reduced burden of proof in actions for intentional infliction of emotional distress.

In *Hustler*, the Supreme Court unanimously held that public officials and public figures must prove actual malice in order to win damages for intentional infliction of emotional distress.¹²² The Court overturned a \$200,000 verdict against the magazine for the publication of an attack aimed at the Rev. Jerry Falwell. *Hustler* had published a parody of the Campari Liquor advertising campaign in which it portrayed Falwell as having a drunken, incestuous relationship with his mother.¹²³ At the close of the evidence, the United States District Court for the Western District of Virginia granted a directed verdict for the magazine on the invasion of privacy action, and a jury found in favor of *Hustler* on Falwell's libel action, finding that the "parody 'could not reasonably be understood as describing actual facts.'"¹²⁴ The jury found in favor of Falwell, however, on intentional infliction of emotional distress,¹²⁵ and the Fourth Circuit affirmed.¹²⁶

The Supreme Court reversed the holding, finding that the parody was protected by the First Amendment. Key to the Court's finding was the political nature of the publication. Falwell and Flynt were embroiled in a political dispute. Falwell had targeted pornography as a societal evil and Flynt, as one of its most vociferous purveyors, responded.¹²⁷ Chief Justice William

120. 485 U.S. 46 (1988).

121. See RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL passim* (1988).

122. *Hustler*, 485 U.S. at 56. Justice Anthony Kennedy took no part in the case. *Id.* at 57. Justice Byron White concurred in the judgment but wrote that the actual malice rule did not apply. *Id.* (White, J., concurring).

123. *Id.* at 48.

124. *Id.* at 49 (quoting App. to Pet. for Cert. C1).

125. *Id.*

126. *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

127. See SMOLLA, *supra* note 121, at 108 ("America's third major sin is pornography.").

Rehnquist compared the parody to the works of political cartoonists and satirists who became involved in political debates throughout history.¹²⁸ Though the parody “is at best a distant cousin . . . and a rather poor relation” to the works of Thomas Nast, whose cartoons helped bring down the Tweed Ring and cartoonists who lampooned George Washington, Franklin Roosevelt, and Teddy Roosevelt, it is, nonetheless, deserving of the same protection because of its political nature.¹²⁹ In such political disputes, the Court held “outrageousness” was insufficient for liability¹³⁰ because sufficient “breathing space” is required to encourage robust political debate.¹³¹ Therefore, in order to provide that breathing space, the Court held that public figures and public officials could not recover for the tort of intentional infliction of emotional distress without proving actual malice — that the material was published with knowing falsity or reckless disregard for the truth.¹³²

There is little dispute that *Hustler* was a significant ruling that provided important protection for participants in robust public debate. The parties in the case could not have stood in starker contrast — one of the country’s leading clergymen and one of the country’s most tasteless pornographers. In addition, few court watchers would have guessed that key to the outcome of the case would be an expansion of the actual malice rule, which at least two of the sitting justices — including Chief Justice Rehnquist, the author of the opinion of the Court — had eschewed as bad law.¹³³

128. *Hustler*, 485 U.S. at 54-55.

129. *Id.*

130. *Id.* at 55. See also *infra* notes 173-177 and accompanying text.

131. *Hustler*, 485 U.S. at 52 (quoting *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 772 (1986)).

132. *Id.* at 56.

133. In an opinion concurring in the judgment in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Justice Byron White made clear that he believed the actual malice rule should be overturned. *Id.* at 769 (White, J., concurring). He wrote that the rule “countenances two evils: “first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts.”

One leading First Amendment scholar called *Hustler* “a classic first amendment case.”¹³⁴ It “stands squarely in the tradition of *Cohen v. California* as an important articulation of the first amendment right to give offense,” Robert C. Post wrote.¹³⁵ And Rodney A. Smolla wrote that the case was of “profound first amendment significance.”¹³⁶ In his book on the case, Smolla wrote that it was a landmark where “rubber meets the road, theory is pressed against fact, abstract philosophical and legal principle is leavened by the human side of the law.”¹³⁷ It was cast, he wrote, “[a]s a cataclysmic American contest between Good and Evil.”¹³⁸

More important than the larger-than-life characters of Larry Flynt and Jerry Falwell, however, were the constitutional principles at stake. Just as the Supreme Court struggled in *New York Times v. Sullivan* to find a way to fit the facts of that case into some kind of constitutional protection for defamatory falsehoods,¹³⁹ the Court in *Hustler* was required to find a way to provide protection for a magazine that was “a parody of itself,”¹⁴⁰ and whose publisher had

Id. at 769 (White, J., concurring). A year later, Chief Justice Warren Burger also called for a reconsideration of the actual malice rule. *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 1188 (1986) (Burger, C.J., dissenting), *denying cert. to* 780 F.2d 340 (3rd Cir. 1986). His dissent was joined by Justice Rehnquist who, as Chief Justice, would write the opinion of the Court in *Hustler*, expanding the rule. *Id.*

134. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 605 (1990).

135. *Id.* at 606.

136. Smolla, *supra* note 15, at 423.

137. SMOLLA, *supra* note 121, at 5.

138. *Id.* at 6.

139. See generally W. WAT HOPKINS, ACTUAL MALICE 18-24 (1989) (analyzing *Times v. Sullivan* at the Supreme Court level, including the problems facing the Court while writing the opinion); W. Wat Hopkins, *Justice Brennan, Justice Harlan and New York Times Co. v. Sullivan: A Case Study in Supreme Court Decision Making*, 1 COMM. L. & POL’Y 469 (1996) (delving into the deliberation process of the Court during *New York Times v. Sullivan*, and the overall importance of the decision).

140. See SMOLLA, *supra* note 121, at 60 (listing a “series of gems from *Hustler’s* past”).

testified under oath that he had intended to assassinate the integrity of Jerry Falwell.¹⁴¹

Falwell's lawsuit, as Smolla wrote, was "simply a public figure striking back for intense distress suffered in the rough and tumble of the American ideological marketplace,"¹⁴² but the question was how to construct a suitable defense for targeted attacks within that marketplace. The Court had used actual malice to do so in libel law, but intentional infliction of emotional distress was a different sort of beast — one for which truth or falsity was irrelevant.¹⁴³ The challenge, Smolla wrote, was not to construct a convincing rationale for rejecting Falwell's claim, but "how to articulate limits on that rationale" that would permit suits for emotional distress in other contexts.¹⁴⁴ Post put it similarly. The question, he wrote, was how the differing elements of defamation and intentional infliction could be superimposed to affect "the world of debate about public affairs" protected by the First Amendment.¹⁴⁵

141. The quote has become part of the lore of the case, appearing in a multitude of sources since uttered by Flynt during a deposition. See, e.g., *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986), *rev'd sub nom.* *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); SMOLLA, *supra* note 121, at 60; Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 GONZ. L. REV. 291, 308-09 (1999). At trial, Flynt backpedaled. He testified that he had no personal animus toward Falwell and that there had been no intent to harm. See SMOLLA, *supra* note 121, at 138-39 (reciting Flynt's claim that he did not intend the parody to have "any effect" on Falwell). If he had intended to harm Falwell, Flynt testified, there would have been an investigation to locate actual harmful facts. *Id.* at 138. By then, however, the damage had been done. Smolla wrote that the videotape of the deposition became "the single most important piece of evidence" at trial. *Id.* at 29. Ironically, Flynt's quote asserting that he had intended to assassinate Falwell's integrity did not appear in the opinion of the Court.

142. Smolla, *supra* note 15, at 427.

143. See *id.* at 430 ("The emotional distress tort . . . has nothing to do with truth or falsity."); Brief of the American Center for Law and Justice, *supra* note 88, at 8.

144. Smolla, *supra* note 15, at 427.

145. Post, *supra* note 134, at 612.

It is not clear that the actual malice rule was the best choice for achieving that goal. It is a test that requires a statement of fact rather than a statement of opinion. That is, there can be neither — knowledge of falsity nor reckless disregard for the truth without the establishment of a statement that is, indeed, false, as the Court noted when it established in 1986 that libel plaintiffs involved in matters of public concern must prove falsity.¹⁴⁶ Actual malice, therefore, would appear to be inappropriate for the statements expressed in the *Hustler* parody, which were not subject to a test of truth or falsity.¹⁴⁷ As Rodney Smolla wrote:

One cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decision-making process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication or with its capacity to inflict reputational damage.¹⁴⁸

The focus on the *Times* case, Smolla wrote, might have done more harm than good, “for fitting the *Times* formulation into *Falwell v. Flynt* created an insoluble conundrum; it was forcing a square peg into a round hole.”¹⁴⁹

Beyond that, *Hustler* had specifically announced that the parody was not factually true, and that the magazine was aware of

146. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

147. Indeed, as previously indicated, Falwell lost his libel action because the jury specifically determined that the “parody could not ‘reasonably be understood as describing actual facts.’” *Hustler v. Falwell*, 485 U.S. 46, 49 (1988) (quoting App. to Pet. for Cert. Cl.). See also Shulman, *supra* note 20, at 315 (writing that “[t]here is no justification for applying the actual malice standard to emotional distress claims outside the public arena . . .”). But see Brief of the American Center for Law and Justice, *supra* note 88, at 9 (reporting that Rev. Falwell claims *Hustler* magazine had published “an extremely distressing lie”).

148. SMOLLA, *supra* note 121, at 170. See also Smolla, *supra* note 15, at 427 (writing that “[t]his matter cannot be resolved merely by superimposing the defamation fault rules of *New York Times* and *Gertz v. Robert Welch, Inc.* upon the cause of action for infliction of emotional distress.”).

149. SMOLLA, *supra* note 121, at 171.

that fact. At the bottom of the page on which the parody appeared, *Hustler* printed the disclaimer, “ad parody — not to be taken seriously,” and the magazine’s table of contents listed the ad as “Fiction; Ad and Personality Parody.”¹⁵⁰ Clearly, then, *Hustler* published the parody knowing it contained false statements of fact — that is, with actual malice.¹⁵¹

That point was made during oral arguments in the case. Alan L. Isaacman, the attorney for *Hustler*, was specifically asked whether the actual malice standard had been satisfied by Falwell because everyone knew the ad was false, “including the speaker.”¹⁵² Isaacman replied that the actual malice rule did not apply because the parody contained no false statement of fact — that it did not purport to state facts.¹⁵³ Some justices did not seem convinced, yet the Court still adopted the actual malice rule for public persons who bring actions for intentional infliction of emotional distress.¹⁵⁴

The irony of that adoption has been recognized by a number of authorities. W. Wat Hopkins, for example, wrote that the ruling in *Hustler* means the actual malice standard applies, not simply to material that is knowingly false, but to material that is intended to deceive.¹⁵⁵ There was no intent to deceive—only an intent to harm. As Flynt had put it, the parody was an attempt to assassinate Falwell’s reputation,¹⁵⁶ though it did not fit within the parameters of the actual malice rule. Actual malice, Justice

150. *Hustler*, 485 U.S. at 48 (quoting the disclaimer from the ad).

151. Justice White did not join the opinion of the Court. He concluded that *Times v. Sullivan* had little to do with the case: “[T]he ad contained no assertion of fact.” *Id.* at 57 (White, J., concurring).

152. Transcript of Oral Arguments, *Hustler Magazine v. Falwell*, reprinted in 181 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 751, 757 (Philip B. Kurland & Gerhard Casper eds. 1989) (1987 Term Supp.).

153. *Id.* at 758.

154. The adoption of the rule was ironic for another reason, as previously indicated. At least two members of the sitting Court had publicly advocated the abandonment of the test. See *supra* note 133 and accompanying text.

155. W. Wat Hopkins, *Hustler Magazine v. Falwell* and Standards of Proof (Old and New) in Cases of Intentional Infliction of Emotional Distress, 30-31 (Apr. 1989) (paper presented at the AEJMC Southeast Colloquium, Chapel Hill, N.C.) (on file with author).

156. See *supra* note 141 and accompanying text.

Brennan had written, was an intent to inflict harm through falsehood.¹⁵⁷ Had Larry Flynt and *Hustler* intended to deceive readers, actual malice would have been at issue. There was no intent to deceive, however, so the Court held that the parody was not published with actual malice.¹⁵⁸ Indeed, the Fourth Circuit held in *Hustler* that *Times v. Sullivan* did not emphasize truth or falsity but, instead, emphasized culpability, and the actual malice standard served to provide a level of protection in intentional infliction cases equivalent to that in libel cases.¹⁵⁹

While that theory may be sound, the ruling begs the question of how the actual malice test could be applied to opinion or rhetorical hyperbole, that is, to intentional infliction of emotional distress. Smolla called the application of actual malice to the emotional distress claim “nonsensical.”¹⁶⁰ The question, Smolla writes, is not how the *Sullivan* standard applies to the facts in the case, but how the First Amendment should be applied to “restrict a state’s decision to impose penalties for this sort of conduct in relation to this sort of risk.”¹⁶¹ The answer, he writes, is a cardinal principle: “[T]he power of speech to generate severe emotional disturbance on issues of public concern is never enough, standing alone, to justify abridging that speech, even when the infliction of emotional disturbance is intentional.”¹⁶²

That’s not the result of *Hustler*, however, though the Fourth Circuit seems to think that it is.¹⁶³ The Supreme Court did not

157. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

158. See HOPKINS, *supra* note 139, at 36-37.

159. *Falwell v. Flynt*, 797 F.2d 1270, 1274 (4th Cir. 1986), *rev’d sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

160. Smolla, *supra* note 15, at 439. See also SMOLLA, *supra* note 121, at 128.

161. Smolla, *supra* note 15, at 439.

162. *Id.* at 440. See also CALVERT, *supra* note 15, at 63 (writing that the *Hustler* protections should be extended to speech that “is both political and centers on a matter of public concern”).

163. The Fourth Circuit cited two Supreme Court cases for its assertion that the Supreme Court had provided protection for speech related to matters of public concern without regard for public or private status—*Milkovich v. Lorain Journal* and *Hustler*. *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009, argued, No. 09-751 (U.S. Oct. 6, 2010)). But neither citation supports the

specifically refer to private persons, but it clearly extended the actual malice rule only to public officials and public figures,¹⁶⁴ and it did not extend any added protection to speech simply because that speech involved matters of public concern. Indeed, as previously noted, the Court rejected just such a rule in *Gertz v. Welch*, specifically overturning the *Rosenbloom* rule.¹⁶⁵

The Court's narrow ruling in *Hustler* means that private-person plaintiffs in cases of intentional infliction of emotional distress need not prove actual malice to win damages.¹⁶⁶ Because a heightened protection applies to cases involving public persons and not to cases involving only matters of public concern, a court in such a case must determine whether a plaintiff is a public or private person. The finding by the federal district court in Maryland that Albert Snyder was a private person, therefore, was essential to the outcome of his intentional infliction case,¹⁶⁷ a proposition simply ignored by the Fourth Circuit.¹⁶⁸ As Jeffrey Shulman writes, "The status of the plaintiff and the content of the defendant's speech are as inseparable as the dancer from the dance."¹⁶⁹

The Fourth Circuit in *Snyder* seemed to be expanding the rules of *Hustler* to all emotional distress tort actions involving matters of public concern. Such a ruling would be contrary to the Supreme Court's holding in *Gertz* overruling a similar proposition

assertion. *Milkovich* reports only that the Court has recognized "constitutional limits on the *type* of speech which may be the subject of state defamation actions," 497 U.S. 1, 16 (1990), and *Hustler* reports only that the First Amendment recognizes "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern," *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). Neither assertion is as broad as that advanced by the Fourth Circuit.

164. *Hustler*, 485 U.S. at 56.

165. *See supra* notes 99-103 and accompanying text.

166. As Post notes, *Hustler* "holds only that nonfactual ridicule is constitutionally privileged from the tort of intentional infliction of emotional distress if the plaintiff is a public figure or public official, and if the ridicule occurs in 'publications such as the one here at issue.'" Post, *supra* note 134, at 662 (quoting *Hustler*, 485 U.S. at 56).

167. *See discussion supra* notes 76-88 and accompanying text.

168. *See Shulman, supra* note 20, at 326.

169. *Id.* at 331.

advanced in *Rosenbloom* and to resulting trends in other lower appellate lower courts.¹⁷⁰

Even if that was the design of the Fourth Circuit, however, Albert Snyder was not a party to a debate on a matter of public concern.

FREE SPEECH AND EMOTIONAL DISTRESS

The free speech doctrine of the Supreme Court has made it clear that speech cannot be punished because it embarrasses, offends, or simply causes hurt feelings.¹⁷¹ “[I]n public debate,” the Court has held, “our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’”¹⁷² Indeed, the Court has held that in some instances, the very purpose of free speech is to cause offense. In *Terminiello v. Chicago*,¹⁷³ for example, Justice William O. Douglas wrote for the Court that:

170. See, e.g., *Barrett v. Outlet Broad. Inc.*, 22 F. Supp. 2d 726, 748 (S.D. Ohio 1997) (holding that there is no unfettered right to broadcast even matters of public concern); *State v. Carpenter*, 171 P.3d 41, 59 (Alaska 2007).

Even speech that relates to a matter of public interest loses its protection and can give rise to an intentional infliction of emotional distress claim if, in addition to meeting the other requirements for an intentional infliction of emotional distress claim, it is uttered with an intent merely to harass and with no intent to persuade, inform, or communicate.

171. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. . . . Some uses of even the most offensive words are unquestionably protected.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“[U]nder our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

172. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

173. 337 U.S. 1 (1949).

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹⁷⁴

This very point was made in *Hustler*. Chief Justice Rehnquist's advocacy for the rights of satirists and others who attacked the governmental hierarchy recognized the place of outrageous speech in debate on matters of public concern. "[R]obust political debate," he wrote, will inevitably produce speech that is not necessarily "reasoned or moderate."¹⁷⁵ Both public officials and public figures will be subject to attacks that are "vehement, caustic, and sometimes unpleasantly sharp."¹⁷⁶ While recognizing that the parody produced by *Hustler* was outrageous, Chief Justice Rehnquist wrote that in the area of public debate involving public figures, "outrageousness" was an insufficient test of liability.¹⁷⁷

Although he didn't cite it, the Chief Justice was referring to the test for intentional infliction of emotional distress described in section 46 of the *Restatement (Second) of Torts*.¹⁷⁸ After delineating the burden of proof for the tort,¹⁷⁹ the *Restatement* quaintly reports that liability can only attach if the actions of the publisher are such that they would cause an observer to exclaim, "Outrageous!"¹⁸⁰

174. *Id.* at 4.

175. *Hustler*, 485 U.S. at 51.

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

177. *Id.* at 55.

178. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

179. *Id.* at § 46 ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").

180. *Id.* at § 46 cmt. d.

Hustler, then, provided additional protection for debate on matters of public concern—protection for which the Court has long recognized to be “[a]t the heart of the First Amendment.”¹⁸¹ The Court has emphasized that the First Amendment “embraces at the least the liberty to discuss publicly . . . all matters of public concern,”¹⁸² and such expression “has always rested on the highest rung of the hierarchy of First Amendment values.”¹⁸³ Implicit in this template, however, is the related proposition that other speech occupies lower rungs in that hierarchy. Indeed, the Court has specifically said that “not all speech is of equal First Amendment importance.”¹⁸⁴ Fighting words¹⁸⁵ and obscenity,¹⁸⁶ for example, have no First Amendment protection, while commercial speech,¹⁸⁷ indecent speech,¹⁸⁸ intimidating speech,¹⁸⁹ and speech “on matters of purely private concern”¹⁹⁰ are protected, but have less protection than speech involving matters of public concern.

181. *Hustler*, 485 U.S. at 50. See also *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (stating that speech on matters of public concern is “entitled to special protection”).

182. *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

183. *Carey*, 447 U.S. at 467.

184. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

185. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

186. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”).

187. See *Central Hudson Gas & Elec., Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980) (holding that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression”).

188. See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (“The ease with which children may obtain access to broadcast material . . . amply justifi[es] special treatment of indecent broadcasting.”).

189. See *Virginia v. Black*, 538 U.S. 343, 363 (2003) (holding constitutional a statute outlawing cross burning done with the intent to intimidate).

190. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

In *Hustler*, therefore, the Court recognized the importance of debate on matters of public concern, and did so in a momentous way. It's clear, for example, that public officials and public figures, under the *Hustler* rubric, will have an exceedingly difficult time sustaining their burdens of proof in cases of intentional infliction of emotional distress. The burden, one scholar wrote, has become "almost insurmountable"¹⁹¹ because "there is almost no way that a public figure will be able to show actual malice" when the offending language can be characterized as satire or caricature.¹⁹² "[I]t is anomalous," he writes, "to allow recovery to public figures upon proof of the defendant's knowledge of falsity or reckless disregard for truth when no actual facts are being asserted."¹⁹³ Indeed, though probably an overstatement, theoretically at least, one scholar opined that the *Hustler* Court had extended absolute protection to satire, parody, and similar speech when it involves public debate about matters of public concern.¹⁹⁴

It would be an error, however, to read *Hustler* as completely gutting the law as it applies to intentional infliction of emotional distress. While recognizing the importance of speech on matters of public concern, the Court has also recognized that some speech does not rise to the level of public debate. Personal abuse, for example, "is not in any proper sense communication of information or opinion safeguarded by the Constitution."¹⁹⁵ In *Hustler*, then, the Court was silent on some issues related to the tort of intentional infliction, and it left others intact. The Court, as Smolla writes, "was quite careful to limit the decision to public officials and public figures."¹⁹⁶ Post agrees. He writes:

The opinion tells us almost nothing about whether the Constitution protects outrageous

191. Laguzza, *supra* note 13, at 113; *see also* Bentley, *supra* note 13, at 839 (writing that "it is difficult to think of many situations where a public plaintiff could establish intentional infliction of emotional distress but not defamation").

192. Laguzza, *supra* note 13, at 111.

193. *Id.* at 111-12.

194. *See* Borden, *supra* note 141, at 314.

195. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

196. Smolla, *supra* note 15, at 427.

communications that are privately disseminated rather than displayed in the pages of a nationally distributed magazine [referring to a publication “such as the one here at issue”], or whether it protects outrageous communications that are designed to hurt or embarrass private figures, or whether it protects communications that, although injuring the same emotional tranquility as that safeguarded by the tort of intentional infliction of emotional distress, are also violative of similar torts like invasion of privacy.¹⁹⁷

In addition, Post writes, “It cannot be that *Falwell* absolutely protects all verbal means of intentionally inflicting emotional distress, all forms of racial, sexual, and religious insults, so long as the offending communications do not contain false factual statements.”¹⁹⁸ That is, the case did not eliminate the tort, although it may have done so as a practical matter for public persons. Jerry Falwell would have won his case, had it not been for the heightened burden of proof imposed by the Court. Indeed, Falwell did win his case until that burden was imposed. First Amendment scholar Diane L. Borden also suggests that the “invisible” person in the case—Falwell’s mother, Helen—would have won an intentional infliction case, had she been alive when the parody was published.¹⁹⁹ The Court did not specifically address private persons in *Hustler*, Borden points out,²⁰⁰ but that does not

197. Post, *supra* note 134, at 615.

198. *Id.* at 662.

199. Borden, *supra* note 141, at 314. The Reporters Committee for Freedom of the Press makes the same point, but, oddly, implies that First Amendment guarantees would be harmed if she had successfully sued *Hustler* magazine. Brief Amici Curiae of the Reporters Committee for Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents at 20-21, *Snyder v. Phelps*, No. 09-751 (U.S. Jul. 14, 2010).

200. Borden, *supra* note 141, at 293. See also Bentley, *supra* note 13, at 839 (“The Court had no opportunity to discuss whether the *Falwell* decision should be read to require a showing of actual malice in order for a private plaintiff to recover punitive damages for emotional distress due to an offensive ‘public issue’ publication.”).

mean that private persons automatically face a heightened burden of proof. To the contrary, she notes, “[I]f the Court’s logic were to be consistent, a private person would be required to meet a lower standard of fault than would a public person.”²⁰¹ The extension of that logic, another authority writes, may also mean that private persons eventually have to prove actual malice in order to recover punitive damages for intentional infliction of emotional distress.²⁰²

Some courts have applied just such logic. A 2007 ruling by the Alaska Supreme Court, for example, makes intentional infliction claims that turn on truth or falsity subject to the same limitations as defamation.²⁰³ Therefore, the court ruled, actual malice is required in Alaska when such cases involve matters of public concern.²⁰⁴ The heightened protection does not apply when claims do not involve such matters.²⁰⁵ Similarly, the Utah Supreme Court ruled in 1992 that private persons must prove negligence in order to sustain actions for intentional infliction of emotional distress, since that is the burden of proof for private persons bringing actions for defamation in Utah.²⁰⁶ And a federal district court in New York, applying that state’s law, ruled that private persons bringing intentional infliction actions involving matters of public concern must prove gross irresponsibility, the same standard as private persons in defamation actions.²⁰⁷

Some authorities argue that to ensure robust and open debate, the First Amendment should bar damage awards in cases of intentional infliction of emotional distress when the issues involved are matters of public concern.²⁰⁸ For example, Smolla writes, “the power of speech to generate severe emotional disturbance on issues of public concern is never enough, standing alone, to justify

201. Borden, *supra* note 141, at 314.

202. *See* Bentley, *supra* note 13, at 840.

203. *State v. Carpenter*, 171 P.3d 41, 55 (Alaska 2007).

204. *Id.*

205. *Id.* at 56.

206. *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906 (Utah 1992).

207. *Chaiken v. VV Publig. Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995).

208. *See* Calvert, *supra* note 15, at 63. *See also* Borden, *supra* note 141, at 314 (arguing that the Court has already established that rule).

abridging that speech, even when the infliction of emotional disturbance is intentional.”²⁰⁹ The clear intent of the Court, however, is to provide sturdy protection for *debate* on matters of public concern. That was the rationale for the holding in *Terminiello*,²¹⁰ for the rules established in *Gertz*,²¹¹ and for the additional protection provided in *Hustler*.²¹²

Snyder v. Phelps is not about debate. While the rights and privileges of gay persons and the war in Iraq are certainly matters of important public concern,²¹³ the facts of the case do not indicate that the plaintiff was involved in the debate. Albert Snyder is a private person who became the target of an expressive attack without voluntarily entering a public debate, or, as a matter of fact, without participating in a public debate at all. As the Court made clear in *Gertz*, whether a libel case relates to matters of public concern is irrelevant when the plaintiff is a private figure.²¹⁴ And, as the Court made clear in *Hustler*, only public figures and public officials are required to prove actual malice in cases of intentional infliction of emotional distress.²¹⁵ When private persons bring such suits, actual malice is not an issue, and, therefore, it is irrelevant whether the offending language involves matters of public concern or whether the language constitutes statements of fact or statements of opinion. The questions are whether the publisher—through action or speech—intentionally intends to inflict serious emotional harm on a specific person and whether the conduct or speech is outrageous.

209. Smolla, *supra* note 15, at 440.

210. See *supra* text accompanying notes 173-74. See also *Boos v. Barry*, 485 U.S. 312, 322 (1988) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)) (noting that in public debate, citizens must tolerate insulting speech in order to provide “‘breathing space’ to the freedoms protected by the First Amendment”).

211. See *supra* text accompanying notes 90, 101, 104-05.

212. See *supra* text accompanying notes 126-32, 176-77.

213. See *Snyder v. Phelps*, 580 F.3d 206, 223 (4th Cir. 2009), *argued*, No. 09-751 (U.S. Oct. 6, 2010); *Calvert*, *supra* note 15, at 66; *Shulman*, *supra* note 20, at 314.

214. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

215. *Hustler*, 485 U.S. at 56.

Albert Snyder's involvement in any debate over the conflicts in Afghanistan and Iraq or gays in the military was certainly less than Elmer Gertz's involvement in any sort of debate over the shooting of a Chicago resident by a police officer. Westboro Baptist Church alleges that Snyder is a limited-purpose public figure,²¹⁶ but does not show the requisite connection between the Snyders and such matters—simply making the allegation is insufficient.²¹⁷

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The *Restatement (Second) of Torts* reports: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."²¹⁸ This generally translates into a four-part burden of proof. Thus, to succeed in a cause for action for intentional infliction of emotional distress, a plaintiff must prove: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; (4) the emotional distress was severe.²¹⁹

The tort, Smolla writes, evolved to cover facts that would not fit comfortably into other, more traditional legal actions.²²⁰ It serves two purposes, Post writes: "it . . . provides relief for those [who] . . . have been threatened by uncivil behavior, [and] it also serves to safeguard those 'generally accepted standards of decency and morality' that define for us the meaning of life in a 'civilized community.'"²²¹ Therefore, there may be instances when outrageous speech is sufficient for the award of damages, even if the speech is true.²²² Because satire and other forms of commentary

216. Brief for Respondent, *supra* note 29, at 32.

217. Shulman, *supra* note 20, at 332.

218. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

219. See *Hustler*, 485 U.S. at 50 n.3 (citing *Falwell v. Flynt*, 797 F.2d 1270, 1275 n.4 (4th Cir. 1986)).

220. SMOLLA, *supra* note 121, at 72.

221. Post, *supra* note 134, at 624 (internal citations omitted).

222. See Laguzza, *supra* note 13, at 110.

are not intended to be taken literally, however, truth or falsity may be deemed irrelevant to an intentional infliction claim. Under a standard of “outrageousness,” damages could be awarded on the basis of opinion or rhetorical hyperbole, if the speech is particularly heinous and targeted at an individual.²²³ Indeed, in some circumstances, publication is not necessary.²²⁴

Application of the burden of proof for intentional infliction of emotional distress demonstrates that Albert Snyder deserves to win his cause of action against Phelps and the Westboro church.²²⁵

Intentional and Outrageous Conduct

The intentional nature of the conduct of the members of Westboro Baptist Church is without dispute. The church, which has made a practice of picketing the funerals of dead military personnel because members believe such protests to be a particularly effective means of conveying their message,²²⁶ issued a press release and traveled from Kansas to Maryland in order to picket at Matthew Snyder’s funeral.²²⁷

There is little dispute that the activities of the church members were outrageous.²²⁸ They selected signs specifically to target the Snyder funeral—signs that identified the Snyders as living in Maryland—and attacked them because they were Roman

223. See *id.* at 113. See also *State v. Carpenter*, 171 P.3d 41, 56-57 n.44 (Alaska 2007) (noting that statements of opinion are protected unless they constitute harassing conduct).

224. See Bentley, *supra* note 13, at 839.

225. For discussion purposes here, the first two elements of the burden of proof are considered together and the third and fourth elements are considered together.

226. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 359 (6th Cir. 2008).

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

228. The Thomas Jefferson Center for the Protection of Free Expression is one disputant to the proposition. In its brief supporting the Westboro church, the center argues that the picketing was neither extreme nor outrageous. Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. in support of Respondents at 16, *Snyder v. Phelps*, No. 09-751 (U.S. Jul. 14, 2010).

Catholics and because Matthew Snyder was a Marine.²²⁹ A video of their activities, produced by a British journalist and posted on the Internet, demonstrates not only the outrageous behavior of the church members, but their intent to be outrageous.²³⁰

After the protest, the church posted a video on its website attacking Matthew Snyder and his family. Church members may have taken no specific action to draw the attention of Albert Snyder to the posting,²³¹ but that is irrelevant. No one associated with *Hustler* magazine notified Jerry Falwell of the publication or drew his attention to it. One would not expect Falwell to be a reader of *Hustler*, and he became aware of the parody because of questions from a reporter,²³² just as Snyder became aware of the church's activities when he watched a news program. By virtue of publishing the parody, *Hustler* had demonstrated its intent to cause severe emotional distress. Similarly, the highly publicized demonstration followed by the publication of the video on the Internet ensured notice of the attack to millions of people—certainly to more people than the single issue of *Hustler* magazine could reach.²³³

Sufficient evidence exists, therefore, to demonstrate that Westboro intended to attack Snyder through a publication that was clearly outrageous.²³⁴

229. See Petition for Writ of Certiorari, *supra* note 20, at 4. This selection of signs seems to at least establish the likelihood that persons were, indeed, targeted. *Id.* Daniel Solove writes, to the contrary, that Westboro's speech was not "specifically directed at particular individuals." Solove, *supra* note 10.

230. Louis Theroux, *Westboro Baptist Church – World's Most Famous Calvinists (1 of 8)*, <http://www.youtube.com/watch?v=hmIr9P-vkSQ>, YOUTUBE (Aug. 23, 2009)(posting of BBC documentary titled "The Most Hated Family in America").

231. The Thomas Jefferson Center argues that the posting of the video was "entirely lawful," and the church "is not liable for IIED . . . for exercising [its] legal rights in a permissible way." Brief for the Thomas Jefferson Center, *supra* note 228, at 20.

232. See SMOLLA, *supra* note 121, at 1.

233. Though the statistics are now out of date, *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997); provides a nutshell report of how the Court views the Internet and the content distributed thereby.

234. Even some defenders of Westboro's First Amendment rights admit that the contents of the video were outrageous. The amicus brief filed with

Causality – Severe Emotional Distress

A plaintiff in an intentional infliction case must demonstrate severe emotional distress that was caused by the defendant. The element of severe emotional distress is often misinterpreted. Fourth Circuit Judge J. Harvie Wilkinson III, for example, wrote that the intentional infliction tort should not allow for damages “for no other reason than hurt feelings.”²³⁵ Daniel Solove writes that the fact that a person becomes “very upset” by speech “is outweighed by the First Amendment protection of free speech.”²³⁶ And Smolla would support a holding that, in order for damages to be awarded in a speech case, there must be palpable evidence of some harm “other than” emotional distress.²³⁷ Similarly, in an amicus brief to the Fourth Circuit supporting the Westboro church, the Thomas Jefferson Center for the Protection of Free Speech argues that, even though the content of the views expressed may have constituted “extreme and outrageous conduct,” because the claim was “based entirely on a distaste for the Phelps’ views,” the messages should enjoy First Amendment protection.²³⁸

These assessments underestimate the impact of the requisite outrageous conduct. The tort targets speech that is particularly heinous, is directed at an individual, and causes injury considerably greater than “hurt feelings” or a feeling of being “very upset.” The outrageousness of the conduct relates to speech that is much more than “personally unpleasant or disagreeable,”²³⁹ or “mere insults or

the Fourth Circuit by the Thomas Jefferson Center for the Protection of Free Expression reports, “The content of the Phelps website may be considered ‘extreme and outrageous’; however, the act of posting is not.” Brief for the Thomas Jefferson Center, *supra* note 228, at 28. Daniel Solove also wrote that Westboro’s speech “was certainly odious . . . and caused Snyder emotional distress.” Solove, *supra* note 10.

235. *Falwell v. Flynt*, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissenting from the denial of rehearing en banc), *rev’d sub nom.* *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

236. Solove, *supra* note 10.

237. Smolla, *supra* note 15, at 440.

238. Brief for the Thomas Jefferson Center, *supra* note 228, at 30.

239. Post, *supra* note 134, at 625.

offensive messages.”²⁴⁰ The claim is not based on distaste for the message; it is based on the targeted attack on private persons. While it is true that citizens in a free society must tolerate much offensive speech, and damages should not be awarded because of mere offensiveness,²⁴¹ the threshold for intentional infliction of emotional distress extends well beyond those descriptors. The issue is not offensiveness; it is outrageousness.²⁴²

The burden of proof for the tort delineated in the *Restatement*, and expanded by the warning that a reasonable person would exclaim “outrageous” upon learning of the actions of the speaker,²⁴³ demonstrate the rigor of the burden of proof for the tort. The impact of the speech must extend well beyond mere upset feelings, and the actions of the speaker must extend well beyond being simply offensive.²⁴⁴ “Even if a defendant’s conduct is outrageous and intentional,” First Amendment scholar Robert E. Drechsel writes, “liability will not attach unless the emotional distress is severe.”²⁴⁵ The distress “must be far more than minor

240. Solove, *supra* note 10.

241. *See id.*

242. A number of sources mistakenly report that the tort would punish offensive speech, using “offensiveness” as a synonym for “outrageousness.” *See, e.g.*, Brief Amici Curiae of the Reporters Committee for Freedom, *supra* note 199, at 4, 11; Brief of Amici Curiae Scholars of First Amendment Law in support of Respondents at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Jul. 14, 2010); Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 300-303 (2010), http://www.cardozolawreview.com/content/denovo/VOLOKH_2010_300.pdf; Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CAL. L. REV. CIR. 71 (2010), <http://www.californialawreview.org/assets/pdfs/Circuit/wells.pdf>.

243. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977). Even the Thomas Jefferson Center reports that recovery for the tort of intentional infliction of emotional distress is extremely rare. Brief of the Thomas Jefferson Center, *supra* note 228, at 16.

244. *See Bass v. Hendrix*, 931 F. Supp. 523, 531 (S.D. Tex. 1996) (noting that mere insults and hurt feelings are insufficient to sustain liability); *Valadez v. Emmis Commc’ns*, 229 P.3d 389, 394 (Kan. 2010) (“The law will not intervene where someone’s feelings merely are hurt.”).

245. Robert E. Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 345 (1985).

discomfort.”²⁴⁶ Indeed, the Kansas Supreme Court recently held that “the absence of psychiatric or medical treatment . . . weighs against a finding of extreme emotional distress.”²⁴⁷ An award of damages cannot be made, the court held, simply because of “[e]levated fright, continuing concern, embarrassment, worry, and nervousness.”²⁴⁸ The tort “is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.”²⁴⁹ The *Restatement* reports that “[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”²⁵⁰ The Kansas Supreme Court further stated that “[the] conduct must be outrageous to the point that it goes beyond the bounds of decency and is utterly intolerable in a civilized society.”²⁵¹ The speech is being used as a weapon, and, like “false rumors [and] invasions of privacy,” such “direct attacks . . . should be actionable.”²⁵² Rather than being tantamount to firing a warning shot over the head of an individual, it is tantamount to firing that shot at the individual.

Some courts have been slow to allow damage awards in such actions, because emotional distress “is not readily quantifiable and [is] difficult to diagnose objectively.”²⁵³ Robert Post, for example,

246. *Id.* at 346.

247. *Valadez*, 229 P.3d at 395 (citing *Roberts v. Saylor*, 637 P.2d 1175, 1181 (Kan. 1981)).

248. *Id.* See also *Bass v. Hendrix*, 931 F. Supp. at 532 (indicating that symptoms like psychological problems, suicidal tendencies and post-traumatic stress would be required for a finding of severe emotional distress).

249. William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939), quoted in Drechsel, *supra* note 245, at 339.

250. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977).

251. *Valadez*, 229 P.3d at 394.

252. Solove, *supra* note 10.

253. See SMOLLA, *supra* note 121, at 71. See also Drechsel, *supra* note 245, at 340-43 (discussing the historical reluctance of American courts to recognize emotional distress suits, and noting “problems of judicial procedure” as one reason). Drechsel also found that cases involving the media rarely turn on causality or severe emotional distress because plaintiffs have extreme difficulty overcoming the outrageousness standard. *Id.* at 347-48. In many cases, however, severe emotional distress is also an onerous burden to overcome. See, e.g., *Barrett v. Outlet Broadcasting, Inc.*, 22 F.

complains that causality is usually satisfied by the plaintiff's testimony, and neither the burden of causality nor the burden of proving severe emotional distress is onerous: it is "generally satisfied by a plaintiff's simple recitation that he has been upset."²⁵⁴ Post uses Jerry Falwell as an example: "Falwell's mental anguish was minimal, to say the least."²⁵⁵ Rodney Smolla, on the other hand, found "[t]he intensity of Falwell's distress . . . convincing." Falwell testified that he was on the verge of tears and would have likely attacked Flynt had he seen him.²⁵⁶ There "was certainly ample record evidence to affirm the jury award," Smolla wrote.²⁵⁷ Smolla's assessment was based on Falwell's testimony that he had never been so angry as when he saw the parody – anger that continues "[t]o this present moment."²⁵⁸ Yet another scholar found the parody the equivalent of "a psychological battery."²⁵⁹

Regardless of the dispute, evidence of Snyder's emotional distress was even more compelling than that of Falwell. He testified that he is often tearful and angry and becomes so sick that he actually vomits.²⁶⁰ He said he cannot separate thoughts of his son from the signs at the demonstration, and that he believes his emotional injury to be permanent.²⁶¹ The district court judge also reported that Snyder was often "reduced to tears" during the trial, was "visibly shaken and distressed," and was granted the opportunity several times to leave the courtroom "to compose himself."²⁶² "The jury," the judge wrote, "witnessed firsthand

Supp. 2d 726, 749-50 (S.D. Ohio 1997) (finding evidence of severe emotional distress in the case of four out of five plaintiffs); *Valadez*, 229 P.3d at 395 (finding evidence of emotional distress, but not severe emotional distress).

254. Post, *supra* note 134, at 622.

255. *Id.*

256. Smolla, *supra* note 15, at 432.

257. *Id.* at 433.

258. *Id.* at 432.

259. R. George Wright, *Hustler Magazine v. Falwell and the Role of the First Amendment*, 19 CUMB. L. REV. 19, 21, 23-24 (1988).

260. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 588 (D. Md. 2008).

261. *Id.* at 588-89. Much of this description was also quoted by the Fourth Circuit, *Snyder v. Phelps*, 580 F.3d 206, 213 (4th Cir. 2009), *argued*, No. 09-751 (U.S. Oct. 6, 2010).

262. *Snyder*, 533 F. Supp. 2d at 589.

Plaintiff's anguish and the unresolved grief he harbors because of the failure to conduct a normal burial."²⁶³ In addition, expert witnesses testified that Snyder's diabetes had worsened and his depression deepened as a result of the actions by church members, "thereby preventing him from going through the normal grieving process."²⁶⁴

CONCLUSION

The Supreme Court has struck a reasonable balance between the interests of private person libel plaintiffs and the need to protect robust debate about matters of public concern. There is no dispute that libel law is mired with problems in both theory and practice. Differentiating between private and public figures²⁶⁵ and between matters of public and private concern are among those problems.²⁶⁶ Definitional problems aside, however, a strong argument can be made that private persons—however they are defined—should not confront the same onerous burden of proof as public figures or public officials. It's clear that public people voluntarily inject themselves into matters of public concern and part of assuming public person status is the willingness to accept such a risk.²⁶⁷

Private people, on the other hand, are private. Arguably, they sometimes are involuntarily embroiled in matters of public concern, and when that happens, possibly, they should face the

263. *Id.*

264. *Snyder*, 580 F.3d at 213-14.

265. *See Post*, *supra* note 134, at 669 (writing that, although the public official branch of the public person distinction is relatively clear, "the 'public figure' branch is ambiguous, half justified by the notion that speech about public figures is normatively relevant to democratic self-governance, and half by the notion that speech about public figures concerns matters of 'notoriety' that have, in a purely descriptive sense, already caught 'the public's attention'").

266. *See id.* at 670 (writing that the Court itself demonstrated the difficult task of determining what matters are of public concern by rejecting the *Rosenbloom* rule in *Gertz*).

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

same burdens as public persons.²⁶⁸ When they are simply targets, however, it is both unfair and legally illogical to saddle them with the same burdens as public persons, even when the issues used to attack them involve matters of public concern.

The proposition that intentional infliction of emotional distress actions should be barred when they grow from matters of public concern — or that, at a minimum, the actual malice standard should apply to such actions — grows, in part, from the notion that there must be some harm other than emotional distress in order for there to be liability;²⁶⁹ after all, it's only speech. The defense strategy in the *Hustler* case, for example, was to minimize the offending publication, with a kind of, "C'mon, [Jerry], loosen up — can't you take a joke?"²⁷⁰ *Hustler*, to some degree, encouraged the attitude that speech must cause some harm other than emotional distress. A similar attitude — skepticism that words could cause psychological harm — prevailed early in the history of privacy law,²⁷¹ and it needs to be put to rest.

Andrew Bickel argued that speech is too important for such a short shrift: speech matters because it always has consequences.²⁷² "There is such a thing as verbal violence," he writes, "a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated."²⁷³ Such speech "constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible."²⁷⁴

Regardless of whether one accepts Bickel's argument, one foundation of First Amendment jurisprudence is that speech is a significant force in society. As previously noted, speech related to

268. *See id.* at 44-49.

269. *See Smolla, supra* note 15, at 440.

270. *See SMOLLA, supra* note 121, at 21.

271. *See* Samuel A. Terilli, Jr. & Sigman Splichal, *Privacy Rights in an Open and Changing Society*, in *COMMUNICATION AND THE LAW* 301, 303-04 (W. Wat Hopkins ed., 2010 ed.); Drechsel, *supra* note 245, at 340-43.

272. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 72 (1975).

273. *Id.*

274. *Id.*

self-governance is given added protection because of its impact on the marketplace of ideas; some speech is regulated or restricted because it does not contribute to a self-governing function, that is, it does not contribute to the search for truth; speech is so important that even false speech has some freedom in order to protect speech that matters; other speech is prohibited because its very utterance is likely to cause harm or some immediate breach of the peace; speech can be restricted because it is threatening, or, absent a true threat, because it can be intimidating.

Speech can also cause severe emotional distress. The children's ditty that "words will never hurt me" is a fallacy. Words do hurt. Sometimes the hurt is justified and results from a public debate in which participants know the risks. Other times, however, speech is used to target innocent bystanders. When it is, and when the result of the speech is that those bystanders suffer severe emotional distress, they deserve some remedy in law.

The speech of the Westboro Baptist Church is problematic, but *not* because it involves matters of public concern. The speech is *not* utterly without redeeming social value; it is *not* knowingly false; it *may be* speech that matters. Indeed there is some evidence that the activities of the church promote positive speech. Responses in opposition to the church's demonstrations have included welcoming songfests²⁷⁵ and prayer meetings.²⁷⁶ The speech is problematic because it is an intentional, outrageous assault designed to cause severe emotional distress.

The distinction has been made between public and private persons in libel law, and private persons — even when involved in matters of public concern — do not face a heightened burden of proof in order to prevail in libel actions. The same buffer should apply in cases involving intentional infliction of emotional distress. It does not advance the cause of free expression to allow outrageous attacks on private persons who have not entered the fray of public debate. Similarly, as Shulman notes, "[t]he speech-

275. See Brock Keeling, *Lowell HS Students Counter Protest Westboro Church*, SFIST, Jan. 29, 2010, http://sfist.com/2010/01/29/lowell_hs_students_counter_protest.php.

276. See Moxley, *supra* note 2.

based emotional distress suit does not operate to restrict public discourse; it restricts only the use of speech to inflict injury, the use of words as weapons.²⁷⁷

Albert Snyder was not embroiled in debate over a matter of public concern when attacked by the Westboro Baptist Church — he was a mourning father doing no more than attempting to bury his son in peace. That right was denied to him because of the designed efforts of church members to intentionally inflict severe emotional distress upon him. The boundaries of intentional infliction cases should be narrowly drawn, but the Snyder case falls into even the most narrow of those boundaries, and the Supreme Court should say so.

277. Shulman, *supra* note 20, at 336.