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Snyder V. Phelps: Searching For a Legal Standard

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• *Funerals, Fire, and Brimstone* •

SNYDER V. PHELPS: SEARCHING FOR A LEGAL STANDARD

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INTRODUCTION

The case of *Snyder v. Phelps*[1] offers an array of legal issues in search of clearer legal standards. The original lawsuit by plaintiff Albert Snyder, father of the deceased soldier Matthew Snyder, against defendants Fred W. Phelps, his Westboro Baptist Church, and other church members for their picketing of Matthew's funeral and their website's "epic" account of Matthew's life, pleaded five tort causes of actions under Maryland law for defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress and civil conspiracy.[2] The district court dismissed the defamation and publicity claims. The jury found the defendants liable on the other three theories and awarded plaintiff $2.9 million in compensatory damages and $8 million in punitive damages. The district court remitted the punitive damages award to $2.1 million.[3]

On appeal, the Fourth Circuit reversed, ruling that the First Amendment required a judgment for the defendants as a matter of law "[b]ecause the judgment [incorrectly] attaches tort liability to constitutionally protected speech . . . ."[4] Preaching the doctrine of constitutional avoidance, however, a concurrence by Judge Shedd concluded that there was insufficient evidence to establish tort liability under Maryland law.[5] There was no intrusion upon seclusion because the defendants never disrupted the funeral service, confronted the plaintiff, called the websites to his attention or intruded upon Snyder's privacy in any way.[6] Moreover, Phelps' conduct was not sufficiently "outrageous"

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1 580 F.3d 206 (4th Cir. 2009), *cert. granted* 130 S. Ct. 1737 (2010).

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

3 *Id.* at 595.

4 580 F.3d at 226.

5 *Id.* at 227 (Shedd, J., concurring in the judgment).

6 *Id.* at 230-31.

to meet the requirements of the tort of intentional infliction of emotional distress. In Maryland, intentional infliction of emotional distress requires the element of extreme and outrageous conduct.[7] Despite the jury's finding for Snyder on this tort, Judge Shedd concluded that Phelps' conduct in protesting the funeral "simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law."[8] Because the defendants had not raised the sufficiency of the evidence claims in their appeal, however, the other judges rejected Shedd's reasoning, held the appellants had waived the evidence argument, and decided the case on First Amendment grounds.[9]

Snyder's petition for a writ of certiorari presented three questions for the Supreme Court to decide:

> 1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
>
> 2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
>
> 3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?[10]

The three questions presented and the underlying opinions suggest that the case is about religion, tort law and free speech. *Snyder v. Phelps* concerns tort law and free speech, and offers the Court an opportunity to clarify the constitutional law of defamation and privacy lawsuits involving speech. But it should not be a case about religion.

I. RELIGION

The Petition's second question forces us to consider what role religion played in the case, and we should conclude that religion should be irrelevant to the outcome of *Snyder v. Phelps*. The district judge rejected defendants' argument that their conduct could not be subjected to tort liability because the Free Exercise Clause of the First Amendment protects their religion from the jury's review. The court relied upon the traditional First Amendment doctrine that although the freedom to believe is absolute, the government may regulate religious

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[7] *Id.* at 232.

[8] *Id.* The conspiracy claim required that the underlying torts of inclusion or IIED be proven and so was dismissed when they were. *See id.* at 232 n.3.

[9] *Id.* at 216-17.

[10] Petition for a Writ of Certiorari at i-ii, Snyder v. Phelps, No. 09-751 (U.S. Dec. 23, 2009), 2009 WL 5115222.

conduct. Because "this case involves balancing [religious freedom] rights with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement,"[11] the court rejected a Free Exercise defense.

The defendants reasserted their religious freedom argument in their appeal to the Fourth Circuit, arguing that

> [t]his case punished defendants' religious belief that they are prophets and God's elect; their belief in God's hate; and their belief in the doctrines of reprobation, election and predestination. The jury should not have had the opportunity to put the official governmental stamp of disapproval on defendants' religious beliefs.[12]

The Fourth Circuit, however, did not address the religious freedom argument, dismissing the case instead under the First Amendment's Free Speech Clause.

In rejecting defendants' free exercise defense, the district court quoted Justice Antonin Scalia's opinion in the leading Free Exercise decision, *Employment Division, Department of Human Resources v. Smith*:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.[13]

The district court's conclusion is unassailable. The case is a reminder of the importance of *Smith*. The Westboro Baptist Church should be treated like all other picketers. Matthew Snyder's funeral at a Catholic Church should be treated like all other funerals. Tort law should not be skewed for or against religious plaintiffs and defendants. "'Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man [Phelps or Snyder] excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'"[14]

Snyder v. Phelps involves tort law and free speech. Unfortunately, the district court repeatedly referred to defendants' "religious opinion" in deciding the free speech issues. The word "religious" should be deleted

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[11] Snyder v. Phelps, 533 F.Supp.2d 567, 579 (D. Md. 2008).

[12] Brief of Appellant at *13, Snyder v. Westboro Baptist Church, Inc., 580 F.3d 206 (4th Cir. 2008) (No. 08-1026), 2008 WL 2563404 (footnote omitted).

[13] 533 F.Supp.2d at 579 (quoting Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990)).

[14] *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).

and ignored. The outcome depends purely upon how constitutional free speech rights affect state tort law.

II. DEFAMATION

The original case involved allegations of one tort designed to protect the plaintiff's *reputation* (defamation), two torts created to protect the plaintiff's *privacy* (intrusion and publication of private facts) and one tort intended to protect plaintiffs against emotional harm (intentional infliction of emotional distress). Ironically, Snyder's defamation claim did not survive in the district court even though it is the current state of defamation law that determined the outcome of the privacy and emotional distress lawsuits and set the stage for the important first question in the petition for certiorari about *Hustler Magazine v. Falwell*.[15]

Albert Snyder's defamation claim involved the "epic" story about his son published on the church's website, www.godhatesfags.com. The story, called "The Burden of Marine Lance Cpl. Matthew Snyder," stated that Albert Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar."[16] Maryland defamation law requires "(1) that Defendants made a defamatory communication to a third person, (2) that the statement was false, (3) that Defendants were at fault in communicating the statement, and (4) that Plaintiff suffered harm."[17] The district court ruled that the first element was not satisfied "because the content of the 'epic' posted on the church's website was essentially Phelps-Roper's religious opinion and would not realistically tend to expose Snyder to public hatred or scorn."[18] That sentence is somewhat confusing. First, it mistakenly suggests that *religious* opinion law differs from other speech law, whereas, as noted above, religion should not be significant to the case. Second, it uses the expression "public hatred or scorn," whereas defamation usually involves any harm to reputation. It would have been more direct to say that under Maryland law the website did not harm Albert's reputation and conveyed only the church's opinion, not any underlying false facts about Albert.

If Albert's lawsuit had satisfied the four elements of Maryland's defamation law, the district court would have had to decide if Phelps' website enjoyed free speech protection under the First Amendment. Starting with *New York Times Co. v. Sullivan*,[19] the Supreme Court has ruled that in some circumstances states may not apply their state law

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15 Petition for a Writ of Certiorari at i, Snyder v. Phelps, No. 09-751 (U.S. Dec. 23, 2009), 2009 WL 5115222 (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988)).

16 533 F.Supp.2d at 572.

17 *Id.*

18 *Id.* at 572-73.

19 376 U.S. 254 (1964).

standards because the First Amendment requires greater protection of free speech than the state standards. In *New York Times* itself, the Court ruled that Alabama could not award damages in lawsuits against public officials for criticism of their official conduct without proof of actual malice by the defendants.[20] The addition of an "actual malice" standard is significant because state tort law traditionally did not require any level of fault by the defendant, instead imposing "strict liability" or liability without fault. See Table 1 below for a list of the elements traditionally required in a defamation claim.

TRADITIONAL ELEMENTS OF A COMMON LAW DEFAMATION SUIT

1. Defamatory Statement
2. Of and Concerning Plaintiff
3. Publication
4. Damages

Table 1

The Court later extended the *New York Times* rule to cover public figures as well as public officials.[21] Then George Rosenbloom, an "individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life," who before his arrest and acquittal on charges of obscenity "was just one of the millions of Americans who live their lives in obscurity"[22] sued Metromedia for its report of his arrest. A plurality on a fractured Court voted to extend *New York Times* fault to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[23]

The full Court, however, never adopted the *Rosenbloom* plurality's standard. Instead, defamation law became linked to some mixture of public and private figures with public and private concerns, as depicted in Table 2 below. Speech about *public* officials and *public* figures involving a matter of *public* concern is governed by *New York Times*.[24] Speech about *private* figures involving matters of *public* concern is governed by *Gertz v. Robert Welch, Inc.*, which held that "so long as

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[20] *Id.* at 283-84.
[21] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
[22] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (Marshall, J., dissenting).
[23] *Id.* at 44 (Brennan, J., plurality opinion).
[24] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[25] Finally, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* held that "speech on matters of *purely private concern* is of less First Amendment concern"[26] because in such cases "'[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.'"[27] In *Dun & Bradstreet*, a case involving private individuals and matters of private concern, the Court ruled that states could award presumed and punitive damages without a showing of *New York Times* actual malice.[28]

	PUBLIC OFFICIAL/FIGURE	PRIVATE FIGURE
PUBLIC CONCERN	*New York Times* Fault (actual malice) Falsity	*Gertz* Fault (negligence?) Falsity
PRIVATE CONCERN	Same as *Dun & Bradstreet*?	*Dun & Bradstreet* Fault (?????) Falsity (?????)

Table 2

[25] 418 U.S. 323, 347 (1974).

[26] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (emphasis added).

[27] *Id.* at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (Or. 1977)).

[28] *Id*. at 761. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986), offers a good summary of these standards:

> 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. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz,* the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

The Court's case-by-case resolution of the constitutional law of defamation has not been tidy. The legal standard that the states may employ in the private/private category is not crystal clear. The combinations of public and private are doubly confusing. The facts of *Snyder v. Phelps* illustrate the limits of the categories. Is Albert Snyder a private figure, because he is a grieving father at a funeral, or public because he published details of the funeral and was picketed by a well-known group? Is Fred Phelps obviously a public figure because of his picketing across the country? Does his status attach to every member of his church? Is the funeral of an Iraq war veteran a private matter or an issue of public concern? Does Phelps' presence turn every funeral into a matter of public concern? Should states be free in the private/private category to set their own standards (including no-fault standards) or must the Court "constitutionalize the entire common law of libel"?[29]

Many Court observers have been puzzled about the Court's granting certiorari in *Snyder v. Phelps*.[30] Is it possible that someone persuaded the Justices to clean up defamation law, either by clarifying the categories or replacing them with something better? A leading constitutional law hornbook, in a section entitled "The Future of the 'Public Concern' Doctrine" warns that in *Rosenbloom*,

> Justices Marshall, Stewart and Harlan in dissent warned that courts are not equipped for such an ill-defined task inevitably involving ad hoc balancing. Courts 'will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. The danger such a doctrine portends for freedom of the press seems apparent.' Judges are not able to determine what is 'public concern' without examining the contents of the speech and then applying their subjective judgments. It may well be that the road the Powell plurality in *Dun & Bradstreet* seeks to travel will *end in a dead end*, as it did the last time the Court took that route.[31]

Would the Roberts Court, recently criticized for its overruling of important precedents,[32] rewrite the framework established by *Dun & Bradstreet*, *Gertz* and that towering symbol of the Warren Court, *New York Times*? Or does it have lesser goals in mind? In order to figure out if *Snyder* will lead us away from a constitutional dead end, it is time to understand why defamation was important to a lawsuit whose claim for defamation was dismissed.

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[29] *Dun & Bradstreet*, 472 U.S. at 761 n.7.

[30] 580 F.3d 206 (4th Cir. 2009), *cert. granted* 130 S. Ct. 1737 (2010).

[31] JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 16.16, at 682-83 (3d ed. 2007) (emphasis added).

[32] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (No. 08-205).

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Even though the defamation count was dismissed, the law of defamation remained relevant to *Snyder v. Phelps* because of the intentional infliction of emotional distress claim. In *Hustler Magazine v. Falwell*,[33] the Court ruled that the evangelist Jerry Falwell, a public figure, could not recover emotional distress damages for a parody ad published by Hustler Magazine absent a showing "that the publication contains a false statement 'of fact' made with actual knowledge that the statement was false or with reckless disregard of whether or not it was true."[34] In other words, *New York Times* applies to intentional infliction of emotional distress cases involving speech (as well as to other privacy torts[35]).

There are tort as well as constitutional law reasons for *Hustler*'s holding. In tort law, courts do not allow plaintiffs to do an end run around prohibited lawsuits by relabeling the same tort under a different name. The Supreme Court of Virginia, for example, dismissed a lawsuit for intentional infliction of emotional distress by a husband against his wife's boyfriend who disrupted their marriage because Virginia does not allow lawsuits for alienation of affection.[36] To allow a distress lawsuit for the same conduct would undermine the Virginia statute prohibiting lawsuits based on adultery. In constitutional law, if speech is protected by the First Amendment, then the speaker should not be subjected to any tort liability for protected speech whether the tort is labeled defamation, privacy or intentional infliction of emotional distress. If *New York Times*, then *Hustler.*

Snyder's claim for emotional distress was based not only on the website statements considered above, but also on the content of the signs held by church members during the picketing of the funeral. The district court ruled that some of the signs, such as "Thank God for Dead Soldiers," "Semper Fi Fags," "You're Going to Hell," and "God Hates You," created issues of fact for the jury because they "could be interpreted as being directed at the Snyder family . . . ."[37] Fred Phelps argued that the emotional distress tort could not be applied against him because Snyder was a public figure involved in a matter of public concern. The district court rejected Phelps' argument, concluding that "[d]efendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Matthew

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33 485 U.S. 46 (1988).

34 Nowak & Rotunda, *supra* note 31, § 16.15, at 677.

35 *See* Time, Inc. v. Hill, 385 U.S. 374 (1967) (applying NYT actual malice to a false light privacy tort).

36 McDermott v. Reynolds, 530 S.E.2d 902 (Va. 2000); *see also* MARC A. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 920-31 (8th ed. 2006).

37 Snyder v. Phelps, 533 F. Supp. 2d 567, 578 (D. Md. 2008).

Snyder was a public figure."[38] Through the intentional infliction of emotional distress tort, therefore, the defamation categories remained relevant to the court's decision even though the defamation count was dismissed. The district court believed the lawsuit involved the private/private category.

Over Phelps' objection, the trial court instructed the jury:

> As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. *Where the speech is directed at private people and matters of private concern*, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. As I have previously indicated to you at the start of this case, you as the judges of the facts in this case must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.[39]

The Fourth Circuit concluded that this instruction was incorrect,[40] but instead of remanding for a new trial ruled that the First Amendment barred the lawsuit completely and vacated the jury's verdict.[41]

The grounds of the Fourth Circuit's decision are confusing, however, and reinforce the idea that the law of defamation is unsatisfactory. The appeals court rejected the district court's conclusion that *Snyder* is a private/private case and instead stated that the facts involved a matter of public concern. Concerning the signs "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags," the court concluded that 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. Such issues are not subjects of 'purely private concern. . . .'"[42]

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[38] *Id.* at 577.
[39] Snyder v. Phelps, 580 F.3d 206, 214-15 (4th Cir. 2009) (emphasis added).
[40] *Id.* at 221.
[41] *Id.* at 226.
[42] *Id.* at 222-23 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759

At that point the court might have remanded the case to be retried under the *Gertz* private figure/public concern standard. Instead, it dismissed the lawsuit on the grounds that the "type of speech" at issue was protected by the First Amendment:

> There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a "provably false factual connotation." . . . Second, rhetorical statements employing "loose, figurative, or hyperbolic language" are entitled to First Amendment protection to ensure that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[43]

The signs and website were therefore "types of speech" protected by the First Amendment and could not be subjected to suit.

The Fourth Circuit distinguished its "type of speech" analysis from the public/private categories associated with *New York Times* and *Gertz*. The court would have been wiser, however, to use the language of "falsity" instead of the expression "type of speech." After *New York Times*, the Supreme Court ruled that public official/figure plaintiffs on matters of public concern must prove not only the *fault* (actual malice) of the speaker but also the *falsity* of the defamatory statement. In Philadelphia Newspapers, Inc. v. Hepps,[44] the Court also clarified that the First Amendment requires both a public-figure plaintiff and a private-figure plaintiff on a matter of public concern to bear the burden of proof on falsity in order to prevail in a defamation lawsuit. In other words, in *New York Times* and *Gertz* cases proving falsity as well as fault is a constitutional requirement. Under this analysis, Snyder could not prove anything false about the signs and the website. They were either hyperbole or opinion containing no underlying false facts about Snyder, and there was nothing false about them. The Fourth Circuit used the language, "they do not assert provable facts about an individual"[45] or they "cannot reasonably be interpreted as stating actual facts about any individual."[46] In the Supreme Court's language, the signs were not false.

Hepps explained the reasons why the First Amendment requires placing the burden on plaintiffs to prove falsity rather than on defendants to prove truth:

(1985)).

[43] *Id.* at 219-20 (internal citations omitted).

[44] 475 U.S. 767, 775-76 (1986).

[45] *Snyder*, 580 F.3d at 223.

[46] *Id.* at 224.

> There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.
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> This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but *all* of such speech is *unknowably* true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and *where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech*. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a [private-figure] plaintiff seeks damages against a media defendant for speech of public concern.[47]

What about private figure plaintiffs involving matters of private concern? Should the constitutional scales tip in favor of the plaintiff proving falsity or the defendant proving truth? That is one of the issues that the Court could choose to resolve in *Snyder v. Phelps.*

CONCLUSION: LEGAL ISSUES TO BE RESOLVED

It is unclear why the Court granted certiorari in *Snyder v. Phelps*. The law of defamation itself, combined with its application to the privacy torts and intentional infliction of emotional distress, contains numerous gaps with unclear legal standards for the Court to fill, depending whether it wants to write a broad or narrow holding. It could narrowly rule that the facts of *Snyder* did not involve a matter of public concern, that Maryland's state standards were applicable and reinstate the jury's

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[47] *Hepps*, 475 U.S. at 776-77 (third emphasis added).

verdict. In doing so, it could clarify the private/private standard in a broad or narrow way. It could simply reinstate the verdict out of deference to the states, or it could uphold Maryland's law because Maryland already requires fault in its torts lawsuits. The strict liability of common law could be abolished in favor of a fault-based system for all defamation lawsuits.

A more ambitious Court would reconsider the public concern test, originally advocated as the key test by Justice Brennan in *Rosenbloom* and now a central part of the public-private figure/public-private concern framework,[48] and decide whether the public/private concern standard survives the Internet era, when presumably almost everything has become a matter of public concern. From the beginning, some Justices worried that the public concern standard was too vague.[49] The district court warned that the defendants should not be allowed "by their own actions [to] transform a private funeral into a public event and then bootstrap their position by arguing that Matthew Snyder was a public figure."[50] The Court could give more guidance about what qualifies as a matter of public concern or perhaps put some alternative new standard in its place. It would be interesting to see if the Roberts Court would really address perceived deficiencies in *New York Times*.

Another option would be for the Court to distinguish the rules applying to media and non-media defendants, the route that the Vermont Supreme Court took when it issued its ruling in *Dun & Bradstreet*.[51] Then private figure/public concern cases against media defendants would remain in the *Gertz* category, while private figure/public concern cases against non-media defendants (i.e., *Snyder v. Phelps*) would move to the *Dun & Bradstreet* box along with private figure/private concern cases.

If the Court did resurrect the media/non-media distinction, however, it would still need to clarify whether it desired to "constitutionalize the entire common law of libel"[52] or to leave the *Dun & Bradstreet* cases to the states, allowing them even to impose liability without fault and to presume falsity and damages as traditional common law did. Because the state courts enforce state defamation law, it seems a bad idea to rule that the First Amendment is not implicated by their judgments (although the Supreme Court may desire to do so). Yet, as Justice Marshall observed in *Rosenbloom*, "[t]he protection of the reputation of such anonymous persons 'from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'"[53]

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48 *See supra* notes 22-23 and accompanying text.

49 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (Marshall, J., dissenting).

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

51 Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414 (Vt. 1983), *aff'd* 472 U.S. 749 (1985).

52 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 n.7 (1985).

53 *Rosenbloom*, 403 U.S. at 78 (Marshall, J., dissenting) (quoting Rosenblatt v. Baer, 383 U.S.

Instead of letting the jury members strike the balance between the private person and the First Amendment, as the instruction in *Snyder* ordered them to do, however, the Court should set some standard.

Justice Harlan's dissent in *Rosenbloom* concluded that "when dealing with private libel, the States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault; that a showing of actual damage should be a requisite to recovery for libel; and that it is impermissible, given the substantial constitutional values involved, to fail to confine the amount of jury verdicts in such cases within any ascertainable limits."[54] In my terminology, "private libel" could now include lawsuits by private figures on matters of public concern against non-media defendants as well as by private figures on purely private concerns.

In other words, the Court might well apply *Gertz*-like *fault* in the *Dun & Bradstreet* cases. Yet it could still distinguish the two types of cases by changing the rules on *falsity*.

In dissent in *Hepps*, Justice Stevens challenged the majority's decision to apply the falsity rule to private plaintiffs. By requiring private plaintiffs to prove *fault*, Stevens argued, "the antecedent fault determination makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale."[55] Because of the "strong state interest in redressing injuries to private reputations,"[56] he wrote, the First Amendment should not require "a private individual to bear the risk that a defamatory statement—uttered either with a mind toward assassinating his good name or with careless indifference to that possibility—cannot be proven false."[57] The error of *Hepps*, Stevens wrote, was the Court's "mistaken belief that doubt regarding the veracity of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of the private individual."[58]

The Court could rule, in other words, that private plaintiffs (Albert Snyder) in matters of public concern against non-media defendants (Fred Phelps and Westboro Baptist Church) must prove fault (negligence) but not falsity. This seems more honest an outcome than concluding that the facts of the case involve a matter of "purely private concern" under *Dun & Bradstreet.*

After cleaning up defamation, the Court would have to decide whether to transfer the same requirements over to intentional infliction of emotional distress and the privacy torts.[59] In Maryland, all three torts at

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75, 92 (1966) (Stewart, J., concurring)).

[54] *Id.* at 64 (Harlan, J., dissenting).

[55] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 783 (Stevens, J., dissenting).

[56] *Id.* at 787.

[57] *Id*. at 781.

[58] *Id*. at 787.

[59] *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (using public figure categories in an

issue in *Snyder* already contain fault elements. Maryland defamation law requires "(1) that Defendants made a defamatory communication to a third person, (2) that the statement was false, (3) that Defendants were at fault in communicating the statement, and (4) that Plaintiff suffered harm."[60] In a Maryland claim for intentional infliction of emotional distress, "a plaintiff must demonstrate that the 'defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.'"[61] The elements of a Maryland intrusion are: "(a) An intentional[;] (b) Intrusion or prying upon[;] (c) Something which is and is entitled to be private[;] (d) In a manner which is highly offensive to a reasonable person, considering the customs of the time and place, although public disclosure is not an element of the offense."[62] Without a falsity requirement, these would be the legal requirements that would govern *Snyder v. Phelps*.

Yet leaving it all to Maryland law would be too easy. The petition for certiorari involves *Hustler*, and a key question therefore should be whether tort liability in non-defamation cases can only be based on speech that is defamatory. No court ruled that Snyder's speech was defamatory but the jury found it to be outrageous, productive of emotional harm and intrusive. The Supreme Court could hold that what the Fourth Circuit should have said was that tort liability can only be based on speech that is defamatory. Defamatory speech is unprotected because it is false. The legal disputes about it involve only who should bear the burden of proof in ambiguous cases in proving truth or falsity. True speech is constitutionally protected. Outrageous and intrusive speech is often true, or at least not false because rhetorical and hyperbolic. Is there any non-defamatory speech that can form the basis of tort liability?

Question three of the petition for certiorari—"Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?[63]—suggests that the plaintiffs are searching for another type of unprotected speech, separate from defamation, that would be an appropriate basis of tort liability. The petition identifies a split in the circuits about funeral picketing and the captive audience.[64] The *amicus* brief for forty-eight states supporting the petitioner argues that "funerals represent a special circumstance warranting state protection"

IIED case); Time, Inc. v. Hill, 385 U.S. 374 (1967) (applying *New York Times* actual malice to a false light privacy tort).

60 Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

61 *Id.* at 580 (quoting Miller v. Bristol-Myers Squibb Co., 121 F. Supp. 2d 831, 839 (D.Md. 2000)).

62 MARYLAND CIVIL PATTERN JURY INSTRUCTIONS, at MPJI-Cv 25:1, cmt. A.3 (Md. Inst. for Continuing Prof'l Educ. of Lawyers, Inc. 2009), MPJI MD-CLE 25-649 (Westlaw) (citing Hollander v. Lubow, 351 A.2d 421 (1976)).

63 Petition for a Writ of Certiorari at ii, Snyder v. Phelps, No. 09-751 (U.S. Dec. 23, 2009), 2009 WL 5115222.

64 *Id.* at *11.

and defends strong state anti-picketing laws.[65]

Yet *Snyder* is the wrong case to make this argument. "It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral."[66] As Respondents explained, the Westboro Baptist Church members "picketed over 1,000 feet from a funeral . . . [and] were not seen by those going in; and did not impact or disrupt the funeral in any slightest degree."[67] The state laws governing picketing were enforced and observed. The constitutional issues at stake in *Snyder* involve a different question, namely whether the First Amendment allows tort liability in circumstances when protesters obedient to the picketing laws inflict emotional distress upon and invade the privacy of the mourners.

Understood in that way, the captive audience issue is another formulation of question one about *Hustler*—namely whether plaintiffs should be allowed to do an end run around picketing laws by collecting tort damages for defendants' legal demonstrations. State picketing laws are governed by the First Amendment, as must be the law of emotional distress and intrusion involving speech.[68]

More interesting than the captive audience question is whether obscenity or fighting words (i.e., "speech that is directed at another and likely to provoke a violent response")[69] could form the basis of an intrusion or emotional distress lawsuit because these two categories of speech, like defamation, enjoy lesser First Amendment protection. The parties and the *amici*, however, have not raised this argument, so it is implausible that the Court would consider it.

Why *did* the Court take *Snyder v. Phelps*? Will they use a bad case to make new law or decide that this is not the proper vehicle to redo the First Amendment? The district court judge dismissed the defamation count, and Judge Shedd ruled that Phelps's actions were neither outrageous or intrusive under Maryland law. The whole case could be dismissed under state law without the need for any constitutional ruling. Or the Court could constitutionalize the law of libel, emotional distress and privacy in one big ruling.

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65 Brief for the State of Kansas, 47 other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 5, Snyder v. Phelps, No. 09-751 (U.S. June 1, 2010), 2010 WL 2224733.

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

67 Brief in Opposition to Petition for Writ of Certioari, at *i, Snyder v. Phelps, No. 09-751 (U.S. Jan. 20, 2010), 2010 WL 271323.

68 *See* Frisby v. Schultz, 487 U.S. 474 (1988).

69 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1001 (3d ed. 2006).