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Jeffrey Shulman[*]

> "[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[1]

INTRODUCTION

The constitutional law on speech-based tort claims is something akin to a doctrinal funhouse. A bewilderment of public and private mirrors, fact and opinion trapdoors, it is law that balances private and public interests in a complicated and ever-shifting calculus. Thus, when I say that the Fourth Circuit got it wrong in *Snyder v. Phelps*,[2] it is with no little sense of the challenges a court would face to get it right. It is always a hard case when fundamental interests collide, but the Fourth Circuit's decision tilts doctrine too far in the direction of free speech, upsetting the Supreme Court's careful weighing of interests that takes into account both the need for robust political debate and the need to protect private individuals from personal abuse. The court's reasoning in *Snyder* follows the lead set out by the Supreme Court in *Hustler Magazine v. Falwell*,[3] but that was a case with different types of actors, a different type of speech, a different communicative setting, and different policy concerns to consider. The Fourth Circuit failed to give these differences due weight, and took a step too far when it applied *New York Times*[4] protection to speech undeserving of such constitutional solicitude. The court muddled through the law, illustrating how unfair it can be to apply to private parties doctrine

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[1] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970).

[2] 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

[3] 485 U.S. 46 (1988).

[4] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

developed to protect public discourse; but it was a muddle of the Supreme Court's making—and it will be up to the Supreme Court to unmuddle it.

With unfeigned caution, then, I want to make four modest points about the Fourth Circuit's decision, each of which addresses the need to secure what is purely private from injurious speech.

1. The Fourth Circuit decided that the issues animating the protest of the Westboro Baptist Church (WBC) were matters of public concern.[5] Of course, the "issue[s] of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens" are matters of public concern.[6] But none of these is the issue whose publicness the Fourth Circuit was called upon to consider. That issue is whatever connection Matthew Snyder had to these matters. In the world of speech-based torts, whether a matter is one of legitimate public concern depends on the content, effect, and significance of the plaintiff's conduct, not the subjective and unilateral assertions of the defendant. *WBC must show that that connection is of public concern.* Otherwise, every soldier, every Catholic, etc., no matter how assiduously he or she has avoided the public fray, would be subject to targeted personal assault as long as WBC speaks under the mantle of some public concern, no matter how tenuously that concern is connected to the conduct of WBC's target. WBC is free to believe what it wants about the death of soldiers, but its beliefs do not render Matthew's funeral a matter of public concern. (Neither the analysis of the Fourth Circuit nor that of the district court relied on any distinction between Albert Snyder and his son.[7] This article similarly does not distinguish between the two for purposes of the "public concern" and "public figure" analyses.).

2. The Fourth Circuit's decision turned on the court's determination that WBC's speech, even if it was not a matter of public concern, was mere rhetorical hyperbole (and, thus, not provably false; and thus protected opinion).[8] Whatever sense this reasoning makes in the area of public debate, it creates a perverse incentive for WBC to be especially abusive and inflammatory: the more hyperbolically hateful the speech, the more it is constitutionally protected. By the court's logic, speech about private figures enjoys constitutional immunity from tort claims as long as the defendant speaks with sufficient rhetorical flourish—that is to say, with sufficient viciousness. This doctrinal borrowing from defamation makes little sense where the plaintiff brings an emotional distress claim. First, when the

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5 *See* 580 F.3d at 222-24.
6 *Id.* at 223.
7 *Id.* at 222 n.17.
8 580 F.3d at 220, 222-24.

plaintiff's claim is based on emotional injury caused by non-provable speech, the state's interest in the protection of private personality is greater. The defamation plaintiff is injured by false statements of fact: where there is no provable factual assertion, there is little chance of reputational injury. No one will believe what is clearly hyperbolic rhetoric. But those same words can heighten a plaintiff's emotional distress (and the more hyperbolic, the more the harm), whether or not the defendant's message is verifiable. Second, the value of the speech at issue, and thus the need to offer it constitutional protection, is lesser. Statements meant merely to cause emotional injury to private plaintiffs bear only the most superficial resemblance to protected forms of speech.

3. There is no justification for applying the actual malice standard to emotional distress claims outside the public arena (and little enough inside). The literal application of the actual malice standard offers no protection to the plaintiff claiming emotional injury from rhetorically hyperbolic speech. The victim of a libel can show that the statement was false. The victim of rhetorical hyperbole can prove or disprove nothing that will bring judicial redress. This may be the cost of doing business in the public arena, but why should the private plaintiff be left defenseless against emotionally injurious speech that serves no valid communicative purpose?

4. The availability of tort remedies for injurious speech is critical if private individuals are to peacefully exercise their own constitutional rights. The state has a substantial interest in protecting families' "personal stake in honoring and mourning their dead" and in keeping the most intimate of moments from "unwarranted public exploitation."[9] Mr. Snyder should have the opportunity to show that WBC's targeted picketing "was intended to cause him and his family substantial psychological distress,"[10] not to disseminate a public message.[11] The Fourth Circuit failed to consider whether WBC's speech was the type of harassment described by the Supreme Court as "fundamentally different from more generally directed means of communication . . . ."[12] There are some places that are especially protected from targeted verbal confrontation.[13] We may soon find out if the sanctuary traditionally set aside for moments of private grieving is one of them.

It is a legal commonplace that not all speech warrants constitutional

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9 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).

10 Frisby v. Schultz, 487 U.S. 474, 498 (1988).

11 *Cf. id.* at 486 (focused picketing "do[es] not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way").

12 *Id.*

13 *See infra* Part III.

protection.[14] Not all speech, the Supreme Court has said, "advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[15] Speech involving purely private matters is of "reduced constitutional value."[16] If such speech were immune to regulation, no one would be safe from injurious statements with only the most attenuated constitutional interest. Justice Powell illustrated the point nicely by observing that if we had a constitutional order that protected purely private speech, "a woman of impeccable character who was branded a 'whore' by a jealous neighbor" would have no effective legal recourse.[17] But what if the neighbor had said, "This woman, like all Catholics, is a whore."? Is this statement constitutionally protected? Suppose the speaker is a member of a religious group that genuinely believes all Catholics to be morally prostituted? Suppose the speaker had said it outside the church where the woman was attending Sunday morning services? Is the speech protected because, though it targets a private person, it purports to address a matter of public concern? Or, is it protected because it is no more than rhetorical hyperbole (though the speaker means it to be taken as fact), the kind of speech that the Court once described as a "lusty and imaginative" expression of contempt?[18]

By no means are these questions likely to lead to easy answers. But they are, of course, not merely academic queries. WBC is a religious group that considers the Catholic Church a "whorehouse" ministered by a priesthood of child molestors.[19] For WBC, the threat to our society represented by the Catholic Church is a matter of the utmost public concern, and WBC claims the right to call any Catholic a whore—and to do so with immunity from tort suit. WBC believes the death of soldiers is to be celebrated as God's punishment on a too-liberal society, and it claims the right to call any soldier a "fag" whose death is richly deserved—and to do so with immunity from tort suit. WBC's moral judgments are not, to say the least, discriminating: there are few who would escape its moral condemnation. If WBC can target private persons under a thin constitutional mantle of public concern, if it can use hyperbole to shield what is no more that a personally targeted attack, then it is fair to wonder who among us (no matter how privately we order our lives) is safe from its injurious speech.

When Marine Lance Corporal Matthew A. Snyder was killed in Iraq, his funeral, held in Westminster, Maryland, was picketed by

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[14] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

[15] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[16] *Dun & Bradstreet*, 472 U.S. at 761.

[17] *Id.* at 761 n.7.

[18] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974).

[19] *See* Westboro Baptist Church, Upcoming Picket Schedule, http://www.godhatesfags.com/schedule.html (last visited May 23, 2010).

WBC.[20] The church held signs that read, "You are going to hell," "God hates you," "Thank God for dead soldiers," and "Semper fi fags."[21] Following the funeral, the church posted on its website (godhatesfags.com) an "epic" entitled "The Burden of Marine Lance Cpl. Matthew Snyder."[22] Matthew's burden, as the church saw it, was that he had been "raised for the devil" and "taught to defy God."[23] Albert Snyder, Matthew's father, brought a civil action against WBC in federal district court, asserting a claim for intentional infliction of mental and emotional distress (among other causes of action).[24] He was awarded $10.9 million in compensatory and punitive damages.[25] That judgment was reversed by the Fourth Circuit.[26]

In *Snyder v. Phelps*, the Fourth Circuit concluded (or seems to have concluded—its decision is not a model of precision and clarity) that as long as WBC does not state facts that are provably false, it does not matter 1) whether the speech at issue is of public or private concern, or 2) whether the plaintiff is a public or private figure. Unless Mr. Snyder can prove that WBC acted with actual malice (which a plaintiff cannot do unless WBC states facts that are provably false), his emotional distress claim is constitutionally barred. The Supreme Court has held that "in the area of public debate" expression of opinion targeted at a public official or figure, however emotionally hurtful, is constitutionally protected.[27] It has been argued that in the area of public debate expressions of opinion should be protected regardless of the status of the plaintiff.[28] But it has not been seriously suggested that the First Amendment protects purely personal invective delivered in the mere milieu of public discourse. The Fourth Circuit comes perilously close to saying just that. If the Fourth Circuit's decision stands, Justice Powell's impeccable neighbor will be effectively without legal recourse.

I do not think that the Supreme Court intended this. Its concern for the "essential dignity and worth of every human being" is strong and longstanding,[29] as is its deference to state prerogatives to shape

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

21 *Id.* at 212.

22 *Id.*

23 *Id.*

24 Snyder originally brought suit on five counts: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008). The district court granted defendants' motions for summary judgment on the claims for defamation and publicity given to private life. *Id.* at 572-73. The court held, however, that the remaining claims raised genuine issues of material fact. *Id.* at 573.

25 *Id.* at 573.

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

27 Hustler Magazine, v. Falwell, 485 U.S. 46, 53 (1988).

28 *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40-45 (1971); *cf.* Deupree v. Iliff, 860 F.2d 300, 304-05 (8th Cir. 1988).

29 Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

common-law remedies for attacks on private personality.[30] Limits on tort remedies come at a cost. In *Snyder v. Phelps*,[31] the Supreme Court has the opportunity to make clear that there are times when the cost is too high. The Court has said that "personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ."[32] This case will test whether that proposition is good law.

The Court will face a number of murky doctrinal questions. First, the meaning and scope of the public concern doctrine needs to be clarified.[33] Is it to be the law that "even the intimate and personal concerns [of private individuals] . . . cannot be said to be outside the area of 'public or general concern'"?[34] Courts decide whether a concern is public without reference to the status of the plaintiff. But isn't the legitimate public concern whatever connection the plaintiff has to the matter at issue? Second, the reach of *Hustler Magazine v. Falwell*[35] needs to be delimited. Where a statement is not objectively verifiable, does *Hustler* protect speech that is meant to injure private parties? Does the literal application of the actual malice standard to private plaintiffs make any sense, let alone properly protect the essential dignity and worth of every human being? Third, how does the captive audience doctrine affect the Court's careful balancing of private and public interests? The Fourth Circuit could have avoided these questions by holding that Mr. Snyder failed to prove at trial sufficient evidence to support his tort claims.[36] But the court waded into murky doctrinal water—and managed to make things even murkier.

Part I of this piece looks briefly at the relevant legal background: A) the Fourth Circuit's decision in *Falwell v. Flynt*[37] (the case that would make it to the Supreme Court as *Hustler Magazine v. Falwell* [38]), B) the relevant Supreme Court cases, and C) the Fourth Circuit's decision in *Snyder v. Phelps*.[39] Part II addresses three arguments likely

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[30] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .").

[31] 580 F.3d 206 (4th Cir. 2009).

[32] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

[33] Clarity is long overdue. *See* Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U.L. REV. 241, 270 (1987) ("If the public concern doctrine called for by the [*Dun & Bradstreet*] plurality is to be applied by lower courts in any reasonable and consistent fashion, the Supreme Court must, in future cases, define the contours of the public concern concept and must enunciate clear standards for determining when a public concern is present.").

[34] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971).

[35] 485 U.S. 46 (1988).

[36] *See* 580 F.3d 206, 227-33 (4th Cir. 2009) (Shedd, J., concurring in the judgment).

[37] 797 F.2d 1270 (4th Cir. 1986).

[38] 485 U.S. 46 (1988).

[39] 580 F.3d 206 (4th Cir. 2009).

to be made by WBC before the Supreme Court, each of which builds on the reasoning of the Fourth Circuit's *Snyder* opinion: A) that this case involves a matter of public concern; B) that the plaintiff should be considered a limited purpose public figure; and C) that WBC did not use language that can be verified as true or false (and, thus, the plaintiff must show that WBC acted with actual malice). Part III considers the state's substantial interest in protecting individuals, especially those held captive by circumstances, from personally injurious speech, and argues that the emotional distress tort claim supports that interest without threatening First Amendment freedoms.

I. THE LEGAL BACKGROUND

A. Falwell v. Flynt*: The Fourth Circuit's Opinion*

Left to its own doctrinal devices, the Fourth Circuit probably would not have read the First Amendment as such a fearsome shield against speech-based tort suits. More likely, it would have decided that WBC was adequately protected by the culpability standard of the common-law emotional distress claim. In *Falwell v. Flynt*, the Fourth Circuit had already considered the argument that some emotional distress claims may be barred under the First Amendment.[40] Following *New York Times v. Sullivan*,[41] the court agreed that Larry Flynt's parody ad (in which Jerry Falwell admits that his "first time" was with his drunken mother[42]) was entitled to the same level of protection afforded by the actual malice standard. The court concluded that "[t]o hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which it sought to abolish."[43]

But the court did not think that "literal application of the actual malice standard" was appropriate in an action for intentional infliction of emotional distress.[44] It based that judgment on its concern that "[r]equiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature."[45] For the Fourth Circuit, the point of the actual malice standard is to focus on the

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40 797 F.2d 1270 (4th Cir. 1986).

41 376 U.S. 254, 270 (1964).

42 797 F.2d at 1272.

43 *Id.* at 1274 ("In the case at bar, Falwell is a public figure, and the gravamen of the suit is a tortious publication. The defendants are, therefore, entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel. To hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which it sought to abolish.").

44 *Id.*

45 *Id.* at 1275.

defendant's culpability; it increases the level of fault the plaintiff must prove to recover in an action based upon a tortious publication. "The emphasis of the actual malice standard is 'knowing . . . or reckless.'"[46]

The court concluded that this culpability standard is met when the emotional distress plaintiff proves his case.

> The first of the four elements of intentional infliction of emotional distress . . . requires that the defendant's misconduct be intentional or reckless. This is precisely the level of fault that *New York Times* requires in an action for defamation. The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress. We, therefore, hold that when the first amendment requires application of the actual malice standard, the stand-ard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of. The jury made such a finding here, and thus the constitutional standard is satisfied.[47]

The Fourth Circuit knew a legal quandary when it saw one. How could Falwell show that Larry Flynt published the parody with actual malice (i.e., knowing that it was false or with reckless disregard of its falsity) when it was, after all . . . a parody? Literal application of the actual malice standard would make the emotional distress tort (at least when based on injurious speech) redundant of defamation claims. The law provides a remedy for harms caused by speech that no one would reasonably believe was describing actual facts. Racial slurs may be actionable on a theory of emotional distress.[48] In such a suit, what would a plaintiff do to satisfy the actual malice standard? Where is the objectively verifiable assertion? It may be, as courts like to say, that mere insults ordinarily would not constitute extreme outrage, but one would think that judgment should be a question for the trier of fact.

The Fourth Circuit also rejected the defendants' argument that "since the jury found that a reader could not reasonably believe that the parody was describing actual facts about Falwell, it must be an opinion and therefore is protected by the first amendment."[49] For the court, whether the defendants' statement constituted opinion is beside the point when the gravamen of the plaintiff's complaint is infliction of emotional distress.

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[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 219 (Cal. 1970). *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). On the constitutionality of laws prohibiting hate speech, see Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 105 n.3 (1992) (citing articles).

[49] *Falwell v. Flynt*, 797 F.2d 1270, 1275-76 (4th Cir. 1986).

> At common law the dichotomy between statements of fact and opinion was often dispositive in actions for defamation. An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se. We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress. The defendants' argument on this point is, therefore, irrelevant in the context of this tort.[50]

Here, the court failed to see a quandary of its own making. We may regret the ambiguity that keeps jurists so busy ruminating about the distinction between opinion and fact,[51] but the distinction is not irrelevant for constitutional purposes. Jerry Falwell had already lost his defamation argument. The jury found that no reasonable person would believe that the ad parody was describing actual facts.[52] The question before the Fourth Circuit was whether there are circumstances under which opinion loses its constitutional protection.[53]

Chastened by the Supreme Court's judgment in *Hustler Magazine v. Falwell*,[54] the Fourth Circuit (as we shall see below) focused on objective verifiability when it came to consider WBC's statements at Matthew Snyder's funeral.[55] With single-minded attention to the factualness (rather than the hurtfulness) of the church's message, the court looked for evidence to show that no reasonable person could think the church was asserting provable facts.[56] Remarkably, it found that evidence in the very outrageousness of the church's speech:

> As we have recognized, the "context and tenor" of the speech at issue, as well as the speaker's use of "irreverent and indefinite language," can serve to negate any impression that he is asserting actual facts about an individual. . . . The general context of the

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[50] *Id.* at 1276.

[51] The literature on the fact/opinion distinction is, needless to say, voluminous. For a rich treatment of the question, see generally Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

[52] *Falwell*, 797 F.2d at 1273.

[53] *Id.* at 1273-76; *cf.* Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 451-52 (1988) ("[T]he modern protection for opinion comes not from the elements of the tort of defamation, but from the first amendment. That the fact/opinion distinction may be irrelevant to the state definition of infliction of emotional distress does not, therefore, decide the matter. The question is whether it is irrelevant under the first amendment. The answer provided by *Hustler v. Falwell* is that the distinction is always relevant. Opinion is always protected under the first amendment; in fact, its absolute protection is one of the most pervasive themes of modern first amendment jurisprudence.") (footnotes omitted).

[54] 485 U.S. 46 (1988).

[55] *See infra* Part I.C.

[56] Snyder v. Phelps, 580 F.3d 206, 222-26 (4th Cir. 2009).

> speech in this proceeding is one of impassioned (and highly offensive) protest, with the speech at issue conveyed on handheld placards. A distasteful protest sign . . . is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts.[57]

It is an odd state of affairs when the message of WBC is described as irreverent. Certainly, the church thought it was conveying actual facts about the plaintiff's religious standing. That aside, the Fourth Circuit seems to be saying that there are no circumstances under which opinion loses its constitutional protection. But that outcome would not be consistent with the careful, if sometimes rather subtle, balancing of interests that has driven the Supreme Court's consideration of speech-based tort claims.

B. Supreme Court Precedent: Balancing Public and Private Interests

The Supreme Court has never heeded Justice Black's admonition that "no law" means no law "without any 'ifs' or 'buts' or 'whereases.'"[58] And for good reason. Other values can be threatened by the talismanic invocation of free speech rights. Free speech always comes at a cost. The question is: When is the cost too high?

Since 1964, the Court has carefully measured the competing weights of public discourse and private personality. The actual malice standard was stable doctrine when it applied to public officials (*New York Times v. Sullivan*, 1964[59]) and public figures (*Curtis Publishing Co. v. Butts*, 1967[60]). Though not quite a bright line, the public official/figure standard was bright enough, heightening constitutional review for media criticism of those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[61] When the Court turned its attention to defamation actions brought by private plaintiffs involving statements of public concern (*Gertz v. Robert Welch, Inc.*, 1974[62]), the issue was initially in doubt. Justice Brennan had previously argued that *New York Times* protection should extend to defamatory falsehoods relating to private persons if the statements were matters of public concern (*Rosenbloom v. Metromedia, Inc.*, 1971[63]). For Brennan, the prevailing interest was society's need to learn about

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57 *Id.* at 224 (internal citation omitted).
58 Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).
59 376 U.S. 254, 270 (1964).
60 388 U.S. 130, 155 (1967).
61 *Id.* at 164 (Warren, J., concurring in judgment).
62 418 U.S. 323 (1974).
63 403 U.S. 29 (1971).

matters of public moment: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[64]

Ultimately, the *Gertz* Court concluded that the balance of competing interests weighed against application of the actual malice standard in cases involving private plaintiffs.[65] Such a categorical privilege for matters of public concern would leave private persons—no matter how attenuated or involuntary their association with some matter of public concern—with no recourse for injury unless they could satisfy the demanding actual malice standard. The Court observed that public officials and public figures 1) have the opportunity to counteract false statements, and 2) must accept the consequences of their (usually voluntary) involvement in public affairs.[66] But it would be unfair to make these assumptions with regard to a private individual.

> He has not accepted public office or assumed an "influential role in ordering society." . . . He 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 inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.[67]

Having distinguished "the state interest in compensating private individuals from the analogous interest involved in the context of public persons,"[68] the Court created a less demanding constitutional standard for suits brought by a private plaintiff on a matter of public concern. The Court concluded that the plaintiff has the burden of proving some level of fault before recovering damages, but that states "may define for themselves the appropriate standard of liability . . . ."[69] Subsequently, the Court rejected the common-law rule on falsity—that the defendant must bear the burden of proving truth—in cases where the plaintiff is a private figure and the speech is of public concern (*Philadelphia Newspapers, Inc. v. Hepps*, 1986[70]). Under *Hepps*, the private plaintiff must bear the burden of proving falsity as well as fault.[71] With these

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64 *Id.* at 43.

65 418 U.S. 323 (1974).

66 *Id.* at 344-45.

67 *Id.* at 345 (internal citation omitted).

68 *Id.* at 346.

69 *Id.* at 347. The Court also decided that states could permit private plaintiffs to recover presumed or punitive damages only upon a showing of actual malice. *See id.* at 348-50.

70 475 U.S. 767 (1986).

71 *Id.* at 776 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.").

constitutional bulwarks in place, traditional common-law defamation principles obtain only where the plaintiff is a private figure and the speech is not a matter of public concern (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1985[72]).

In the *New York Times-Gertz* line of cases, the Court created culpability requirements to ensure robust debate on public issues. Such cases would involve statements (on a matter of public concern) that reasonably imply a false and defamatory fact. In a separate line of cases, the Court fashioned constitutional protection for statements of public concern that do not contain a provably false factual connotation (*Greenbelt Coop. Publ'g Ass'n v. Bresler*, 1970;[73] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin,* 1974;[74] *Milkovich v. Lorain Journal Co.*, 1990[75]). Where a statement relating to matters of public concern could not reasonably be interpreted as making a factual inference, it would receive full constitutional protection (at least where the plaintiff seeks damages against a media defendant).[76] Here, the Court wandered deeply into the land of fine distinctions. Thus, the statement "Mayor Jones is a liar" might be actionable, but the statement "Mayor Jones shows his abysmal ignorance when discussing the teachings of Marx and Lenin" would not be actionable because it does not contain a provably false factual connotation.[77] Who can plumb the depths of Mayor Jones' ignorance? But what about the statement, "Mayor Jones accepts the teachings of Marx and Lenin"? Whether this is provable is, I think, anybody's guess.

The Court also provided *New York Times* constitutional protection against emotional distress claims in the area of public debate about public figures (*Hustler Magazine v. Falwell,* 1988[78]). In effect, the Court has created something close to a categorical privilege for statements on matters of public concern unless they are provably false.[79] The *Hustler* Court did not say whether statements of public concern are shielded from emotional distress claims where the plaintiff is a private figure (or, for that matter, whether statements not of public concern are

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72 472 U.S. 749 (1985).

73 398 U.S. 6 (1970).

74 418 U.S. 264 (1974).

75 497 U.S. 1 (1990).

76 *See Milkovich*, 497 U.S. at 20 ("*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.").

77 *See id.*; *cf.*, *e.g.*, Ollman v. Evans, 750 F.2d 970, 1000 (1984) ("A statement that, on its face and standing alone, sounds like an assertion of fact may not be actionable. Context is crucial and can turn what, out of context, appears to be a statement of fact into 'rhetorical hyperbole,' which is not actionable.").

78 485 U.S. 46, 53 (1988).

79 The Supreme Court has not yet "addressed the question of whether the constitutional protections afforded to statements not provably false should apply with equal force to both media and nonmedia defendants." Snyder v. Phelps, 580 F.3d 206, 219 n.13 (4th Cir. 2009).

shielded from emotional distress claims where the plaintiff is a public official or figure), and, if so, what level of protection they would get.[80] More generally, the Court has chosen to see the status of the plaintiff (i.e., whether the plaintiff is a public or private figure) and the content of the defendant's speech (i.e., whether the speech is of public concern) as two separate forces shaping the common-law landscape.[81] The Court has doubted the wisdom of letting judges "decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not,"[82] but it has precious little wisdom of its own to offer on this subject. Thus, the Court has left some important doctrinal doors ajar—through which defendants like WBC can blithely march under the banner of free speech.

C. Snyder v. Phelps*: The Fourth Circuit Once More*

In its *Snyder v. Phelps* decision, the Fourth Circuit rebuked the district court for its focus on the status of the plaintiff.[83] The district court determined that Matthew Snyder was not a public figure, that his funeral was not a public event, and that "[d]efendants [could not] 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."[84] For the district court, this case was simply a common-law tort claim where 1) the defendants' speech was directed against private individuals, and 2) the subject of the lawsuit was a matter of private concern. The plaintiff, accordingly, could recover damages without clearing any constitutional hurdles.

For the Fourth Circuit, the conclusion that the Snyders were not private figures "did not dispose of the Defendants' First Amendment contentions."[85] In the view of the circuit court, the district court "failed to assess whether the pertinent statements could reasonably be interpreted as asserting 'actual facts' about an individual, or whether they instead merely contained rhetorical hyperbole."[86] The district court, in other words, had looked at the wrong line of Supreme Court cases. It should have focused on the type of speech at issue (i.e.,

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[80] For a multi-tiered approach to the question of constitutional protection where the plaintiff claims emotional distress based on speech, see Smolla, *supra* note 53, at 466-74.

[81] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) ("One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern.").

[82] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

[83] Snyder v. Phelps, 580 F.3d 206, 222 (4th Cir. 2009).

[84] Snyder v. Phelps, 533 F. Supp. 2d 567, 577 (D. Md. 2008).

[85] 580 F.3d at 222.

[86] *Id.*

whether it was a matter of public concern, whether it was objectively verifiable), not on the status of the Snyders or the circumstances surrounding Matthew's funeral.[87]

The Fourth Circuit simply ignored the status of the plaintiff. It began its analysis by considering whether WBC's speech was a matter of public concern. The court first looked at a group of signs that, it assumed, were not about the Snyders—that is, they were a matter of public concern.

> The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.[88]

Next, the court noted that some signs could be construed as mere personal abuse. Two signs—"You're Going to Hell" and "God Hates You"—could reasonably be read as referring to "Snyder or his son only . . . ."[89] But as it turns out, it made no difference to the Court whether the signs were targeted personally at Mr. Snyder or his son, for none of the signs could be reasonably read to assert "actual and provable facts."[90] Whether personal or not, the signs were "incapable of objective verification."[91] What did matter—the only thing that mattered—to the court was WBC's use of "rhetorical hyperbole and figurative expression."[92] The use of such "irreverent and indefinite" language negated any impression that WBC was trying to state objectively verifiable facts.[93]

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[87] *See id.* at 222 ("The Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target.").

[88] *Id.* at 222-23 (footnote omitted).

[89] *Id.* at 224.

[90] *Id.* at 224; *see also id.* ("We need not resolve this question of usage, however, because a reasonable reader would not interpret the statements on these two signs as asserting actual and provable facts. Whether an individual is 'Going to Hell' or whether God approves of someone's character could not possibly be subject to objective verification. Thus, even if the reasonable reader understood the 'you' in these signs to refer to Snyder or his son, no such reader would understand those statements ('You're Going to Hell' and 'God Hates You') to assert provable facts about either of them.").

[91] *Id.* at 223.

[92] *Id.* at 224.

[93] *Id.*

When the court turned to the "Epic" published on WBC's website, it had already decided that the protest was a matter of public concern (and that whether it was public or not didn't much matter, anyway). It was of no significance that WBC was protesting *this* funeral, the funeral of Matthew Snyder. The Epic occasioned no second thoughts on the court's behalf despite these facts:

1. The Epic was titled "The Burden of Marine Lance Cpl. Matthew A. Snyder."[94]

2. The Epic discusses Matthew's life in great, if delusional, personal detail. This is the Fourth Circuit's description of the Epic:

> "Twenty years ago, little Matthew Snyder came into the world. . . . God created him and loaned/entrusted him to Albert and Julie Snyder." . . . The Epic states that the Snyders "had a DUTY to prepare that child to serve the LORD his GOD-PERIOD! You did JUST THE OPPOSITE-you raised him for the devil. You taught him that God was a liar." . . . The Epic also focuses on Matthew's upbringing, asserting that "Albert and Julie . . . taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. . . . They also, in supporting satanic Catholicism, taught Matthew to be an idolater." . . . After interspersing additional excerpts from the Bible, the Epic refers to Matthew's service in the military, noting that he fought for
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> > the United States of Sodom, a filthy country that is in lock step with his evil, wicked[,] and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?[95]

3. The Epic makes only the most fanciful connection between Matthew and WBC's public concerns. From the WBC's Epic:

> 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 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.[96]

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[94] *Id.*
[95] *Id.* at 225 (internal citations omitted).
[96] *Id.*

Whether Matthew's upbringing is of substantial public interest, as WBC contends, or a purely private matter made no difference to the court. It rested its judgment on the conclusion that 1) "the Epic cannot be divorced from the general context of the funeral protest," and 2) "it is patterned after the hyperbolic and figurative language used on the various signs."[97] On the latter count, WBC had going for it—in the court's estimation—a general distastefulness and a lack of concern for grammatical niceties.

> [T]he Defendants interspersed strong, figurative language with verses from the Bible. They utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor rather than an objective reporter of facts.[98]

Since "[t]he general tenor of the Epic . . . serves to negate any impression that it was the source of any actual facts," it could not be about the Snyders.[99] It had to be "primarily concerned with the Defendants' strongly held views on matters of public concern."[100]

The court seems to be creating a constitutional catch-22. If WBC's speech is not about the Snyders, it is protected as a matter of public concern; but if WBC's speech is about the Snyders (and thus is not a matter of public concern), it is protected as hyperbolic rhetoric. The bottom line seems to be this: Mr. Snyder's claim of emotional injury is only viable if WBC speaks as an objective reporter of facts. If affirmed, this would be a strong doctrinal brew. Concocted by the Supreme Court, such protection against speech-based emotional distress claims was meant to give breathing space for contentious speech about public official and figures.[101] To support its position, the Fourth Circuit quoted the Supreme Court's decision in *Cantwell v. Connecticut*: "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state . . . ."[102] This is strange support, unless one ignores the concluding qualifying phrase: "*[O]f men who have been, or are,*

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97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) ("The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.") (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the judgment)).

102 Snyder v. Phelps, 580 F.3d 206, 226 (4th Cir. 2009) (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

prominent in church or state . . . ."[103] Mr. Snyder is prominent in neither, of course.

Cantwell is instructive for another reason. There, the Court reasoned that no breach of the peace had occurred because Cantwell 1) used no coercive means to spread his message,[104] and 2) used no personal abuse "intended to insult or affront the hearers . . . ."[105] Of particular importance to the Court was the evidence that Cantwell sought to persuade "willing listener[s]" and that his advocacy involved "no truculent bearing, no intentional discourtesy, no personal abuse."[106] On these facts, the Court found that Cantwell "had invaded no right or interest . . . of the men accosted."[107] The Court hastened to distinguish speech that *would* amount to a breach of the peace because it "consisted of profane, indecent, or abusive remarks directed to the person of the hearer."[108] The Supreme Court has said that targeted speech (as opposed to abstract advocacy) may be subject to reasonable restrictions, but the Fourth Circuit did not consider whether WBC's protest was this type of speech: personally provocative, directed to a captive audience, and motivated by a desire to cause that audience psychological distress. The question of whether WBC's speech was of legitimate public concern ought not to be answered without reference to the privacy interests of the plaintiffs; and the question of whether WBC's protest "serve[d] a reasonable communicative purpose"[109] ought not to be answered without reference to the state's strong interest in protecting private parties from emotionally injurious speech.

II. UNDER THE BANNER OF FREE SPEECH: WBC'S LINE OF DEFENSE

WBC made productive use of the Fourth Circuit's handiwork. Its "Brief in Opposition to Petition for Writ of Certiorari" anticipates its position before the Supreme Court, building on doctrinal ambiguities to argue that: A) this case involves matters of vital public interest; B) Mr.

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103 *Id.* (emphasis added).

104 Cantwell v. Connecticut, 310 U.S. 296, 301, 308 (1940).

105 *Id.* at 309.

106 *Id.* at 310.

107 *Id.* at 309.

108 *Id.* at 309 ("One may, however, be guilty of [breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*.") (emphasis added); *cf.* Cohen v. California, 403 U.S. 15, 20 (1971) ("While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'" (quoting *Cantwell*, 310 U.S. at 309)).

109 Frisby v. Schultz, 487 U.S. 474, 499 (1988) (Stevens, J., dissenting).

Snyder is a limited purpose public figure; and C) WBC did not use language that can be verified as true or false (and, thus, Mr. Snyder must show that WBC acted with actual malice).[110] If nothing more, these arguments call for greater doctrinal definition and coherence from the Supreme Court. But given the consequences that would arise if WBC's arguments prevail, the Court should do more. It needs to decide what limit states can set on intentionally injurious speech; it needs to define how broadly the common law protects the dignity and worth of every human being.

A. WBC argues that this case involves matters of vital public interest.

For WBC, the matter of public concern is the same for all its protests: "how God is dealing with this nation . . . ."[111] Of course, there are more direct manifestations of God's judgment that form the specific content of WBC's message:

> Of greatest importance is the fact that the speech at issue was speech on public issues. That fact cannot be gainsaid, because the topics were the dying soldiers, homosexuality in the military, the sex-abuse scandal in the Catholic Church, and the morals of this nation. Given the magnitude and gravity of the problems facing this once-great nation, nothing could be more important at this hour than the question of how God is dealing with this nation, especially on the battlefield.[112]

But this reasoning, accepted without discussion by the Fourth Circuit, mistakes *any* public concern for the kind of concern that has traditionally shielded plaintiffs from speech-based tort claims. The Supreme Court looks for a demonstrable connection between the plaintiff and some matter of public interest. The defendant must be able to argue, credibly, that, given the "content, form, and context" of its message,[113] there is something about *this plaintiff* that "requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'"[114] The reality is that there are not two separate forces shaping the common-law landscape. The status of the plaintiff and the content of the defendant's speech are as inseparable as the

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[110] Brief in Opposition to Petition of Writ of Certiorari at 14-19, Snyder v. Phelps, No. 09-751 (U.S. Jan. 20, 2010), 2010 WL 271323.

[111] *Id.* at 15.

[112] *Id.*

[113] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

[114] *Id.* at 762 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

dancer from the dance.

Case after case illustrates the point that WBC's speech is protected only if the conduct of Matthew Snyder is of legitimate public concern. In *Gertz v. Robert Welch, Inc.*,[115] the plaintiff was accused of being part of a dangerous communist conspiracy. Elmer Gertz was neither a public official nor a public figure. The question before the Supreme Court was "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."[116] The answer would turn out to be that a media defendant does enjoy some degree of constitutional protection. Of critical significance to the Court was the fact that the case "involved expression on a matter of *undoubted* public concern."[117] That concern was not whether there was a communist conspiracy that threatened the United States. Or whether lawyers (Gertz was an attorney) were bad people. The concern was whether Elmer Gertz was a "Communist-fronter" and whether, as part of a communist conspiracy, he had worked to "frame" a Chicago policeman who was being prosecuted for homicide.[118] In short, Gertz had been "linked" to Communist activity. Had the concern been defined more broadly—say, the role of lawyers as a front for a communist conspiracy—the defendant could have targeted any lawyer. The "link" would not have been needed, and no lawyer, no matter how far removed from things public (or communistic), would have been safe from the accusation that he was a menace to the nation.

In *Time, Inc. v. Firestone*, the Supreme Court refused to equate "public controversy" for defamation purposes with all controversies of interest to the public.[119] The lurid details of Mary Alice Firestone's divorce proceedings (which were described by the Florida Supreme Court as a "cause celebre") were not the "sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."[120] Under the Fourth Circuit's reasoning, the defendant could have manufactured a public controversy by discussing the sad state of modern marriage, or the erotic zest of celebrity satyrs, or who knows what. Provided that the defendant had spoken in terms so outrageous they would not be objectively verifiable, Ms. Firestone would have had no cause of action.

In *Greenbelt Cooperative Publishing Association, Inc. v.*

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115 418 U.S. 323 (1974).
116 *Id.* at 332.
117 *Dun & Bradstreet*, 472 U.S. at 756 (emphasis added).
118 *Gertz*, 418 U.S. at 326.
119 424 U.S. 448, 454 (1976).
120 *Id.*

Bresler,[121] the matter of public concern was whether the plaintiff's negotiating positions amounted to "blackmail," not sordid doings in the world of zoning variances; in *Wolston v. Reader's Digest Association, Inc.*,[122] the public concern was whether the plaintiff was a spy, not the threat of Soviet espionage; in *Philadelphia Newspapers, Inc. v. Hepps*,[123] whether the plaintiff "had links to organized crime"[124] was the matter of public concern; and in *Milkovich v. Lorain Journal Co.*,[125] the question of public interest was whether the plaintiff had perjured himself, not violence in high-school athletics. Even the *Rosenbloom* plurality, which sought to extend constitutional protection to all matters of public concern without regard to the plaintiff's status, insisted that "the public focus is on the conduct of the participant [i.e., the plaintiff] and the content, effect, and significance of the conduct . . . ."[126]

None of these cases suggests that the subjective and unilateral assertions of the defendant are sufficient to make any issue a matter of legitimate concern to the public. WBC must show that the content, effect, and significance of Matthew Snyder's conduct requires special protection to ensure robust public debate. Of course, it can make no such showing. Or, to put it another way, it could make the same showing about every soldier. But soldiers, just because they are soldiers, cannot be dragged into the public arena on the premise that the military conflict of which they are a part (or something even vaguer) is a public concern. Otherwise, no soldier is safe from personal verbal assault. The only aspect of Matthew Snyder's conduct that bears some connection to WBC's concerns was his military service. Though the significance of that conduct cannot be underestimated, it does not have a public focus. The significance of his death belongs to those who now wish to be let alone to mourn Matthew and honor his sacrifice.

B. WBC argues that "there is a viable basis for concluding that [Mr. Snyder] is a limited purpose public figure."[127]

Perhaps this argument is not meant to be taken seriously. Support

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121 398 U.S. 6 (1970).

122 443 U.S. 157 (1979).

123 475 U.S. 767 (1986).

124 *Id.* at 769.

125 497 U.S. 1 (1990).

126 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971). In *Rosenbloom*, there was no disagreement that the plaintiff was "involved in matters of public or general concern." *Id.* at 48. It did not matter to the Court "[w]hether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand . . . ." *Id.* at 43. I disagree that the status of the plaintiff "has no relevance in ascertaining whether the public has an interest in the issue." *Id.* But at least Mr. Rosenbloom was, in the Court's judgment, *involved* in a matter of public concern. Even this much cannot be said of Matthew Snyder.

127 Brief in Opposition to Petition of Writ of Certiorari at 19, Snyder v. Phelps, No. 09-751 (U.S. Jan. 20, 2010), 2010 WL 271323.

for the contention is a bit far-fetched:

> * Mr. Snyder "chose to have the funeral at a Catholic church, knowing the public's attention on this sex-abuse scandal."[128]
>
> * "Petitioner's son voluntarily enlisted knowing the war in Iraq was of national importance and interest."[129]
>
> * "Petitioner spoke with the media about his son, attempting to influence the public to believe his son was a hero."[130]

But the evidence brought forward by WBC illustrates how easy it is to erode delicate doctrinal distinctions between the public and private spheres. For WBC's argument depends on the Fourth Circuit's ready acceptance that, regardless of the plaintiff's conduct, issues of public import are necessarily of legitimate public concern in the context of tort suits. WBC would establish this equation: the more likely that speech is a matter of public concern, the less likely that the plaintiff is a private figure. The content of the defendant's speech would determine how the court understands the status of the plaintiff. But the Supreme Court has rejected the proposition that "mere newsworthiness" justifies the application of the *New York Times* standard to private plaintiffs.[131] "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[132] It is the "nature and extent of an individual's participation in the particular controversy" that determines the status of the plaintiff.[133] So, the equation ought to be this: the more private a figure the plaintiff is, the less likely that speech about him is a matter of public concern.[134] The status of the plaintiff should determine how the court understands the content of the defendant's speech.

If the latter equation is right, then WBC's speech has no legitimate public interest, for the Snyders are purely private figures. Elmer Gertz was a private figure "even though he voluntarily associated himself with a case that was certain to receive extensive media exposure."[135] Ilya Wolston was a private figure even though he "voluntarily chose not to appear before the grand jury [investigating Soviet intelligence activity],

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128 *Id.* at 19-20.
129 *Id.* at 19.
130 *Id.*
131 Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167 (1979).
132 *Id.*
133 Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).
134 *Cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 781 n.5 (1985) (Brennan, J., dissenting) ("Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures.").
135 *Wolston*, 443 U.S. at 167.

knowing that his action might be attended by publicity . . . ."[136] The public attention that Matthew's funeral attracted does not make his father a public figure. Mary Alice Firestone was not a public figure even though her divorce was a "cause celebre."[137] Whatever publicity Matthew's funeral occasioned, Mr. Snyder did not "engage[] the attention of the public in an attempt to influence the resolution of the issues involved."[138] The fact that he spoke to the media does not suggest that he "sought to use the press conferences as a vehicle by which to thrust [himself] to the forefront of some unrelated controversy in order to influence its resolution."[139]

Indeed, Mr. Snyder was thrust into the glare of public controversy. The Court has said that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[140] But, as the district court concluded, it was the WBC defendants who thrust the Snyder family into the unwelcome glare of national media coverage, "transform[ing] a private funeral into a public event . . . ."[141] The district court rightly rejected WBC's attempt to "bootstrap [its] position by arguing that Matthew Snyder was a public figure."[142]

* * *

The connection between Mr. Snyder and the topics of concern to WBC is too attenuated to justify constitutional protection for speech that amounts to no more than a personal attack. WBC targeted a private figure for emotional injury; it clothed personal abuse in the dress of public concern. Whatever social value, if any, may be derived from WBC's speech is far outweighed by the state's interest in protecting private individuals from this kind of unprompted verbal attack.

C. WBC argues that it did not use language that can be verified as true or false. Thus, Mr. Snyder must show that WBC acted with actual malice.

As a matter of religious principle, WBC ought forcefully to reject the notion that it does not mean what it says, but it takes refuge in the proposition that the more "hyperbolic" its speech (the more its religious viewpoint is reduced to rhetorical show), the more it is constitutionally protected.

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136 *Id.*
137 Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).
138 *Wolston*, 443 U.S. at 168 (citing *Gertz*, 418 U.S. at 351).
139 *Time, Inc.*, 424 U.S. at 454 n.3.
140 Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); *see also Wolston*, 443 U.S. at 167-168; *Time, Inc.*, 424 U.S. at 454-55.
141 Snyder v. Phelps, 533 F. Supp. 2d 567, 577 (D. Md. 2008).
142 *Id.*

> [T]he Fourth Circuit was correct in finding that the language of respondents is not language which can be verified as true or false. . . . The rule of law about hyperbolic and objectively unverifiable language being protected is well-established, and does not need to be revisited . . . .[143]

If the Fourth Circuit's judgment is affirmed, groups like WBC will be encouraged to be as distasteful as possible. To protect themselves, such groups need only disguise personally derogatory language as public discourse and redouble their rhetorical efforts. Though it is hard to imagine how WBC could do that, it hardly needs the invitation.

If there is something unseemly in WBC's willingness to concede, if only for the sake of argument, that its message was rhetorical hyperbole, there is something downright offensive about the condescension with which the Fourth Circuit treats WBC and its message. Why would a reasonable reader take as rhetorically hyperbolic WBC's description of the Catholic Church as a "pedophile machine"?[144] Perhaps the reasonable reader would understand that some of WBC's assertions about the Catholic Church (or the United States, or Matthew Snyder,) do not contain demonstrable facts, but they are certainly assertions that WBC thought were factual and presented as true. It is almost as though the court were treating WBC's protest as some sort of religious parody, as though it ought to be accompanied (as was the Falwell parody ad) with a disclaimer that the message was not meant to be taken seriously. Because WBC's message is not verifiable, it cannot be the basis of a defamation claim, but whether WBC meant what it said and meant that message to cause emotional distress—that should be taken seriously. WBC's intent is relevant not only to the merits of Mr. Snyder's tort claim but to the question of whether that claim ought to be constitutionally barred.

The Fourth Circuit was wrong when it stated that adjudicating a claim for emotional distress did not require consideration of whether the defendant's statement is opinion or fact. Where the plaintiff is a public official or figure, opinion on matters of public concern warrants constitutional protection. But where the private plaintiff brings an emotional distress claim, a different constitutional calculus is appropriate: the state's interest in the protection of private personality is greater, and the value of First Amendment protection is lesser. In defamation cases, a lack of objective verifiability lessens the plaintiff's reputational or dignitary injury. No one will believe matters that are not provably true or false. In emotional distress cases, however,

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143 Brief in Opposition to Petition of Writ of Certiorari at 21-22, Snyder v. Phelps, No. 09-751 (U.S. Jan. 20, 2010), 2010 WL 271323.

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

rhetorical hyperbole may serve to heighten the psychological injury, whether people believe the defendant's message or not. Further, the state has a compelling interest in the protection of truthful statements; if some meritorious suits fail because the plaintiff cannot prove falsity, that is a cost we pay to ensure robust public debate.[145] But the state has no interest in the protection of statements that are meant to wound private plaintiffs. The speech-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.[146] Mr. Snyder did not bring suit to stop WBC from spreading its message. He brought suit to stop the church from using its speech to target him for injury—at a time when he was likely to be especially vulnerable to and unable to avoid the attack.[147] If a private plaintiff can show common-law malice—that is, that the defendant intentionally or recklessly caused emotional distress—the constitutional standard ought to be satisfied (and, thus, in a roundabout way, the Fourth Circuit got it right when it found that Falwell's suit was not constitutionally barred). *Hustler* may create "breathing space" for robust debate about public affairs, but the literal application of the actual malice standard would leave private plaintiffs helpless against malicious speakers. The victim of a libel gets a chance to show that the statement was false. The victim of rhetorical hyperbole can prove or disprove nothing that will bring judicial redress. Indeed, the standard invites malicious speakers to greater heights of hysterical protest.

There is no justification for applying the actual malice standard outside the public arena. (And little enough inside the public arena. Why not just bar speech-based emotional distress suits against public officials and figures? Who would reasonably think that Jerry Falwell's "first time" was a drunken tryst with his mother in an outhouse. And how would Falwell prove that *Hustler* acted with actual malice? It would be more than a bit ludicrous for him to argue that, in fact, it was not his first time—and Larry Flynt knew it!) The Supreme Court was probably right to decide that a public figure ought not to recover damages for emotional harm based on statements that are not

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[145] *Cf.* New York Times v. Sullivan, 376 U.S. 254, 271 (1964) ("[E]rroneous statement is inevitable in free debate . . . .") (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

[146] *See* Falwell v. Flynt, 797 F.2d 1270, 1276 (4th Cir. 1986) ("An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se."); *see also* Hill v. Colorado, 530 U.S. 703, 716 (2000) (Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 n.6 (1975) (citation and brackets omitted)); *cf.* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2307 (1999) ("[S]peech used to create a hostile working environment is unprotected not because of its content, but because in the social context in which it occurs, it is used a method of employment discrimination.").

[147] *See infra* Part III.

objectively verifiable. The First Amendment shields "many things done with motives that are less than admirable . . . in the area of public debate about public figures."[148] But the Court should have stopped there. The actual malice standard offers no viable defense to the kinds of statements that inflict emotional distress. Its literal application would be, as Rodney Smolla says, "nonsensical."[149] Perhaps Jerry Falwell should be made to take it, but public debate will be just as robust if private plaintiffs have legal recourse for intentionally injurious speech.[150] Where the plaintiff has no connection to the public fray, the state's interest in protecting private personality should pierce the First Amendment shield.

III. *SNYDER V. PHELPS*: WEIGHING THE INTERESTS

The Supreme Court has spoken eloquently about "the interests decent people have for those whom they have lost."[151] This privacy interest is, of course, a deeply personal one. "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."[152] But the state, too, has a significant stake in ensuring the survival of "well-established cultural tradition[s]" that signify "the respect a society shows for the deceased and for the surviving family members."[153]

The state has a broader interest in protecting individuals made vulnerable by circumstances to unwanted speech. Though "'we are often "captives" outside the sanctuary of the home and subject to

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148 Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).

149 *See* Smolla, *supra* note 53, at 439 ("The term 'actual malice,' as used in *New York Times*, is nonsensical when applied mechanically to the emotional distress claim in Falwell. One cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decisionmaking process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication, or with its capacity to inflict reputational damage.").

150 *Cf.* State v. Carpenter, 171 P.3d 41, 56 (Alaska 2007) ("Heightened First Amendment protection does not extend to IIED claims based on speech that is not *about* a public figure or *about* a matter of public concern."); Van Duyn v. Smith, 527 N.E.2d 1005, 1011 (Ill. App. Ct. 1988) ("Our review of *Hustler Magazine* leads us to believe that the court's primary concern was with public officials and public figures. Nowhere did the court indicate that its holding applied to private individuals. Although we do not discount defendant's right to free speech under the First Amendment, we do not read *Hustler Magazine* as requiring proof of an additional element to the tort of intentional infliction of emotional distress where the plaintiff is a private individual."). *But see* Deupree v. Iliff, 860 F.2d 300, 304-05 (8th Cir. 1988) ("We believe 'expressions of opinion are protected whether the subject of the comment is a private or public figure.'") (quoting Ollmann v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984)).

151 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).

152 *Id.*

153 *Id.*

objectionable speech,"' the constitutional commitment to open discourse "does not mean we must be captives everywhere."[154] The Supreme Court has unhesitatingly protected the "unwilling listener" when protesters invade residential privacy.

> [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.[155]

By analogy, the Supreme Court has applied the state's interest in residential privacy to medical privacy,[156] and the doctrine has been extended by lower courts to houses of worship[157] and funerals.[158] The

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[154] Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)).

[155] *Id.* at 484-85.

[156] *See* Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 768 (1994) (citing Operation Rescue v. Women's Health Ctr. Inc., 626 So. 2d 664, 672 (Fla. 1993) ("We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy.")); *see also* Hill v. Colorado, 530 U.S. 703 (2000); Frisby v. Schultz, 487 U.S. 474 (1988); *cf.* F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Cohen v. California, 403 U.S. 15, 21 (1971) (persons confronted with defendant's jacket bearing the words "Fuck the Draft" could have avoided "further bombardment of their sensibilities simply by averting their eyes"); Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970); Kovacs v. Cooper, 336 U.S. 77 (1949); Packer Corp. v. Utah, 285 U.S. 105 (1932); Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978) (residents could "simply avoid" Nazi-affiliated party protest activities).

[157] St. David's Episcopal Church v. Westboro Baptist Church, 921 P.2d 821, 830 (Kan. Ct. App. 1996) ("[I]n addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well."); *cf.* Tompkins v. Cyr, 995 F. Supp. 664, 681 n.10 (N.D. Tex. 1998) ("The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion. The government certainly has a significant interest in protecting this important First Amendment right."). *But see* Olmer v. City of Lincoln, 192 F.3d 1176, 1182 (8th Cir. 1999) ("Allowing other locations, even churches, to claim the same level of constitutionally protected privacy [as residences] would, we think, permit government to prohibit too much speech and other communication.").

[158] *See* Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 619 (N.D. Ohio 2007) ("Because the mourners are a captive audience unable to avoid communications simply by averting their eyes, the Court finds that the State of Ohio has a significant interest in protecting its citizens from disruption during the events associated with a funeral or burial service."); McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) ("A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive."); *cf.* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004) ("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."). *But see* Phelps-Roper v. Nixon, 509 F.3d 480, 486-87 (8th Cir. 2007) (no significant state interest in protecting funeral attendees). *See generally* Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151

Supreme Court has been especially severe with targeted or "focused picketing,"[159] which the Court considers "fundamentally different from more generally directed means of communication . . . ."[160] Targeted picketing "generally do[es] not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[161] Even when protesters do have a communicative purpose, however, their activity may "inherently" intrude on privacy.[162] The home becomes something less than a home under the "tensions and pressures" created by knowledge of protest outside the door.[163] Indeed, these psychological pressures can have a "devastating effect" on our peace and privacy.[164]

It is always a bad business when rights collide. In the pantheon of rights, freedom of speech may have a preferred position, but it is no license to disregard the rights of others.[165] Supported by the "very basic right to be free from sights, sounds, and tangible matter we do not

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(2008); Amanda Asbury, Note, *Finding Rest in Peace and Not in Speech: The Government's Interest in Privacy Protection in and around Funerals*, 41 IND. L. REV. 383 (2008).

159 *See* Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 769 (1994) ("We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation."); Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) ("One may, however, be guilty of [breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*.") (emphasis added); *cf.* Cohen v. California, 403 U.S. 15, 20 (1971) ("While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'" (quoting *Cantwell*, 310 U.S. at 309)).

160 Frisby v. Schultz, 487 U.S. 474, 486 (1988).

161 *Id.*; *cf.* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 206 (1994) ("Hate speech is harassment because it is targeted expression that serves no purpose other than the infliction of serious harm on its victims."); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 306 (1990) ("If racial and ethnic epithets and slurs are to be made illegal by separate legal standards, the focus should be on face-to-face encounters, targeted vilification aimed at members of the audience."); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1843-72 (1992) (state interest justifies restrictions on directed speech (speech that is aimed at a particular individual) but not undirected speech).

162 *Frisby*, 487 U.S. at 486.

163 *See Madsen*, 512 U.S. at 768. ("[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." (citing Operation Rescue v. Women's Health Ctr. Inc., 626 So. 2d 664, 673 (Fla. 1993))); *see also Frisby*, 487 U.S. at 486; Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (citing City of Wauwatosa v. King, 182 N.W.2d 530, 537 (Wis. 1971)) (describing the psychological tensions and pressures that result from targeted residential picketing).

164 *Frisby*, 487 U.S. at 486.

165 *See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949) ("To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."); *cf.* Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring) ("[L]imits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

want,"[166] we carry with us a measure of protection from confrontational acts,[167] when we go to and from work,[168] when we view display advertising,[169] when we use the city transit system,[170] and when we seek out medical care.[171] Where there is room, literally, for disagreement (in the meeting hall, park, street corner, or public thoroughfare), and where there is opportunity for the unwilling recipient of someone else's communication to look the other way (in both literal and metaphorical senses), "First Amendment values inalterably prevail."[172] But when communication is forced upon us, the state has a substantial interest in protecting our right to be let alone.[173]

Old as the saying is, it remains true that "whether the pitcher hits the stone, or the stone the pitcher, it's a bad business for the pitcher."[174] Some rights are simply more fragile than others; without state support, they are bound to lose ground to their hardier counterparts. Alan Brownstein usefully observes that when unequally strong rights collide, a policy of non-involvement by the state will subordinate the weaker to the stronger right.[175] To illustrate the point, Brownstein considers a protest at a house of worship (and, for our purposes, we may easily substitute a protest at a funeral). The right to worship often presupposes

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166 Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970).

167 *Cf.* Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it. . . . But even the interest in preserving tranquility in 'the Sheep Meadow' portion of Central Park may at times justify official restraints on offensive musical expression.") (internal citation omitted); Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) ("In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.").

168 *See* Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921) ("How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free.").

169 *See generally* Packer Corp. v. Utah, 285 U.S. 105 (1932).

170 *See Lehman*, 418 U.S. at 303-04.

171 *See generally Hill*, 530 U.S. 703; Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

172 *Lehman*, 418 U.S. at 302.

173 *See Hill*, 530 U.S. at 717 & n.24 (characterizing "right to avoid unwelcome speech" as a common-law "'interest' that States can choose to protect in certain situations"); *see also, e.g.*, Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009).

174 MIGUEL DE CERVANTES, DON QUIXOTE 660 (Joseph R. Jones & Kenneth Douglas, eds., Norton 1981) (1605).

175 *See* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1192-1215 (1996).

an environment conducive to spiritual activities. What happens when protest activity destroys the requisite sense of religious sanctuary? Brownstein suggests—rightly, I think—that a policy of non-involvement by the state will subordinate the right to worship peacefully to the right to speak loudly. "The formal equality of a policy of non-regulation will result in substantive inequality."[176] Formal equality "does not accommodate freedom of speech and freedom of religion. Rather, it sacrifices the latter right to protect the exercise of the former right."[177] More generally, it ignores the fundamental principle that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[178]

Tort liability can, at a minimum, maintain some degree of substantive equality of rights. Federal and state statutes can protect those private sanctuaries where we ought to be let alone: let alone to worship,[179] let alone to mourn the dead.[180] But tort liability can provide a more elastic remedy against egregious forms of misconduct meant to disrupt and distress.[181] Emotional distress claims are well suited to suggest the outer limits of civil tolerance for offensive speech. Because the bar an emotional distress claimant must clear is a high one, such cases provide a

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[176] *Id.* at 1203.

[177] *Id.* at 1205.

[178] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970); *cf.* Burson v. Freeman, 504 U.S. 191, 198 (1992) ("Despite the ritualistic ease with which we state this now-familiar [exacting scrutiny] standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. . . . This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote-a right at the heart of our democracy.") (internal citation omitted). *But see* Hill v. Colorado, 530 U.S. 703, 751 (2000) (Scalia, J., dissenting) ("[T]he Court's attempt to disguise the 'right to be let alone' as a 'governmental interest in protecting the right to be let alone' is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights . . . .").

[179] *See supra* note 157.

[180] *See supra* note 158. On the constitutionality of funeral picketing statutes, see Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575 (2007); Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097 (2007); Cynthia Mosher, Comment, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN. ST. L. REV. 587 (2007); 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 (2008); Kara Beil, Note, *Funeral Protest Bans: Do They Kill Speech or Resurrect Respect for the Dead?*, 42 VAL. U. L. REV. 503 (2008); Robert F. McCarthy, Note, *The Incompatibility of Free Speech and Funerals: A* Grayned*-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L.J. 1469 (2007); Katherine A. Ritts, Note, *The Constitutionality of "Let Them Rest in Peace" Bills: Can Governments Say "Not Today, Fred" to Demonstrations at Funeral Ceremonies?*, 58 SYRACUSE L. REV. 137 (2007).

[181] *See generally* Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381 (2008); *cf.* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting) ("Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.").

way to establish a narrow limitation on speech that is by definition meant to cause harm. To not provide a remedy for psychologically injurious speech truly would be to sacrifice one set of rights for another.

Nor does adjudication of tort suits require any retreat from the First Amendment principle that civil courts should not "intermeddle in internal ecclesiastical disputes."[182] Mr. Snyder's claim can be resolved by the neutral and generally applicable principles of tort law. Tort claims do not ask the Court to render a decision about "discipline, faith, internal organization, or ecclesiastical rule, custom or law,"[183] to "second-guess ecclesiastical decisions made by hierarchical church bodies,"[184] or to determine "the correctness of an interpretation of canonical text . . . ."[185] Such claims do not demand a judicial judgment about the truth or falsity of religious belief.[186] To the extent that religious entities are held responsible for their misconduct, the burden they suffer is "merely the incidental effect of a generally applicable and otherwise valid provision."[187]

It is entirely consistent with legal precedent to hold religious groups liable in tort when their religious advocacy subjects others to emotional distress. The right of free exercise has always meant more than the right to believe. Thomas Jefferson understood it to mean that government could not "restrain the profession or propagation of [religious] principles . . . ."[188] If religious freedom leaves "all men . . . free to profess, and by argument to maintain, their opinion in matters of religion,"[189] by the same token there are times when we should be equally free to avoid unwanted and offensive religious advocacy. While "[r]eligious activities which concern only members of the faith are and

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182 Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 330 (4th Cir. 1997); *see also* Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-10 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871).

183 *Bell,* 126 F.3d at 331 (quoting *Serbian E. Orthodox Diocese,* 426 U.S. at 713).

184 Downs v. Roman Catholic Archbishop, 683 A.2d 808, 811 (Md. Ct. Spec. App. 1996) (citing *Serbian E. Orthodox Diocese*, 426 U.S. at 724-25 ("In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.")).

185 Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 878 n.1 (9th Cir. 1987).

186 *See* United States v. Ballard*,* 322 U.S. 78 (1944) (courts will not inquire as to the truth or falsity of religious beliefs).

187 *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (to make religious practices superior to the law of the land would permit every citizen "'to become a law unto himself'" (quoting Reynolds v. United States*,* 98 U.S. 145, 167 (1878))).

188 Thomas Jefferson, *The Statute of Virginia for Religious Freedom* (1786), *reprinted in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY, at xviii (Merrill D. Peterson & Robert C. Vaughan eds., 2003) (1988).

189 *Id.*

ought to be free—as nearly absolutely free as anything can be,"[190] tort liability protects the rights of others to choose religious belief or to choose none at all.[191]

The *Hustler* Court was concerned that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[192] Perhaps so, but in the funeral of a private individual we might find "a principled standard"[193] by which to circumscribe emotional distress claims within a safe constitutional perimeter. Where discourse is not, in fact, of public concern, where it is targeted to a private audience unwilling to receive it but unable to avoid it, where its purpose is to injure, then its restriction is little threat to free speech values; where public concern is a mask for mere personal abuse, private individuals should have full legal recourse to secure their right to be let alone.

CONCLUSION

> "[T]he rights and values of private personality far transcend mere personal interests."[194]

So what shall become of our impeccable neighbor? I think she deserves her day in court, even though most speech-based emotional distress claims are unlikely to survive summary judgment. (There is not much speech anymore that makes us want to cry out, "Outrageous!")

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190 Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment).

191 *Cf.* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 779 (Okla. 1989) ("No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.") (footnote omitted).

192 Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988). *Cf.* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon against "Other People's Faiths*," 34 WM. & MARY L. REV. 579, 580 (1993) (Emotional distress claims "are ill defined, requiring the trier of fact in each case to render an ad hoc judgment about the outrageousness of the particular defendant's particular conduct."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 45-46 (describing tort suits based on religious speech as "characterized by attempts to incite the jury to fear and hatred of a strange faith."); Massey, *supra* note 48, at 121 ("*Hustler* can thus be seen to be a repudiation of pluralism as a foundation for free speech, but an even deeper meaning may be derived from the case. If 'outrageousness' were to have been recognized as an exception from free speech, the standards of *every* community would prevail, thus regulating public discourse at the level of the most restrictive community. Alternatively, if some 'objective' standard of 'reasonableness' were to be employed in testing 'outrageousness,' the standards of the community most 'objectively reasonable' would govern. In either case, the prevailing mode of legal thought would have been distinctly culturally authoritarian, for the values of one group would control all others.").

193 *Hustler Magazine*, 485 U.S. at 55.

194 Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting).

Whether or not the alleged harlotry of the Catholic Church is a matter of public concern, there must be some demonstrable connection between our neighbor and that concern to justify special constitutional protection for speech branding her a whore, some connection greater than the mere fact that our neighbor is Catholic. It is not a matter of civility, but of civilness; we do not have to be nice, but we do have to live with one another.

In its cases dealing with speech-based tort claims, the Supreme Court has spent almost fifty years juggling constitutional and common-law concerns. It would, no doubt, be a great relief to find some way to end the sport, perhaps by adopting a categorical principle that protects abusive speech unless it amounts to "fighting words."[195] But other forms of speech, if not quite outside the constitutional pale, do not warrant protection from tort suit. Where speech is directed at a private individual, especially one unwilling to hear but unable to escape the speaker's message, the elements of the emotional distress claim more than satisfy the appropriate constitutional standard. Indeed, such a standard can help create a civil space where both robust advocacy and the freedom to avoid robust advocacy can flourish.

Matthew Snyder died in service to his country, but the injuries that took his life left a legacy of trauma for his family. The state's interest in protecting—at least for a moment of mourning—the peace and privacy of the Snyder family is a substantial one. The Fourth Circuit failed to protect that interest. It is now the Supreme Court's opportunity to decide whether our nation's profound commitment to the contentious discussion of public issues is also a license for egregiously intrusive and injurious speech.

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[195] Such an approach would be at odds with many existing speech restrictions. *See* Brownstein, *supra* note 161, at 181-82. Brownstein argues that "[t]he problem of targeted abusive speech directed at specific victims can only be resolved through a multi-factored analysis. . . . If verbal harassment is to be coherently defined and regulated, speech has to be evaluated as to its content, its purpose, its impact, and in terms of the circumstances in which it occurs." *Id.* at 215-16. *But see* Massey, *supra* note 48, at 155 (legitimacy of captive audience doctrine "outside of *Chaplinsky*-type circumstances is problematic").