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## ***Snyder v. Phelps: A Hard Case That Did Not Make Bad Law***

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## *Snyder v. Phelps*: A Hard Case That Did Not Make Bad Law

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# *Snyder v. Phelps*: A Hard Case That Did Not Make Bad Law

Paul E. Salamanca\*

In *Snyder v. Phelps*,<sup>1</sup> the Court stood by the First Amendment in hard times. A religious group conducted a protest some 1,000 feet from a fallen marine's funeral, holding such pickets as "God Hates the USA," "Thank God for Dead Soldiers," and "You're Going to Hell." Despite the empathy that virtually anyone would feel for the marine's grieving father, the Court held by a vote of eight to one that his action for intentional infliction of emotional distress and intrusion upon seclusion could not survive, owing largely to the public nature of the issues the protesters had raised.<sup>2</sup> "Hard cases," a British judge once wrote, "are apt to introduce bad law."<sup>3</sup> "Great cases," Justice Holmes elaborated, "like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."<sup>4</sup> The "accident of immediate overwhelming interest" at work in *Snyder v. Phelps* was the very real and compelling humanitarian claim presented by that grieving father, Albert Snyder.

As a doctrinal matter, *Snyder* may have involved little more than the application of settled law to difficult facts. More than a dozen

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<sup>1</sup> 131 S. Ct. 1207 (2011).

<sup>2</sup> See *id.* at 1219 (intentional infliction of emotional distress); see also *id.* at 1220 (intrusion upon seclusion).

<sup>3</sup> *Winterbottom v. Wright*, (1842) 152 Eng.Rep. 402, 406; 10 M.&W. 109, 116 (Rolfe, B.).

<sup>4</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). See also Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. Rev. 151, 233 (2008).

times, the Court has recognized that the Constitution protects sharp discourse over matters of public concern. The list of words and phrases it has used to make this point is long. The First Amendment protects “disagreeable” speech,<sup>5</sup> “distasteful” speech,<sup>6</sup> speech that has “profound unsettling effects,”<sup>7</sup> “misguided” speech,<sup>8</sup> “scurrilous” speech,<sup>9</sup> speech that “stirs people to anger,”<sup>10</sup> “unseemly expletive[s],”<sup>11</sup> “four-letter word[s],”<sup>12</sup> “execrations,”<sup>13</sup> “contemptuous” speech,<sup>14</sup> “offensive” speech,<sup>15</sup> “embarrass[ing]” speech,<sup>16</sup> “insulting” speech,<sup>17</sup> “outrageous” speech,<sup>18</sup> even “hurtful” speech.<sup>19</sup> With this language in mind, some of which the Court first used more than 70 years ago, one might plausibly be surprised that the litigation between Mr. Snyder and the church went as far as it did. The answer might lie in the circumstances of the case: a father in grief, a son who gave his life for his country, and a religious group that took advantage of the son’s funeral to express a message that many consider outrageous. The cultural pressure on the Court to uphold the verdict against the church was unquestionably intense. The Court

<sup>5</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning of the flag).

<sup>6</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971) (wearing of a jacket bearing the words “Fuck the Draft” in a courthouse).

<sup>7</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (provocative speech).

<sup>8</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (exclusion of a group from a private parade); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (religious speech).

<sup>9</sup> *Cohen*, 403 U.S. at 22.

<sup>10</sup> *Terminiello*, 337 U.S. at 4.

<sup>11</sup> *Cohen*, 403 U.S. at 23.

<sup>12</sup> *Id.* at 25.

<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Street v. New York*, 394 U.S. 576, 593 (1969) (burning of the flag accompanied by derogatory words relating thereto).

<sup>15</sup> *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (statute prohibiting certain expressive activity within 100 feet of the entrance to a medical facility); *Texas v. Johnson*, 491 U.S. at 414; *Cohen*, 403 U.S. at 23, 25; *Street*, 394 U.S. at 592.

<sup>16</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (boycott of commercial establishments).

<sup>17</sup> *Boos v. Barry*, 485 U.S. 312, 322 (1988) (signs near an embassy that might bring the foreign government into “public odium” or “public disrepute”).

<sup>18</sup> *Id.*

<sup>19</sup> *Hurley*, 515 U.S. at 574.

therefore deserves credit for adhering to previously recognized principles and for not constructing an artificial category to sustain an otherwise desirable result.

To be sure, *Snyder* did break some new ground. For example, the Court may have recast *Hustler Magazine, Inc. v. Falwell*—albeit without being explicit—as a case depending more on the status of the speech at issue therein (a crude parody suggesting that Jerry Falwell had committed incest with his mother) than on Falwell’s status as a public figure.<sup>20</sup> Had *Hustler* depended entirely on Falwell’s status, it would not have supported the holding in *Snyder*, assuming Mr. Snyder was a private figure—an issue the Court did not address.<sup>21</sup> In fact, by the principle of *expressio unius est exclusio alterius* (“to say the one is to exclude the other”), it might have supported a holding against the church.

The Court could have explained exactly why the protest did not fall into any recognized category of unprotected speech, such as fighting words. Instead, it took the incremental tack of reiterating the importance of speech on matters of public concern and putting the protest in that category. In doing this, the Court responded to arguments that the protesters had sought to exploit the funeral for their own benefit and that Mr. Snyder was part of a “captive audience.” In a potentially important development, the Court indicated that merely hitching speech on a matter of public concern to someone else’s wagon, without more, does not exclude it from protection.<sup>22</sup> With respect to captive audiences, the Court may have nudged this doctrine back toward its proper boundaries, where people in public places subjected to speech they find offensive are ordinarily expected to look or walk away.

The following is a brief description and largely positive critique of *Snyder*.

## I. Facts

On March 3, 2006, Marine Lance Corporal Matthew A. Snyder died in the line of duty in Iraq.<sup>23</sup> His father, Albert Snyder, arranged

<sup>20</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>21</sup> Although the Court did not address this issue, Justice Samuel Alito in his dissent twice described Mr. Snyder as a private figure. See *Snyder*, 131 S. Ct. at 1222, 1226 (Alito, J., dissenting).

<sup>22</sup> See *Snyder*, 131 S. Ct. at 1217–18.

<sup>23</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008).

for the funeral to take place on March 10 at St. John's Catholic Church in Westminster, Maryland. Local papers gave notice of the service.<sup>24</sup>

On March 8, members of the Westboro Baptist Church of Topeka, Kansas, founded in 1955 by Fred W. Phelps, announced their intention to travel to Maryland to conduct a protest of the funeral. In fact, they conducted three protests in Maryland, one near the capitol in Annapolis, one near the Naval Academy, and one near the funeral itself.<sup>25</sup>

The funeral procession passed within 200 or 300 feet of the last protest.<sup>26</sup> Although Mr. Snyder could see only the tops of Westboro's signs, and did not learn their contents until he saw them on television that evening,<sup>27</sup> they bore messages that would deeply offend the average citizen, let alone a grieving father. Reflecting their belief that "God hates and punishes the United States for its tolerance of homosexuality, particularly in [its] military,"<sup>28</sup> the signs read: "God Hates the USA/Thank God for 9/11," "America Is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."<sup>29</sup>

The protest took place approximately 1,000 feet from the church, on public land next to a public way, in a plot designated by police. Although the protesters sang hymns and recited verses from the Bible, they did not yell or utter profanities. There was no violence,<sup>30</sup>

<sup>24</sup> In their brief and throughout oral argument, respondents contended or suggested that Mr. Snyder had made himself a public figure by notifying the press about the funeral, by giving interviews to the media about his son, and perhaps by engaging in other expressive activities. See Brief for Respondents at 5–6, 32, Snyder, 131 S. Ct. 1207 (No. 09–751); Transcript of Oral Argument at 32, 34, 36, 39, 40, 51, 52, Snyder, 131 S. Ct. 1207 (No. 09–751).

<sup>25</sup> Snyder, 131 S. Ct. at 1213. See also Brief of Amicus Curiae American Civil Liberties Union et al. at 2, Snyder, 131 S. Ct. 1207 (2011) (No. 09–751).

<sup>26</sup> According to Mr. Snyder, the procession would have passed closer to the protest had it not been rerouted. See Brief for Petitioner at 4, Snyder, 131 S. Ct. 1207 (No. 09–751).

<sup>27</sup> See Snyder, 131 S. Ct. at 1213.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1216–17. "God Hates the USA" and "Thank God for 9/11" were on opposite sides of the same sign. The words "God's View" were opposite the words "Not Blessed Just Cursed." See Brief of Amicus Curiae ACLU, *supra* note 25, at 3.

<sup>30</sup> See Snyder, 131 S. Ct. at 1213.

but there appear to have been a number of people in the area, owing in part to counterprotests against Westboro.<sup>31</sup> The protest lasted about half an hour and ended as the funeral began.<sup>32</sup>

Some weeks later, one of Westboro's members, Shirley L. Phelps-Roper, posted an "epic" on the church's website. In this tract, Ms. Phelps-Roper made pointed criticisms of Mr. Snyder and his ex-wife, specifically that they had "taught Matthew to defy his creator," that they had "raised him for the devil," and that they had "taught him that God was a liar."<sup>33</sup> Mr. Snyder discovered the epic while conducting a search on Google.<sup>34</sup>

On June 5, 2006, Mr. Snyder filed a lawsuit in federal court against Mr. Phelps and the church.<sup>35</sup> He later added Ms. Phelps-Roper and Rebekah A. Phelps-Davis as defendants. Mr. Snyder sought damages on five different theories: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. In October 2007, the district court granted defendants' motion for summary judgment on the claims of defamation and publicity given to private life.<sup>36</sup> The court justified its decision as to defamation on the ground that the epic "was essentially Phelps-Roper's religious opinion and would not realistically tend to expose Snyder to public hatred or scorn."<sup>37</sup> It rejected the claim of publicity given to private life because defendants had not published any information that had previously been private. The case went to the jury on the remaining three claims.

<sup>31</sup> See Brief of Amicus Curiae ACLU, *supra* note 25, at 4, ("More than 20 Patriot Guard Riders . . . carried American flags and stood between Respondents and the church. The Patriot Guard made a 'tunnel' of flags from Mr. Snyder's car to the church entrance. . . .") (citation omitted); see also J. Joshua Wheeler, *The Road Not Taken: How the Fourth Circuit Reached the Right Result for the Wrong Reason in Snyder v. Phelps*, 2010 Cardozo L. Rev. de novo 273, 277–78 (2010) ("An organized group of motorcycle riders. . . . were stationed at two places during the funeral service, both of which were closer to the church than the location of the Phelps protest.").

<sup>32</sup> See Snyder, 131 S. Ct. at 1213; Brief of Amicus Curiae ACLU, *supra* note 25, at 3; Brief for Respondents, *supra* note 24, at 8.

<sup>33</sup> Snyder, 533 F. Supp. 2d at 572.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Jurisdiction rested on diversity of citizenship.

<sup>36</sup> *Id.* Mr. Snyder did not seek review of these decisions. See Snyder v. Phelps, 580 F.3d 206, 213 n.3 (4th Cir. 2009).

<sup>37</sup> *Id.* at 572–73. The claim for defamation appears to have depended entirely on the epic.

The jury then brought in a plaintiff's verdict of \$10.9 million, including \$2.9 million in compensatory and \$8 million in punitive damages.<sup>38</sup> Although the court rejected most of defendants' motions after trial, it did reduce punitive damages to \$2.1 million, making the total award \$5 million.<sup>39</sup>

The Fourth Circuit Court of Appeals reversed, concluding that Westboro's speech addressed matters of public concern,<sup>40</sup> made no assertions that were susceptible to proof or disproof,<sup>41</sup> and consisted largely of "rhetorical hyperbole and figurative expression."<sup>42</sup>

The Supreme Court affirmed, in an opinion written by Chief Justice John Roberts and joined by every member of the Court except Justice Samuel Alito (with Justice Stephen Breyer writing a short concurring opinion). The Court divided its analysis into two parts, one relating to Mr. Snyder's claim for intentional infliction of emotional distress<sup>43</sup> and another relating to his claim for intrusion upon seclusion.<sup>44</sup>

## II. The Court Precludes Recovery for Intentional Infliction of Emotional Distress

In the first analytical part of *Snyder*, the Court devoted much of its attention to reiterating the importance of speech on matters of public concern, allocating the signs to this category, and defending

<sup>38</sup> *Id.* at 573.

<sup>39</sup> *Id.* at 597.

<sup>40</sup> *Snyder*, 580 F.3d at 222–23.

<sup>41</sup> *Id.* at 223.

<sup>42</sup> *Id.* at 224. Judge Dennis Shedd concurred in the judgment, concluding that Mr. Snyder had not satisfied the elements of either intentional infliction of emotional distress or intrusion upon seclusion under Maryland law. See *id.* at 227 (Shedd, J., concurring in the judgment). The majority rejected this tack on the ground that the appellants had not presented it for review. See *id.* at 216–17. The Supreme Court acknowledged Judge Shedd's view but assumed for the sake of argument that the protest would constitute a tort. See *Snyder*, 131 S. Ct. at 1215 n.2. In his dissent, Justice Alito emphatically maintained that Mr. Snyder had made out a proper claim for intentional infliction of emotional distress. See *id.* at 1223 (Alito, J., dissenting) ("Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here.").

<sup>43</sup> See *Snyder*, 131 S. Ct. at 1215–19 (Part II).

<sup>44</sup> See *id.* at 1219–20 (Part III).



this allocation against Mr. Snyder's most salient objections.<sup>45</sup> Although this part ran to only 19 paragraphs, the Court devoted at least 13 of them to this one issue. As the Court explained, speech on matters of public concern "is the essence of self-government" in a democracy, where the people themselves are the ultimate source of authority.<sup>46</sup> Quoting previous cases, the Court then gave a broad conception of such speech. "Speech deals with matters of public concern," wrote the Chief Justice, "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"<sup>47</sup> The Court then explained that whether speech pertains to public or private matters depends on its "content, form, and context," "as revealed by the whole record,"<sup>48</sup> and that courts have a duty to conduct "an independent examination" of the record to ensure that the principles of free speech are protected.<sup>49</sup>

The Court applied that precedent to the protest, beginning with the signs' content. Although most would reject Westboro's theology, the Court properly recognized that the signs spoke to matters of public importance—"the political and moral conduct of the United States and its citizens, the fate of our nation, homosexuality in the military, and scandals involving the Catholic clergy."<sup>50</sup>

The Court then turned to Mr. Snyder's objections. He had argued that at least some of the signs, particularly those that included the

<sup>45</sup> The Court rendered its decision without reference to the epic, concluding that petitioner had not presented it for review. See Snyder, 131 S. Ct. at 1214 n.1.

<sup>46</sup> *Id.* at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

<sup>47</sup> *Id.* at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam)) (internal citations omitted).

<sup>48</sup> *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (opinion of Powell, J.) (quoting *Connick*, 461 U.S. at 761)) (internal quotation marks omitted).

<sup>49</sup> *Id.* (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 284–86 (1964))). At this point in the opinion, the need at least for a remand became obvious, because the Maryland district court had allowed the jury to decide whether the First Amendment protected at least some of the signs. See Snyder, 533 F. Supp. 2d at 578 ("While signs expressing general points of view are afforded . . . protection," the court wrote, certain other signs, "which could be interpreted as being directed at the Snyder family, created issues for the finder of fact.").

<sup>50</sup> Snyder, 131 S. Ct. at 1217.

word “you,” referred directly to his son or his family as a whole and therefore spoke only to private matters.<sup>51</sup> He also argued that speech on a matter of public concern loses some of its protection when it is attached to an event like the funeral.<sup>52</sup> Even if the factual premises underlying these arguments were valid, the Court said, they did not lessen the protest’s claim to protection, given both its “overall thrust and dominant theme” and its location “on public land next to a public street.”<sup>53</sup> In other words, the Court indicated, the fact that speech takes place in a traditional public forum renders more likely its status as speech on a matter of public concern. By taking this tack, the Court was able to pretermitt the issue of whether the signs “related to” the Snyders.<sup>54</sup> It was also able to concede that Westboro had set up its protest in “connection” or “conjunction” with the funeral.<sup>55</sup> “There is no doubt,” wrote the Chief Justice, “that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder’s funeral to increase publicity for its views and because of the relation between those sites and its views . . . .”<sup>56</sup>

Although the Court acknowledged the pain the protest must have caused Mr. Snyder, it nevertheless refused to allow his claim for intentional infliction of emotional distress to go forward.<sup>57</sup>

<sup>51</sup> See Brief for Petitioner, *supra* note 26, at 36 (“The [Fourth Circuit] declined to analyze whether the Phelps’s numerous other signs, including those saying, ‘You’re Going to Hell’ and ‘God Hates You,’ raised a matter of public concern, despite acknowledging that the signs could reasonably be interpreted as targeted specifically at Mr. Snyder.”). Justice Alito emphasized this point in his dissent. See Snyder, 131 S. Ct. at 1226 (Alito, J., dissenting) (“[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder.”).

<sup>52</sup> See Brief for Petitioner, *supra* note 26, at 40 (“[E]ven matters of ‘public concern’ lose some of their protection when interjected into the context of a private funeral.”).

<sup>53</sup> Snyder, 131 S. Ct. at 1217.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 1217–19. At this point, the Court might also have explained why Mr. Snyder’s likely status as a private figure did not put the protest outside the First Amendment. See *infra* notes 72–82 and accompanying text for a discussion of this issue.

### III. The Court Precludes Recovery for Intrusion upon Seclusion

The Court then turned to Mr. Snyder's claim for intrusion upon seclusion, with particular reference to his contention that he was part of a "captive audience" at his son's funeral.<sup>58</sup> In making this argument, Mr. Snyder relied on a line of cases in which the Court had held that the First Amendment does not protect speech that invades a "substantial privacy interest . . . in an essentially intolerable manner."<sup>59</sup> The difficulty with such precedent is always in the details, of course. But the Court made relatively short work of this issue, resolving it in only five paragraphs.<sup>60</sup> It began by emphasizing a salutary rule of default, that people in public places subjected to speech they dislike have a presumptive duty to avert their eyes (from a visual message) or walk away (from an aural message). "In most circumstances," wrote the Chief Justice, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather," he continued, "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."<sup>61</sup> The Court then described the doctrine of captive audiences as one "applied . . . only sparingly," giving two examples of its application to the home.<sup>62</sup> It then refused to apply this narrow doctrine to Mr. Snyder's situation, rendering his claim for intrusion upon seclusion untenable.<sup>63</sup>

<sup>58</sup> See Brief for Petitioner, *supra* note 26, at 45 ("Even assuming . . . that the Phelps' speech alone would be entitled to First Amendment protection in other circumstances, Mr. Snyder is entitled to governmental protection from the Phelps' conduct because he was a captive audience at his son's funeral.").

<sup>59</sup> Cohen, 403 U.S. at 21.

<sup>60</sup> See Snyder, 131 S. Ct. at 1219–20 (Part III).

<sup>61</sup> *Id.* at 1220 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975)) (brackets original) (quotation marks omitted).

<sup>62</sup> See *id.* (citing *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (delivery of offensive mail to the home); citing and quoting *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (pickets "before or about" a residence)).

<sup>63</sup> See Snyder, 131 S. Ct. at 1220. Mr. Snyder's claim for civil conspiracy, on which the jury had also found in his favor, required liability for at least one substantive tort. Because the First Amendment was a bar to both intentional infliction of emotional distress and intrusion upon seclusion, the Court held that Mr. Snyder could not recover on this claim. See *id.*

#### IV. The “Outrageousness” of Speech Should Not Exclude It from Protection

In *Snyder*, the Court stood by its own precedent in difficult circumstances, which is the test of any principle. The First Amendment would not be worth much if it gave way when *truly* unpopular speech were at issue,<sup>64</sup> and practitioners will now have *Snyder* as an example of how far the Constitution extends in protecting unpalatable speech. The Court also deserves credit for not constructing an artificial category to sustain the verdict in favor of Mr. Snyder. Any such category would have had porous walls and therefore would have posed a threat to free expression.

Take, for example, the basic argument that “outrageous” speech is a category with real contours that public servants and juries can administer without regard to point of view. This task is virtually, if not literally, an impossible one for human beings.<sup>65</sup> “‘Outrageousness,’” the Court correctly observed, “is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”<sup>66</sup> As Chief Justice William Rehnquist wrote in *Hustler*, if the Court there could have laid down “a principled standard” to distinguish *Hustler*’s parody from Thomas Nast’s cartoons, “public discourse would probably [have] suffer[ed] little or no harm.” “But we doubt that there is any such standard,” he went on to say, “and we are quite sure that the pejorative description ‘outrageous’ does not supply one.”<sup>67</sup> The Court in *Snyder* was therefore on solid ground in holding that the nature of the protest was no bar to protection. In fact, the Court quite properly observed that, had others stood next to Westboro with such pickets as “God Bless America” and “God Loves You,” liability would not have attached.<sup>68</sup>

<sup>64</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 446–47 (1969) (per curiam) (speech at a meeting of the Ku Klux Klan that included extensive racial epithets). See also Brief of Amicus Curiae Reporters Committee for Freedom of the Press et al. at 12–14, *Snyder*, 131 S. Ct. 1207 (No. 09–751).

<sup>65</sup> See generally Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 Cardozo L. Rev. de novo 300, 308 (2010).

<sup>66</sup> *Snyder*, 131 S. Ct. at 1219 (quoting *Hustler*, 485 U.S. at 55).

<sup>67</sup> *Hustler*, 485 U.S. at 55.

<sup>68</sup> *Snyder*, 131 S. Ct. at 1219.

The principle of avoiding malleable tests appeared throughout *Snyder*, not just in the context of “outrageous” speech. Whether speech is directed at another person is also a matter of degree. Outside the context of fighting words, which merits distinct attention,<sup>69</sup> a large volume of powerful speech can be seen as “directed” toward someone, rendering the presence or absence of “direction” a weak limiting principle from the point of view of free speech. Imagine, for example, a university that conferred degrees in a discipline sincerely believed by a small group to be frivolous. Imagine as well a protest of its graduation with such pickets as “This Place Is a Joke,” “You Never Studied,” or “You Learned Nothing.” The graduates may well find the signs “outrageous” and see them as “directed” toward them. This cannot be enough to render the First Amendment inapplicable. Human beings are social beings, and much of what they do is bound up with matters of public concern. Mere “relation to” another person, without more, should not exclude speech on a matter of public concern from protection. The Court was thus correct not to find this point dispositive.<sup>70</sup>

Much the same can be said with respect to the question of taking advantage of another’s event for expressive purposes. At first impression, such speech truly does come across as opportunistic and perhaps even obnoxious. “This is my graduation,” one might say. But again we find ourselves with a principle that potentially includes so much that it would inevitably facilitate uneven application and discrimination according to point of view. Speech is most powerful when given at the right place and time. Effective speech will often exploit some other event. The Gettysburg Address is one of the most famous speeches ever given on our nation’s soil. Its power arose in part from its location, its proximity in time to the battle, and the blood that had earned the site its special significance. We can surely assign a positive valence to the principles Lincoln articulated in 1863 that virtually all would deny to Westboro’s signs, but that contrast should be irrelevant to the scope of protection. The

<sup>69</sup> See *infra* notes 123–30 and accompanying text.

<sup>70</sup> See *Snyder*, 131 S. Ct. at 1217 (“[E]ven if a few of the signs . . . were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”).

Court was therefore on solid ground in finding this issue as well non-dispositive.<sup>71</sup>

For similar reasons, the Court was correct not to allow Mr. Snyder's likely status as a private figure to affect its conclusion. In addition to arguing that speech directed to another or that exploits the event of another deserves minimal protection, Mr. Snyder had also argued that the First Amendment should strike a different balance where the audience of harsh language is a private figure. "Where . . . a private figure has not linked himself to an issue of public concern," he maintained, "the state's interest in protecting the private figure should outweigh an attacker's First Amendment right to publicly hurl epithets in his direction."<sup>72</sup>

In making this argument, Mr. Snyder had some wind at his back. In its jurisprudence on defamation and the First Amendment, for example, the Court has emphasized the status of the plaintiff. Thus, a public official or figure seeking to recover for defamation must establish not only that the statement was false but also that the defendant acted with "actual malice"—"knowledge" that the statement was false or "reckless disregard" as to its accuracy.<sup>73</sup> This requirement holds true without regard to the relief sought. For private plaintiffs, however, the rules are different. If the statement pertains to a matter of public concern, a private plaintiff can obtain compensatory damages for defamation by establishing falsity and a degree of fault short of actual malice, such as negligence.<sup>74</sup> In addition, if the statement pertains to a matter of *private* concern, a private plaintiff potentially can obtain any form of relief, whether or not he or she can establish actual malice.<sup>75</sup> The Court has justified its differential treatment of public and private figures on two grounds. First, public figures presumably have greater access to the media to defend themselves and thus less need to vindicate themselves in court.<sup>76</sup> Second, public figures choose to enter the

<sup>71</sup> See *id.* at 1217–18.

<sup>72</sup> Brief for Petitioner, *supra* note 26, at 34.

<sup>73</sup> *N.Y. Times*, 376 U.S. at 279–80.

<sup>74</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

<sup>75</sup> See *Dun & Bradstreet*, 472 U.S. at 761 (plurality).

<sup>76</sup> See *Gertz*, 418 U.S. at 344.

maelstrom of debate and thus can be seen in purely normative terms as less deserving of the courts' protection.<sup>77</sup>

Despite this jurisprudence on defamation, however, Mr. Snyder's best support arguably lay in *Hustler Magazine, Inc. v. Falwell*, a decision from 1988 that actually involved a claim for intentional infliction of emotional distress.<sup>78</sup> *Hustler* arose from a parody of an advertisement for Campari Liqueur. In a feigned interview, the magazine had Falwell describing "a drunken incestuous rendezvous with his mother in an outhouse."<sup>79</sup> Per Chief Justice Rehnquist, the Court foreclosed the claim unless Falwell, clearly a public figure, could establish the same kind of "actual malice" on the magazine's part as would be required to sustain a claim for defamation.<sup>80</sup> Because the parody was too hyperbolic to be credible, this exception was essentially a throw-away, leaving a public figure like Falwell at the mercy of such caricatures.

That case was arguably strong precedent for Mr. Snyder. If *Hustler* relied entirely on Falwell's status as a public figure, and if Mr. Snyder could establish that he was not such a figure, logic might suggest that his action should proceed. Here, the Court was perhaps called on to reconcile two lines of precedent: on the one hand, its many recognitions over the years that the Constitution protects sharp words in public discourse, and on the other, its apparent emphasis in *Hustler* on the status of the plaintiff. Although it did not resolve this issue explicitly in *Snyder*, between the lines it may have recast *Hustler* as extending to all claims arising from speech on a matter of public concern, even if the plaintiff is a private figure. If so, Mr. Snyder's likely status as a private figure mattered only in determining whether the protest spoke to an issue of public concern. As the Court observed, however, "even if a few of the signs . . . were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."<sup>81</sup>

<sup>77</sup> See *id.*

<sup>78</sup> 485 U.S. 46 (1988).

<sup>79</sup> *Id.* at 48.

<sup>80</sup> See *id.* at 56.

<sup>81</sup> *Snyder*, 131 S. Ct. at 1217.

Whatever the Court's exact analysis, it was correct not to allow Mr. Snyder's status to dictate the holding of the case. Private figures are often implicated in debates on public issues. Consider again the hypothetical university conferring degrees in a discipline thought by some to be frivolous. The graduates themselves would almost certainly be private figures.<sup>82</sup>

## V. The "Captive Audience" Should Be a Narrow Category

As many have observed, the Court's jurisprudence on the question of captive audiences has not been entirely coherent.<sup>83</sup> At times, it has adhered to the idea that a captive audience is one that literally cannot avoid a particular form of expression. Thus, in *Kovacs v. Cooper*, the Court upheld a law that forbade individuals from operating trucks that emitted "loud and raucous noises" on public ways, due to the inability of those nearby to ignore such noises.<sup>84</sup> Likewise, in *Grayned v. City of Rockford*, the Court upheld restrictions on "[n]oisy" and "disrupt[ive]" protests near schools in session.<sup>85</sup> Applying the same principle to reach the opposite conclusion, the Court in *Cohen v. California* famously vacated a conviction for disturbing the peace of a man who had worn a jacket bearing the words "Fuck the Draft" in a courthouse.<sup>86</sup> "[P]ersons confronted with Cohen's jacket," wrote Justice Harlan by way of distinguishing *Kovacs*, "were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."<sup>87</sup>

Other cases followed in the same vein. In *Erznoznik v. City of Jacksonville*, the Court struck down an ordinance that prohibited

<sup>82</sup> See Volokh, *supra* note 65, at 305 ("[T]he category of private figures includes many people—civil rights lawyers, authors, civic group officers, professors, criminals, and more—who are involved with matters of public concern."); see also *id.* ("Even the speech in *Hustler* could easily have inflicted emotional distress on Falwell's mother, had she been alive at the time.").

<sup>83</sup> See, e.g., Wells, *supra* note 4, at 156.

<sup>84</sup> 336 U.S. 77, 78 (1949) (plurality) (quoting the ordinance).

<sup>85</sup> 408 U.S. 104, 120 (1972).

<sup>86</sup> 403 U.S. 15, 26 (1971).

<sup>87</sup> *Id.* at 21.



nude images from the screens of drive-ins visible from a public way, on the ground that people could simply look away.<sup>88</sup> Similarly, in *Madsen v. Women's Health Center, Inc.*, the Court invalidated part of an injunction that prohibited protesters from displaying images outside a medical clinic that could be seen by patients inside.<sup>89</sup> In reaching this conclusion, the Court took the sensible position that the clinic could simply "pull its curtains."<sup>90</sup>

On the other hand, the Court has also upheld various restrictions without regard to whether the audience could just avert its eyes or walk away. In *Frisby v. Schultz*, for instance, it upheld an ordinance that prohibited prolonged pickets in front of a single residence, even though the occupants could presumably close their blinds.<sup>91</sup> Similarly, in *Rowan v. Post Office Department*, the Court upheld a statute that authorized people to specify erotic material that they did not want to receive in the mail, even though they could simply take one look at it and throw it away.<sup>92</sup> Perhaps the most extreme case in this vein was *Lehman v. City of Shaker Heights*, where the Court upheld a city's refusal to carry advertisements for political campaigns inside its municipal buses, despite patrons' ability to sit or look elsewhere.<sup>93</sup> Finally, in *FCC v. Pacifica Foundation* the Court upheld a reprimand against Pacifica for its broadcast of George Carlin's "Seven Dirty Words" over the radio during the day.<sup>94</sup> Although someone could certainly have averted his or her ears by turning off the radio after the broadcast began, Justice John Paul Stevens rejected this option, analogizing it to "saying that the remedy for an assault is to run away after the first blow."<sup>95</sup>

This second line of decisions is problematic. When the Court expands the concept of a "captive audience" beyond the bounds of

<sup>88</sup> 422 U.S. 205 (1975).

<sup>89</sup> 512 U.S. 753, 773 (1994).

<sup>90</sup> *Id.* The Court upheld other parts of this injunction, however. See *id.* at 770 (prohibition on pickets in certain areas); *id.* at 772–73 (prohibition on noise). The Court justified the ban on pickets as a means of protecting access. The ban on loud noises reflected the teaching of *Kovacs*.

<sup>91</sup> 487 U.S. 474, 488 (1988).

<sup>92</sup> 397 U.S. 728, 737–38 (1970).

<sup>93</sup> 418 U.S. 298, 304 (1974) (plurality).

<sup>94</sup> 438 U.S. 726, 750–51 (1978).

<sup>95</sup> *Id.* at 748–49.

someone who literally cannot avoid the speech at issue, it adopts a construction of “captivity” that arguably allocates too much authority to the audience. That is, instead of protecting an unwilling listener from hearing something that he or she simply cannot avoid, the Court grants that person an ability to restrict all speech within his or her zone that he or she finds offensive—however that zone may come to be defined.

There is abstract merit to this construction of “captivity,” but not enough to matter. As Robert Nozick argued, our sensibilities are more fully implicated in a community than across an entire country. “In a nation,” he wrote, “one knows that there are nonconforming individuals, but one need not be directly confronted by these individuals or by the fact of their nonconformity. Even if one finds it offensive that others do not conform,” he went on, “even if the knowledge that there exist nonconformists rankles and makes one very unhappy, this does not constitute being harmed by the others or having one’s rights violated.” But, he concluded, “in a face-to-face community one cannot avoid being directly confronted with what one finds to be offensive. How one lives in one’s immediate environment is affected.”<sup>96</sup> In other words, people will often feel better if their daily movements and transactions do not bring them into contact with ways of life and forms of expression that they find unorthodox and unsettling.

This utopian vision has intuitive appeal. Indeed, it may be compelling with respect to private property owned by people who prefer harmony over cacophony. But it has never found support in our cases with respect to public property, especially such traditional public forums as streets, walks, and parks—and rightly so. Given our pluralistic culture, our belief that answers come from unexpected directions, and our inveterate mistrust of the censor’s hand—who, after all, is always a human being—we have properly eschewed the idea that the government or any group of citizens can edit the content of expression in a public place for the sake of decorum or the protection of sensibilities. As Justice Oliver Wendell Holmes once wrote, “time has upset many fighting faiths.” “[T]he best test of truth,” he added, “is the power of the thought to get itself accepted

<sup>96</sup> Robert Nozick, *Anarchy, State, and Utopia* 322 (1974).

in the competition of the market. . . .”<sup>97</sup> “The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed,” observed Justice Anthony Kennedy. “[T]hese judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”<sup>98</sup>

At least some of the variant precedent described above can be defended on alternate grounds. *Frisby*, for example, can perhaps be defended on the ground that an omnipresent protest in front of one’s house implicates the physical security of oneself and one’s family. Arguably, few heads of household would relax knowing that someone was continually present just outside. In a completely different context, the Court has observed that being able to maintain control over the proximity of others is causally related to physical security.<sup>99</sup> On balance, however, this approach may not prove persuasive. After all, many people live on streets full of pedestrians, and even a Hyde Park of the United States may have neighbors.<sup>100</sup>

*Frisby* might also be defended on the ground that the home is unique, the “last citadel of the tired, the weary, and the sick.”<sup>101</sup> (The Fourth Amendment also provides a textual hook.) This approach might also go some way to explain *Pacifica* and *Rowan*. The problem here is that empiric categories are inevitably porous at their outer edges. At one time, many might have put the Pledge of Allegiance in a unique juridical category,<sup>102</sup> or the flag.<sup>103</sup> Mr.

<sup>97</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>98</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

<sup>99</sup> See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (identifying “the need to protect the security of embassies” as a potentially valid basis for regulating protests near such buildings); see also *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) (observing that, were the city to exact a “permanent recreational easement” along the edge of Dolan’s property, she would “lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store”).

<sup>100</sup> I refer, of course, to London’s famous public green, not our current president’s formative Chicago neighborhood.

<sup>101</sup> 487 U.S. at 484 (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

<sup>102</sup> See *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>103</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

Snyder might well have seen the venue for his son's funeral as comparably special.<sup>104</sup>

The Court might have used *Snyder v. Phelps* as a vehicle for clarifying this area of the law. For example, it could have adopted the position that a captive audience is one that literally cannot avoid particular speech, and that Mr. Snyder was not such a person. The latter, minor premise is certainly true, as Mr. Snyder did not have to look at the Phelpses' signs, nor in fact was he able to, according to his own testimony, until he saw them on television after both the protest and the funeral were over. Instead of adopting such an aggressive approach, however, the Court simply recognized the concept of a captive audience and held that, whatever its contours, it did not embrace Mr. Snyder's situation.<sup>105</sup>

The Court provided some guidance on captive audiences. Along with describing the doctrine as one it applies only "sparingly,"<sup>106</sup> the Court also reiterated the important language from *Erznoznik* (quoting *Cohen*) that "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."<sup>107</sup> Recognizing aversion as a default emphasizes the primacy of the approach taken by such cases as *Kovacs*, *Cohen*, *Grayned*, *Erznoznik*, and parts of *Madsen*, to the effect that a captive audience is one that cannot avoid being subject to unwanted speech either by looking or walking away. On the other hand, the Court cited *Frisby* and *Rowan* with approval, confirming their validity as precedent.<sup>108</sup>

The Court also referred to *Frisby* and *Madsen* in its analysis of Mr. Snyder's claim for intentional infliction of emotional distress. There are "a few limited situations," the Chief Justice wrote, "where the

<sup>104</sup> See *Snyder*, 131 S. Ct. at 1227–28 (Alito, J., dissenting) ("[F]unerals are unique events. . . ."). But see Wells, *supra* note 4, at 231 ("Extending the *Frisby* rationale to funeral services because they are particularly unique [is] a mistake. One can make that claim about a host of events, ranging from graduation ceremonies to weddings and bar mitzvahs.").

<sup>105</sup> *Snyder*, 131 S. Ct. at 1220 ("We decline to expand the captive audience doctrine to the circumstances presented here.").

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975)) (brackets in the original).

<sup>108</sup> See *id.* (citing *Frisby*, 487 U.S. at 484–85; *Rowan*, 397 U.S. at 736–38).

location of targeted picketing can be regulated under provisions the Court has determined to be content neutral.”<sup>109</sup> He then gave the ban on “picketing ‘before or about’ a particular residence” from *Frisby* and the “buffer zone between protesters and an abortion clinic entrance” from *Madsen* as examples.<sup>110</sup> This language is important both for what it says and for what it does not say. The Court obviously wrapped its arms around *Frisby*. On the other hand, by giving *Madsen* and not the later case of *Hill v. Colorado* as an example of a valid regulation of protests near a clinic, the Court may have suggested a subtle retreat from the latter precedent.

In *Hill*, the Court upheld a Ptolemaic bubble around people within a certain radius of the entrance to a medical facility.<sup>111</sup> Specifically, the cycle was within 100 feet of the door, and the epicycle was within eight feet of the person.<sup>112</sup> The Court justified its holding on the ground that the statute was neutral as to content and satisfied the test applicable to such regulations—that it served a significant public interest, was narrowly tailored, and left open ample alternative channels of communication.<sup>113</sup> Some of the Court’s language, however, was quite broad.<sup>114</sup> For example, it suggested that the state’s interest in the health and safety of citizens might allow a “special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.”<sup>115</sup> Preventing impediments to “access” is an obvious regulation of the place or manner of speech,<sup>116</sup> but preventing “trauma” appears to serve interests both related and unrelated to content. A loud noise or rapid approach could certainly be “traumatic” without regard to content, reflecting the general approach of *Kovacs*, but so too could a peaceful message that a person simply does not want to hear.

<sup>109</sup> *Id.* at 1218.

<sup>110</sup> *Id.* (quoting *Frisby*, 487 U.S. at 477; *Madsen*, 512 U.S. at 768).

<sup>111</sup> See *Hill v. Colorado*, 530 U.S. 703, 730 (2000).

<sup>112</sup> See *id.* at 707.

<sup>113</sup> See *id.* at 725–26. The statute allowed some approach within the bubble, giving some support to the argument that it was not in fact neutral as to content. See *id.* at 742 (Scalia, J., dissenting).

<sup>114</sup> See generally Wells, *supra* note 4, at 208–12.

<sup>115</sup> *Hill*, 530 U.S. at 715.

<sup>116</sup> See *Boos*, 485 U.S. at 321.

The Court also sought to justify the bubble as a device to “protect listeners from unwanted communication,”<sup>117</sup> thus implying that a person can be a part of a “captive audience” in a public place 100 feet from the entrance to a clinic. Almost certainly, however, people do not have “substantial privacy interests,” as per *Cohen*,<sup>118</sup> in a bubble 16 feet wide in a public place 100 feet from a clinic or hospital, absent a prophylactic need, demonstrated in the circumstances of the case, to prevent loud noises or other forms of unprotected expressive activity.<sup>119</sup> Perhaps the Court’s decision in *Snyder* not to cite *Hill* portends a willingness to retreat from the breadth of *Hill*’s language.

## VI. Going Forward

Under such precedent as *Madsen* and *Hill*, the Court has allowed lower courts and legislatures to forbid certain forms of speech in close proximity to medical clinics. If the Court stands by these decisions, a legislature perhaps may impose similar limits on protests very near funerals. Various scholars have made this observation,<sup>120</sup> and the Court in *Snyder* was careful to reserve this issue.<sup>121</sup> The question then arises whether expressive activity that would violate such restrictions would give rise to an action for intentional infliction of emotional distress or intrusion upon seclusion. Perhaps so. There is general parity between what the government may forbid in the first instance and what a jury may later deem tortious.<sup>122</sup>

Such a conclusion may depend on the presence or absence of some form of unprotected conduct or expression, such as “fighting words.”

<sup>117</sup> *Hill*, 530 U.S. at 715–16.

<sup>118</sup> 403 U.S. at 21.

<sup>119</sup> See *Hill*, 530 U.S. at 761 (Scalia, J., dissenting); see generally Wells, *supra* note 4, at 212 (raising this general issue).

<sup>120</sup> See, e.g., Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 612 (2006–2007) (“Is it possible to enact a constitutional funeral picketing law? The short answer is yes.”); *id.* at 601 (reading *Frisby*, *Madsen*, and *Hill* to indicate that a buffer around funerals “may be permissible for purposes such as limiting noise and ensuring ingress and egress, but not simply to prevent persons from seeing messages or images that they may find disturbing or offensive”); Wells, *supra* note 4, at 231 (“What then can states do to protect mourners’ privacy at funerals? More than many people realize given the seemingly all or nothing manner in which this debate has been framed.”).

<sup>121</sup> See *Snyder*, 131 S. Ct. at 1218.

<sup>122</sup> See *N.Y. Times*, 376 U.S. at 265.

The original and perhaps sole justification for excluding such words from the ambit of the First Amendment was to prevent immediate breaches of the peace. By the Court's analysis, "fighting words" are words so insulting, both in content and delivery, that they are likely to induce the listener to violence.<sup>123</sup> The immediacy of this reaction explains why more speech or better speech cannot serve as the antidote for bad speech. To the extent it has taken this approach, the Court has adopted for fighting words the same justification it has used for excluding incitement from constitutional protection.<sup>124</sup>

But query whether *Madsen* and *Hill* depend entirely on this justification. To some extent, of course, they reflect a simple concern with access to places where people have a lawful right to be, a concern neutral as to content and therefore unobjectionable if drawn with enough precision. A corresponding civil action for some kind of trespass might therefore have been available in these cases.<sup>125</sup> But both *Madsen* and *Hill* appear to go beyond such concerns in their analysis, taking up the legal status of words that do not literally deny access. Query further, then, whether the Court would allow civil liability for non-impeding, expressive activity that would be subject to one of the restrictions upheld in these cases, and if so, on what theory.

This issue arose during the oral arguments in *Snyder*. In particular, some of the justices asked whether "fighting words," as a category of unprotected speech, could only be directed to an individual literally capable of resorting to violence.<sup>126</sup> The justices also asked whether

<sup>123</sup> See *Cohen*, 403 U.S. at 20 (defining "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); *Street*, 394 U.S. at 592; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

<sup>124</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>125</sup> See generally Prosser and Keeton on the Law of Torts 47 (W. Page Keeton gen. ed.) (5th ed. 1984).

<sup>126</sup> Transcript of Oral Argument, *supra* note 24, at 32:

JUSTICE ALITO: Well, it's an older—it's an elderly person. She's really probably not in—in a position to punch this person in the nose.

JUSTICE SCALIA: And she's a Quaker, too.

persistent following, stalking, or harassment might support liability.<sup>127</sup> Although the Phelps' counsel denied that any such activity, expressive or otherwise, was at issue in the case,<sup>128</sup> and the Court later confirmed the absence of such activity,<sup>129</sup> the justices' questions certainly support the conclusion that a case that did present fighting words or the like could support liability. In fact, Justice Breyer was quite clear in his concurrence that the First Amendment would not protect a message communicated via fighting words.<sup>130</sup>

## Conclusion

In *Snyder*, the Court took the modest tack of identifying a category of protected speech—speech on a matter of public concern—and refusing to make an exception to that category for Westboro's protest. The Court was therefore justified in describing its holding as "narrow." This approach has the advantage of being minimalist, which a court would undoubtedly prefer in a case with strong cultural implications. On the other hand, this approach perhaps has the disadvantage of creating false implications about the scope of unprotected speech.

When a court starts by defining a category of unprotected expression, it suggests that speech outside the category is protected, unless it falls into yet another category of unprotected expression. The default, thus, is protection, or at least presumptive protection. (The government may regulate even protected speech if it can satisfy "strict scrutiny" by showing that the regulation is necessary and narrowly tailored to serve a compelling public interest, with no less

<sup>127</sup> See *id.* at 27 (question by Justice Kagan) ("Ms. Phelps, suppose—suppose your group or another group or—picks a wounded soldier and follows him around . . . . Does that person not have a claim for intentional infliction of emotional distress?"); *id.* at 43 (remark by Justice Kennedy) ("But . . . the hypotheticals point out that there can be an intentional infliction of emotional distress action for certain harassing conduct.").

<sup>128</sup> See *id.* at 29–30 (fighting words); *id.* at 41 ("[A]pproaching an individual up close and in their grill to berate them gets you out of the zone of protection, and we would never do that."); *id.* at 42 ("[W]e don't do follow-around in this church.").

<sup>129</sup> See *Snyder*, 131 S. Ct. at 1215 n.3.

<sup>130</sup> See *id.* at 1221 (Breyer, J., concurring). A few months after *Snyder*, Justice Scalia also gave "fighting words" as an example of unprotected speech. See *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011). This might have been an oblique reference to *Snyder*.



restrictive alternatives.<sup>131</sup>) In two recent cases, *United States v. Stevens* and *Brown v. Entertainment Merchants Association*,<sup>132</sup> the Court has taken this approach, beginning with categories of unprotected expression and emphasizing that such categories require a strong historical basis.<sup>133</sup> “‘From 1791 to the present,’” wrote the Chief Justice in *Stevens*, a case about depictions of cruelty to animals, “‘the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas.’”<sup>134</sup> “‘These ‘historic and traditional categories long familiar to the bar,’” he went on, “‘—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’”<sup>135</sup> Because the United States has no legal tradition of excluding depictions of cruelty to animals from First Amendment protection, the defendant’s films of fights between animals (principally dogs) did not fall into an unprotected category.<sup>136</sup> The Court reached a similar conclusion in *Brown* with respect to video games.<sup>137</sup>

On the other hand, when the Court starts out by defining a category of protected speech, it suggests that speech outside the category is not protected. This implication was perhaps a latent weakness of *Hustler*, where the Court’s emphasis on Falwell’s status as a public figure arguably meant that the First Amendment would not protect crude speech on a matter of public concern that did not pertain to a public figure. Given the posture of *Snyder*, in terms of both its

<sup>131</sup> See Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009–2010 Cato Sup. Ct. Rev. 67, 77–78 (2010).

<sup>132</sup> *Stevens*, 130 S. Ct. 1577 (2010); *Brown*, 131 S. Ct. 2729 (2011).

<sup>133</sup> See, e.g., *Stevens*, 130 S. Ct. at 1584.

<sup>134</sup> *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)).

<sup>135</sup> *Id.* (citations omitted).

<sup>136</sup> See *id.* at 1585.

<sup>137</sup> See *Brown*, 131 S. Ct. at 2733–34. Justice Scalia’s taxonomy of unprotected speech in *Brown* differed slightly from that of Chief Justice Roberts in *Stevens*. The Chief Justice gave five examples of such speech—obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, see *Stevens*, 130 S. Ct. at 1584—whereas Justice Scalia gave only three: obscenity, incitement, and fighting words. See *Brown*, 131 S. Ct. at 2733. The distinctions may not be material, although Scalia’s mention of fighting words might constitute an oblique reference to *Snyder*, which preceded *Brown* by a few months.

cultural implications and the remote applicability of any such unprotected category of speech as fighting words, the Court was justified in taking the minimalist approach. In doing so, however, it left it to future cases to clarify the law in the area between the categories of protected and unprotected speech.