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Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment

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INTRODUCTION

Since 2005, the Reverend Fred Phelps and other members of the Westboro Baptist Church have outraged almost everyone by protesting near military funerals.[1] In *Snyder v. Phelps* the Supreme Court will finally decide whether that outrage is actionable.[2] Few people will lose sleep if the Court finds that the First Amendment allows Albert Snyder to sue the Phelpses for intentional infliction of emotional distress and invasion of privacy for protesting near his

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1. Lizette Alvarez, *Outrage At Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14 (quoting Indiana Representative Steve Buyer describing Phelps' behavior as "repugnant, outrageous, [and] despicable"). Others refer to the Phelpses as "pieces of garbage" and "evil." Geoff Oldfather, *A Good Way to Handle Westboro Protestors: Ignore Them*, FORT PIERCE TRIB. (Fla.), May 22, 2008, at B6; Michael Bearak, *Westboro Baptist Church Is Evil*, DIGITAL J., Apr. 11, 2010, http://www.digitaljournal.com/article/290434.

2. 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010) (No. 09-751).

son's funeral.[3] After all, their messages, including statements such as "Semper Fi Fags," "Thank God for Dead Soldiers," "America is Doomed," "God Hates the USA," "God Hates You," and "Pope in Hell"[4] were objectionable and mean-spirited. Snyder must have viewed their speech as "an affront of the most egregious kind."[5]

This case, however, has the potential to undo decades of the Court's jurisprudence protecting offensive speech. Nothing about *Snyder* suggests the Phelpses disrupted the funeral.[6] Rather, Snyder and his supporters wish to restrict the Phelpses' speech because they find it abhorrent and inappropriate. But the Court's free speech jurisprudence does not allow government-sanctioned punishment of speech solely because others find the message offensive.[7] It allows regulation of speech only if the speech contains objective indicia of harm, such as speech accompanied by physical or aural invasions, threats, or violence.[8] These requirements exist for good reason. Absent objective indicia of harm, regulation of offensive speech amounts to content-based censorship and "effectively empower[s] a majority to silence dissidents simply as a matter of personal predilections."[9]

Psychological research on emotions validates the Court's approach by revealing that anger—the emotion most likely involved with speech we find offensive—is inextricably linked to censorship. Put simply, individuals get angry when others demean their personal or social identities.[10] Speech that criticizes or ridicules another's deeply held personal beliefs or values exemplifies such an offense. The resulting anger often leads to responsive action, including the desire to punish the offensive speech.[11] Individual perceptions of what amounts to a demeaning offense vary greatly, however, depending on particular worldviews, internalized cultural norms, and personal experiences and beliefs.[12] Thus, reactions to speech are the result of a complicated interplay between the content of speech and an individual's subjective emotions.

The Court's requirement of external indicia of harm, such as imminent violence, intuitively recognizes and protects against our subjective and unpredictable emotional responses to speech. Absent an external constraint,

3. Mr. Snyder sued Fred Phelps and several others, including Mr. Phelps's daughters, Shirley Phelps-Roper and Rebekah Phelps-Davis. *See id.* at 211–12.

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

5. Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 153 (2008).

6. *Snyder*, 580 F.3d at 212 (noting that the Phelpses maintained a distance of several hundred feet from the funeral and were not noisy or disruptive).

7. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716 (2000); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989).

8. *See infra* Part III.

9. Cohen v. California, 403 U.S. 15, 21 (1971).

10. RICHARD J. LAZARUS, EMOTION & ADAPTATION 217, 222 (1991).

11. *Id.* at 226.

12. Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 892 (2009).

allowing anger or outrage to guide regulation of speech leads to suppression of speech simply because the content offends a listener's world view. Unfortunately, the arguments made in favor of tort liability in *Snyder* effectively bypass such external indicia by asking the Court to allow tort liability based on little more than the Phelpses' offensive messages.[13] Such an approach is especially dangerous in the context of civil liability. Unlike generally applicable criminal laws that clearly notify people of behavior that is out-of-bounds, tort lawsuits involve individual disputes between discrete parties. Without a requirement that the speech contain external indicia of harm, anyone can bring a claim that another's speech inflicts emotional distress because such speech offends their world view. Holding the Phelpses liable thus allows censorship of speech based upon its unpopular message. Given that the potential bases for tort liability are endless, such an approach threatens to remove contentious speech from public discussion.

Part I of this Essay discusses the history of *Snyder*. Part II examines the Court's doctrines pertaining to offensive speech, reviewing its longstanding jurisprudence protecting offensive messages and explaining why the Phelpses' speech in *Snyder* fits within this doctrine. Part III then examines certain exceptions to the Court's protection of speech—the captive audience and low value speech doctrines—and explains why attempts to analogize between these doctrines and the tort liability in *Snyder* fall short. Finally, Part IV discusses the psychology of emotions, focusing primarily on how anger arises. Relying on these psychological findings, Part IV explains why Snyder's intentional infliction of emotional distress (IIED) and invasion of privacy claims cannot fit within the existing free speech structure. The Essay concludes that the Court should not recognize a claim for IIED based on offensive messages like those involved in *Snyder*, as such liability risks undermining decades of the Court's free speech jurisprudence and chilling protected speech.

I
SNYDER V. PHELPS BACKGROUND

A. The Facts

The Phelpses started protesting at the funerals of slain Iraqi and Afghan war veterans in 2005 to spread their belief that those wars were the ultimate result of America's willingness to embrace homosexuality.[14] Lawmakers have reacted overwhelmingly negatively to the protests, with the federal government and over forty states enacting laws regulating their expression.[15]

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13. *See infra* note 55 and Part III.B.

14. Snyder v. Phelps, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008) (describing the Phelpses' view that "God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military"); Wells, *supra* note 5, at 160 & n.44.

15. Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009); *see also* Wells, *supra* note 5, at 161–74.

Snyder, however, involves a civil suit stemming from the Phelpses' protest near the funeral of Snyder's son, Lance Corporal Matthew Snyder. After issuing a press release and notifying local police about their intent to picket the funeral, seven members of Phelps's congregation, the Westboro Baptist Church, protested at Matthew Snyder's funeral with signs bearing messages similar or identical to those described above.[16] The protestors were not noisy, did not block access to the funeral, and obeyed all official directives to remain at least several hundred feet from the ceremony.[17] Although Snyder was aware of the Phelpses' presence nearby, he did not see their signs until after the funeral when he viewed a news broadcast in his home.[18]

The Phelpses also posted an Internet "epic" on their website mentioning Snyder and his son.[19] The Phelpses' online post claimed that the Snyders "raised [their son] for the devil, . . . [and] taught [him] to defy his Creator, to divorce and to commit adultery . . . [and] to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity."[20] Snyder also did not view this post until days later when he ran a Google search about his son's funeral on the Internet.[21] Nevertheless, in the aftermath of the Phelpses' expression, Snyder experienced severe emotional distress, becoming tearful and angry upon recalling their actions and suffering physical effects such as vomiting and an exacerbation of his diabetes.[22]

B. The Lawsuit

Snyder sued the Phelpses for IIED and invasion of privacy by intrusion upon seclusion in 2007.[23] Although the district court cautioned the jury against suppressing merely offensive speech, it also noted that free speech interests "must be balanced against a state's interest in protecting its residents from wrongful injury."[24] According to the court, the Phelpses could be liable for speech directed at Snyder if their "actions would be highly offensive to a reasonable person, . . . were extreme and outrageous and . . . were so offensive and shocking as to not be entitled to First Amendment protection."[25] The jury returned a verdict of $10.9 million against the Phelpses.[26] The district court judge denied the Phelpses' post-trial motions based on the First Amendment, ruling that the protestors' expression created an "atmosphere of confrontation"

16. *Snyder*, 580 F.3d at 211–12.
17. *See id.* at 212.
18. *Id.*
19. *Id.* (describing the "The Burden of Marine Lance Cpl. Matthew Snyder").
20. Brief for Petitioner at 7–8, Snyder v. Phelps, No. 09-751 (U.S. May 24, 2010); Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009).
21. *Id.*
22. *Id.* at 213; Brief for Petitioner, *supra* note 20, at 8.
23. The court dismissed Snyder's defamation and publicity given to private life claims. *Snyder*, 580 F.3d at 212–13.
24. *Id.* at 214–15.
25. *Id.* (quoting Joint Appendix at 3113–14).
26. *Id.* at 211.

that invoked the rights of mourners to "avoid being verbally assaulted by outrageous speech and comment during a time of bereavement."[27]

The Fourth Circuit, however, found that the First Amendment protected the Phelpses' speech. Although recognizing that the expression profoundly distressed Snyder, the appellate court ruled that tort liability was inappropriate when speech "cannot reasonably be interpreted as stating actual facts about an individual."[28] The court concluded that the Phelpses' speech could not reasonably be read to imply an assertion about the Snyders, and even if it could, the speech expressed "subjective opinion" and "hyperbolic rhetoric intended to spark [public] debate."[29] According to the Fourth Circuit, the First Amendment provides "breathing space for [such] contentious speech," even when it involves "exaggeration, . . . vilification of men . . . [and] the probability of excesses and abuses."[30]

The Supreme Court granted certiorari in March 2010.[31]

II
OFFENSIVE SPEECH IN THE SUPREME COURT

The Court has long recognized that expression can "sti[r] people to anger," "strike at prejudices and preconceptions," and have "profound unsettling effects as it presses for acceptance of an idea."[32] Nevertheless, the Court has consistently found that the government may not curtail speech "simply because the speaker's message may be offensive to his audience."[33] The Court protects offensive speech for two reasons. First, speech on matters of public concern retains its value even when delivered in an offensive manner.[34] Second, attempts to punish offensive speech too often lead to censorship of unpopular ideas.[35]

Snyder implicates the Court's offensive speech jurisprudence in its purest sense. The Phelpses' expression was disrespectful, even contemptible, but, as the Fourth Circuit found, it falls squarely within the realm of public discourse.[36]

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27. Snyder v. Phelps, 533 F. Supp. 2d 567, 577, 579 (D. Md. 2008).

28. *Snyder*, 580 F.3d at 218 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)).

29. *Id.* at 223.

30. *Id.* at 226 (quotations omitted).

31. 130 S. Ct. 1737 (Mar. 8, 2010) (No. 09-751).

32. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

33. Hill v. Colorado, 530 U.S. 703, 716 (2000); *see also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989); Boos v. Barry, 485 U.S. 312, 322 (1988); Hustler Magazine v. Falwell, 485 U.S. 46, 55–56 (1988); Cohen v. California, 403 U.S. 15, 21 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

34. *Terminiello*, 337 U.S. at 4 ("The vitality of civil and political institutions in our society depends on free discussion . . . . [A] function of free speech under our system of government is to invite dispute.").

35. *Cohen*, 403 U.S. at 21 (Indiscriminate punishment of offensive speech "effectively empower[s] a majority to silence dissidents simply as a matter of personal predilections.").

36. Snyder v. Phelps, 580 F.3d 206, 222–23 (4th Cir. 2009).

The Phelpses' signs and Internet epic expressed their opinions on the Iraq and Afghanistan wars, the validity of the Catholic faith, and gay rights.[37] Such topics are of considerable contemporaneous interest to the public.[38] That speech also conveys beliefs the Phelpses sincerely hold. As one court noted:

> [The Phelpses] have long expressed their religious views by . . . picket[ing] . . . various . . . public events that they view as promoting homosexuality, idolatry, and other sin. . . . [T]hey have also picketed near funerals of gay persons, persons who died from AIDS, people whose lifestyles they believe to be sinful but who are touted as heroic upon their death, and people whose actions while alive had supported homosexuality and other activities they consider proud sin. . . . [The Phelpses] believe that one of the great sins of America is idolatry in the form of worshiping the human instead of God and that, in America, this has taken the form of intense worship of the dead, particularly soldiers. . . .[39]

Although the Phelpses' speech is well outside mainstream thought, the Court's doctrine maintains such expression is part of public discourse. As the Court noted, "*[m]ost* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation."[40]

Furthermore, the negative public reaction to the Phelpses' speech, and arguments favoring imposing tort liability on the family, suggests a strong risk of censorship of their speech. Unlike neutral laws regulating the time, place, and manner of *any* protests near funerals, a lawsuit seeking imposition of damages targets particular individuals or groups and is far more likely a response to the protestors' offensive messages.[41] Typically, the Court would find this to be reason alone to eschew regulation: "[T]hat society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[42]

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37. *See supra* notes 4 & 20.

38. Media outlets regularly address these issues. *See, e.g.*, Rod Nordland, *12 NATO Soldiers, 7 From U.S., Are Killed in Afghanistan*, N.Y. TIMES, June 8, 2010, at A11; Christopher Hitchens, *Bring the Pope to Justice*, NEWSWEEK, Apr. 23, 2010, http://www.newsweek.com/2010/04/22/bring-the-pope-to-justice.html; Peter Moskos, *Don't Ask, Don't Tell: Farewell to My Father's Idea*, WASH. POST, June 4, 2010, at A17; Maura Dolan, *Gay Rights Groups Lose a Round,* L.A. TIMES, July 17, 2008, http://articles.latimes.com/2008/jul/17/local/me-gaymarriage17.

39. Phelps-Roper v. Bruning, No. 4:10CV3131, 2010 WL 2723202, at *1 (D. Neb. July 6, 2010).

40. United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) (citation omitted) (original emphasis).

41. Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE WEST. RES. L. REV. 1, 32–33 (2000) (discussing how broadly applicable neutral statutes better protect against censorship compared to restrictions applicable to particular individuals).

42. FCC v. Pacifica Found., 438 U.S. 726, 745 (1978); *see also* Boos v. Barry, 485 U.S. 312, 322 (1988); Cohen v. California, 403 U.S. 15, 22–24 (1971).

Those arguing for tort liability in *Snyder*, however, claim that the Phelpses' speech falls within exceptions to the Court's First Amendment protection. Specifically, they (1) argue that the Court's captive audience doctrine allows regulation of offensive speech that invades the listener's privacy, and (2) analogize liability for IIED and invasion of privacy to the Court's other areas of low value speech, such as libel or fighting words. As discussed below, tort liability based solely on offensive messages would require substantial extension of the Court's jurisprudence.

III
EXCEPTIONS TO FREE SPEECH PROTECTION

A. Invasion of Privacy and the Captive Audience

The Court's captive audience doctrine allows regulation of speech that unreasonably invades the privacy interests of listeners. This aspect of the Court's jurisprudence is most clearly associated with the home, where privacy protection is at its apex.[43] For example, the Court upheld content-based regulations controlling indecent broadcasts and mailings into the home.[44] In *Frisby v. Schultz*, it also upheld content-neutral regulations of "targeted" picketing aimed at a single residence, recognizing that such picketing "inherently and offensively intrudes on residential privacy" because "the home becomes something less than the home."[45]

When the listener is in a public space, however, the Court is far less willing to recognize a captive audience. It rejected the notion that individuals have a "generalized right to be left alone on a public street or sidewalk."[46] Rather, it requires that speech physically or aurally invade a zone of privacy before invoking the captive audience doctrine. Thus, the Court upheld claims based on aural intrusions by noisy protestors around medical clinics and schools, as well as physical intrusions from protestors who approached audience members so closely as to cause invasions of personal space.[47] Notably, however, the Court rejected attempts to invoke a captive audience rationale based solely on the offensiveness of the speaker's message.[48] Indeed,

43. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

44. *Pacifica*, 438 U.S. at 750; Rowan v. U.S. Post Office Dep't., 397 U.S. 728, 738 (1970).

45. 487 U.S. at 486 (citation omitted).

46. Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997) (citation omitted). For elaboration of this argument, see Wells, *supra* note 5, at 200–12, 228–30.

47. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994) (upholding restriction on noisy protests around medical clinic); Grayned v. City of Rockford, 408 U.S. 104, 121 (1972) (upholding restriction on noisy and disruptive protests around schools); *Schenck*, 519 U.S. 357, 384–85 (upholding injunction restricting protestors based on previous harassing and intimidating conduct); Hill v. Colorado, 530 U.S. 703, 718 n.25 (2000) (upholding eight foot no-approach zone to prevent unwanted physical approaches of individuals at close range).

48. *Madsen*, 512 U.S. at 773 (refusing to uphold an injunction banning "images observable" by persons within medical clinics because the only "plausible reason" such signs disturbed patients was that they "found the expression contained in such images disagreeable").

the Court routinely states that in public, "the burden normally falls upon . . . viewer[s] to avoid further bombardment of . . . [their] sensibilities simply by averting . . . [their] eyes."[49] The fundamental tenet of the captive audience doctrine is that an individual in public can claim an invasion of privacy only when he or she encounters a physical or aural intrusion and cannot avoid that intrusion by moving or looking away.

Supporters of tort liability, however, argue that mourners at a funeral have a privacy interest "at least as significant as the privacy interes[t] at stake in one's home."[50] Accordingly, they liken the Phelpses' protests to the "inherently" intrusive residential picketing in *Frisby*.[51] Although friends and family surely have a privacy interest in mourning their loved ones free from disruption,[52] the analogy to *Frisby* falls apart when one examines the "inherently" intrusive rationale. *Frisby* validated the regulation of targeted picketing because a picketer (even a solitary, quiet vigil) focusing on one's residence day after day was akin to harassment.[53] That concept of intrusion had nothing to do with the content of the speech but, rather, with the erosion of the home as a place of solitude. In fact, the Court made clear that one could protest in the neighborhood as long as he or she did not solely target a particular residence.[54]

In contrast, finding the Phelpses' speech intrusive in *Snyder* requires the Court to embrace the notion that peaceful protestors who stood several hundred feet away from the funeral somehow intruded upon it. Absent a physical or aural invasion, that concept of intrusion *must* rest solely on the offensiveness of the protestors' message.[55] In effect, the invasion of privacy claim in *Snyder*

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49. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

50. Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 13, Snyder v. Phelps, No. 09-751 (U.S. June 1, 2010); *see also* Brief for Petitioner, *supra* note 20, at 53.

51. Brief for the State of Kansas, *supra* note 50, at 13–17; Brief for Petitioner, *supra* note 20, at 52–53. State officials defending funeral protest laws make similar arguments. Wells, *supra* note 5, at 214–17.

52. Wells, *supra* note 5, at 228.

53. Frisby v. Schultz, 487 U.S. 474, 486–87 (1988) (finding that "[t]he devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt").

54. *Id.* at 482–84.

55. Several amicus briefs openly seek regulation of the content of the Phelpses' message. *E.g.*, Brief for the State of Kansas, *supra* note 50, at 15 (describing the Phelpses' signs as "personal and vicious attacks, fully intended to target the mourners"); Brief for the Veterans of Foreign Wars of the United States as *Amicus Curiae* in Support of Petitioner at 10, Snyder v. Phelps, No. 09-751 (U.S. June 1, 2010) (stating that the "First Amendment does not require the grieving family to endure offensive speech of a personally abusive nature"). Snyder, however, argues that the Phelpses' mere presence at the funeral violated his privacy at a time when he was mourning and emotionally vulnerable. Brief for Petitioner, *supra* note 20, at 8–9. But this argument is grounded in the content of the Phelpses' speech. There is nothing inherently offensive about peaceful, nondisruptive protests near a funeral; protests occurred in association with funerals well before the Phelpses' activities. *See, e.g.*, JOYCE L. KORNBLUH, REBEL VOICES: AN IWW ANTHOLOGY 200 (1964) (discussing the 1913 funeral/protest of two workers killed by private detectives); *Violent Protests Erupt After Funeral*, ORLANDO SENTINEL, Mar. 26, 2000, at

rests on the notion that one can be captive to non-invasive but offensive messages expressed from a distance. This assertion is a significant extension of the Court's existing doctrine and threatens speakers with content-based censorship.

B. Low Value Speech

The Court has carefully crafted its low value speech doctrines to identify narrow categories of speech capable of restriction.[56] Although its methodology is not always clear, the Court recently noted that it does *not* find speech unprotected "on the basis of a simple cost-benefit analysis."[57] Rather, the structure of its low value speech categories reveals that the Court carefully limits regulation to prevent punishment of speech based solely on its offensive content.[58] The Court finds speech unprotected only when it does not contribute to the exchange of ideas as evidenced by external indicia of harm resulting from speech or from actions that are independently harmful, such as threats or lies.[59] For example, the Court recognizes that government can punish advocacy of unlawful action only if it is "directed to inciting or producing imminent lawless action and . . . [is] likely to incite or produce such action."[60] The Court also has permitted officials to punish fighting words only if they "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed.[61] And the Court's libel jurisprudence requires plaintiffs to show that a defamatory statement causes actual harm to their reputation in order to recover damages.[62] The Court designed these low value speech categories to preserve the "adequate breathing space" necessary for full exercise of First Amendment freedoms[63] and to prevent punishment of speech based solely on

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A4 (discussing protest involving 3,000 marchers following funeral of man shot by police). Furthermore, Snyder welcomed protestors with a supportive message. *See* Brief in Opposition to Petition for Writ of Cert. at 6–7, Snyder v. Phelps, No. 09-751 (U.S. Jan. 20, 2010) (describing the well-received "picketing" of school children and the Patriot Guard Riders at the Snyder funeral). Thus, the Phelpses' speech is "inappropriate" only because of their disrespectful and hurtful message.

56. Those categories include incitement of illegal action, fighting words, defamation, fraud, true threats, obscenity, child pornography, and speech integral to criminal conduct. *See* United States v. Stevens, 130 S. Ct. 1577, 1585–86 (2010).

57. *Id.* at 1586.

58. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949).

59. Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 933 (2009) ("[T]he large majority of proscribed speech adds little or nothing to public discourse . . . partly because the [Court's] 'narrow tailoring' requirement . . . [forces] the state to focus on speech that has little function except to threaten the government's compelling interest [such as preventing violence or preserving individual reputation].").

60. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

61. Gooding v. Wilson, 405 U.S. 518, 523 (1972).

62. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (refusing to allow presumed or punitive damages absent a finding that defendant acted with "knowledge of falsity or reckless disregard for the truth").

63. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988); *see also* Bose Corp. v.

its "emotive impact."[64]

The IIED and invasion of privacy standards Snyder and others advocate do not incorporate these external indicia of harm and, thus, fit poorly within the Court's low value speech categories. Snyder urges imposition of IIED liability, for example, based upon the common law elements of that tort.[65] However, those elements—intent, extreme and outrageous conduct, and severe emotional harm[66]—are inconsistent with First Amendment protections. They do not prevent imposition of liability simply because the listener finds the expression at issue offensive or outrageous.

In fact, the Court in *Hustler v. Falwell* already recognized that the common law standards for IIED do not sufficiently protect free speech values.[67] *Falwell* found that IIED's "outrageousness" standard was so subjective as to "run[] afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."[68] The Court also noted that the intent requirement did not protect public debate because the "speaker must run the risk that it will be proved in court that he spoke out of hatred."[69] Even speakers who act out of malice or ill will, the Court found, can contribute to public debate.[70] Accordingly, *Falwell* required that public figures suing for IIED show a false statement of fact made with actual malice in order to recover damages. *Falwell* effectively recognized that the IIED tort fits uncomfortably within the Court's low value speech framework and required an external indicia of harm when speech is the basis of the tort. Although *Falwell*'s holding is limited to public figures, the Court's reasoning is applicable to the tort regardless of the subject of a suit—a false statement of fact made with actual malice is necessary to prevent censorship of *any* speech related to public concern, not just speech related to public figures.

The broad invasion of privacy argument embraced by Snyder and others faces similar problems. The common law elements of invasion of privacy typically involve (1) an unauthorized intrusion, (2) into a secluded space or one's private affairs, (3) that is highly offensive to a reasonable person.[71] These

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Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984) (describing Court review as designed "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited").

64. Texas v. Johnson, 491 U.S. 397, 412 (1989) (quotation omitted); *see also Falwell*, 485 U.S. at 55.

65. Brief for Petitioner, *supra* note 20, at 21–41 (arguing against the imposition of First Amendment standards in Snyder's IIED case).

66. *See, e.g.*, Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986).

67. *Falwell*, 485 U.S. at 56. *Falwell* involved common law standards nearly identical to Maryland's standards. *Id.* at 50 n.3.

68. *Id.* at 55.

69. *Id.* at 53 (quoting Garrison v. Louisiana*,* 379 U.S. 64, 73 (1964)).

70. *Id.*

71. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining the intrusion upon seclusion form of invasion of privacy as "intentionally intrud[ing], physically or otherwise, upon the solitude of another or his private affairs or concerns . . . [when] the intrusion would be highly

elements protect against punishment of speech based on its emotional impact by recognizing only physical, spatial, or aural intrusions into a secluded area.[72] Snyder and others, however, urge the Court to find an invasion of privacy because they find the Phelpses' message abhorrent, an argument that divorces the notion of "intrusion" from the physical, spatial, or aural invasion required at common law. Their argument conflates the first element of the tort, an intrusion, with the third element, that the intrusion be offensive to a reasonable person, and urges that the Phelpses' speech is intrusive *because* it offends a reasonable person. As with imposition of tort liability for IIED, that approach lacks an external indicium of harm and allows punishment of the "emotive impact of speech."[73]

IV
EMOTION AND THE FIRST AMENDMENT

Several observers argue that this emotional impact is precisely the reason why Snyder should recover damages. They claim, for example, that the First Amendment should not protect "the use of words as weapons" and argue allowing tort liability for highly offensive speech will not interfere with robust "public discourse."[74] Supporters of Snyder contend that compelling private persons to show anything beyond the common law requirements leaves them "helpless against malicious speakers," unlike public figures who must endure insults and humiliation.[75] Few people doubt the power of words to inflict emotional wounds. *Snyder* exemplifies this. But psychological research on emotion reveals the Court's wisdom in refusing to allow regulation of speech based on its emotive impact.

A. The Psychology of Anger

Contrary to conventional and legal wisdom, which often treat emotion as

offensive to a reasonable person").

72. *See, e.g.*, Schulman v. Group W Prods., Inc., 955 P. 2d 469, 490 (Cal. 1998) ("[P]laintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source."); 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:89 (2d. ed. 2010) (Intrusion usually "involves some physical, not merely psychological, incursion into one's privacy," including invasion of space around a person via surveillance or stalking.); RESTATEMENT (SECOND) OF TORTS § 652B cmt. B (1977) (Intrusion requires physical intrusion into a place of plaintiff's seclusion or "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs.").

73. Texas v. Johnson, 491 U.S. 397, 412 (1989) (quotation omitted).

74. Jeffrey Shulman, *Free Speech at What Cost?:* Snyder v. Phelps *and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 336 (2010); *see also* Chelsea Brown, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 (2009); Brief for the State of Kansas, *supra* note 50, at 23–24, 33–34.

75. Shulman, *supra* note 74, at 336.

irrational and fleeting, emotions "are determined, in large part, by beliefs."[76] They are the primary mechanism by which humans understand and respond to their environment.[77] Accordingly, "people's emotions arise from their perceptions of their circumstances—immediate, imagined, or remembered."[78] Emotions thus have a strong cognitive component. The circumstances of a given situation, as well as how a person appraises those circumstances, determine whether a person experiences a particular emotion. For instance, psychologists believe that emotions occur according to "core relational themes" and particular appraisals result in particular emotions.[79] As Terry Mahoney explains, core relational themes "are a 'psychobiological principle' captured as an 'if-then' formulation: if a person appraises his or her relationship to the environment in a particular way then a specific emotion always follows."[80] An individual will experience the emotion "anger," for example, when they perceive that another person engaged in a demeaning offense against him or her.[81]

Not everyone, however, perceives the same action as demeaning.[82] Rather, a variety of environmental and personality factors affect whether people respond to an offense with a particular emotion as well as the intensity of their response. Thus, an individual's personal goals, values, and beliefs affect his or her emotional response.[83] If people perceive an offending actor to interfere with those goals, values, and beliefs—especially intentionally and in a manner that could have been avoided—they will likely respond with anger, even outrage.[84] People's appraisals that an offender's behavior violates social

76. Maroney, *supra* note 12, at 891. Conventional legal wisdom often treats emotion as unpredictable and visceral. *See* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 15 (1997).

77. Maroney, *supra* note 12, at 874; *see also* Craig A. Smith & Richard S. Lazarus, *Emotion and Adaptation*, *in* HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 609, 611 (Lawrence A. Pervin ed., 1990).

78. Phoebe C. Ellsworth & Klaus R. Scherer, *Appraisal Processes in Emotion*, *in* HANDBOOK OF AFFECTIVE SCIENCES 572, 572 (Richard J. Davidson et al. eds., 2003).

79. LAZARUS, *supra* note 10, at 81–82; Phoebe C. Ellsworth & Craig A. Smith, *From Appraisal to Emotion: Differences Among Unpleasant Feelings*, 12 MOTIVATION AND EMOTION 271, 272 (1988); Matthias Siemer et al., *Same Situation—Different Emotions: How Appraisals Shape Our Emotions*, 7 EMOTION 592, 598 (2007).

80. Maroney, *supra* note 12, at 892.

81. LAZARUS, *supra* note 10, at 222; Paul Ekman, *Antecedent Events and Emotion Metaphors, in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 146, 147 (P. Ekman & R. Davidson eds., 1994).

82. Smith & Lazarus, *supra* note 77, at 616 ("Appraisals are strongly influenced by personality variables. Two individuals can construe their situations quite similarly (agree on all the facts) and yet react with very different emotions, because they have appraised the adaptational significance of those facts differently.").

83. *Id.* at 625.

84. LAZARUS, *supra* note 10, at 222–23; GERALD CLORE, ANDREW ORTNEY & ALLAN COLLINS, THE COGNITIVE STRUCTURE OF EMOTIONS 146–54 (1988); *see also* Gerald L. Clore & Karen Gasper, *Feeling Is Believing: Some Affective Influences on Belief*, *in* EMOTIONS AND BELIEFS: HOW FEELINGS INFLUENCE THOUGHTS 10, 30 (Nico H. Frijda et al. eds., 2000); Siemer et al., *supra* note 79, at 595.

norms may also lead to or exacerbate this anger.[85] Perceived disrespectful treatment is an especially common trigger of anger.[86]

People also tend toward particular actions when experiencing particular emotions. Thus, those who experience anger tend to express a greater willingness to attack the offending individual.[87] Sometimes this attack comes in the form of violence.[88] At other times, especially when anger results from a perceived injustice, an attack can occur through formalized mechanisms, including filing civil lawsuits.[89]

B. Emotion, Tort Liability and Snyder

This psychological research reveals the problematic nature of the civil claims in *Snyder*. They are not problematic because emotions such as anger are inherently bad or because emotion has no role in First Amendment doctrine. Indeed, the Court has recognized the important relationship between emotion and expression.[90] But the manner in which emotion plays a role in *Snyder* has the potential to undermine the very framework of the Court's jurisprudence and generally destabilize its protection of offensive and unpopular speech.

Outrageous action is the core element of IIED. When *actions*, such as having sexual relations with the spouse of one's client,[91] are the basis for tort liability, this element is less problematic. But when one seeks damages based upon "outrageous" speech that otherwise contributes to public discourse, IIED lawsuits become tools of censorship. One does not sue under those circumstances *unless* the content of the speech reflects beliefs that interfere with one's own. Limiting liability to the most outrageous speech will not curb such lawsuits. The more that people are outraged, the more certain they become of the validity of their beliefs and the invalidity of conflicting beliefs.[92] Outrageous speech merely reinforces the plaintiff's belief that he or she was wronged by the defendant's message, especially if it is disrespectful.

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85. Smith & Lazarus, *supra* note 77, at 627; Ellsworth & Scherer, *supra* note 78, at 581.

86. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 533 (2001).

87. LAZARUS, *supra* note 10, at 226; *see* Ellsworth & Smith, *supra* note 79, at 296.

88. *See, e.g.*, Dov Cohen et al., *Insult, Aggression, and the Southern Culture of Honor: An "Experimental Ethnography*," 70 J. PERSON. & SOC. PSYCH. 945 (1996) (studying insults to honor among Southern and Northern males, and linking propensity for hostile reaction to insults to whether one had grown up in Southern "honor" culture).

89. Miller, *supra* note 86, at 544 (noting that desire for retribution is a motivator for lawsuits and that disrespectful treatment can increase people's willingness to avail themselves of formal avenues of redress); *see also* Ellsworth & Smith, *supra* note 79, at 301 (noting that angry people might seek less aggressive, more socially acceptable means of retaliation if they are influenced by other factors).

90. Cohen v. California, 403 U.S. 15, 26 (1971) (noting that "words are often chosen as much for their emotive as their cognitive force").

91. Figueiredo-Torres v. Nickel, 584 A.2d 69, 77 (1991) (upholding IIED claim against psychologist who had sexual relations with patient's wife).

92. Clore & Gasper, *supra* note 84, at 30 (noting that "emotional feeling can then increase certainty or commitment").

Accordingly, the very nature of IIED encourages lawsuits when plaintiffs profoundly disagree with or are insulted by defendants' speech. The Court has never allowed punishment of speech for such reasons.[93]

The other elements of IIED do nothing to limit potential censorship. Although the intent requirement superficially limits liability to the worst actors, it does little to protect free speech values. As noted above, an offender's perceived blameworthiness is a component of an outraged plaintiff's response—the defendant's perceived blameworthiness is partly why the plaintiff is angry. Anger also often causes plaintiffs to attribute bad intent to those they want to find blameworthy, whether or not they actually acted with such intent.[94] Accordingly, IIED's intent standard overlaps substantially with and *reinforces* the outrage element, making use of the tort especially problematic to punish speech that violates widely held social norms. That speech is the very type of expression most likely to anger plaintiffs and cause them to attribute blame.[95] Similarly, the requirement of severe emotional distress does not prevent punishment of speech based merely on the content of its message. Even speech that contributes to public discourse can result in such distress.[96]

Similar censorship problems arise with Snyder's invasion of privacy argument. Conflating intrusion and offensiveness reduces the question of tort liability to whether speech is offensive to a reasonable person. As with IIED, a plaintiff is most likely offended by speech that interferes with his or her values and beliefs. Although invasion of privacy also requires an intrusion upon *seclusion*, that concept is malleable[97] and alone cannot prevent punishment based solely on a plaintiff's offense at the speaker's message if the intrusion element is equated with offensive conduct. In fact, the district court's instructions to the jury in *Snyder* effectively ignored the seclusion element and

93. Texas v. Johnson, 491 U.S. 397, 415 (1989) (holding that the state cannot regulate flag burning to promote respect for the flag); Boos v. Barry, 485 U.S. 312, 322 (1988) (finding unconstitutional a law prohibiting the display of signs tending to bring foreign governments into public odium or disrepute); Cohen v. California, 403 U.S. 15, 22–24 (1971) (holding that the state cannot censor citizens to promote public civility).

94. CLORE, ORTNEY & COLLINS, *supra* note 84, at 151; Miller, *supra* note 86, at 537.

95. It is perhaps not surprising that *Falwell* rejected the intent standard of IIED as insufficiently protective of speech. Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964)).

96. Although emotional distress can manifest in physical symptoms (occasionally required to recover in some jurisdictions), such symptoms are not objective indicia of harm like the threats, violence or other indicia present in the Court's low value speech categories or captive audience doctrine. Physical symptoms, although more tangible than emotional harm, still emanate from the listener's response to the offensive message. Such a response is not consistent with the Court's conception of low value speech as speech that, by definition, does not contribute to public discourse.

97. Wells, *supra* note 5, at 181–82 ("recognizing relative zones of privacy involves a delicate balance of preserving social interaction while carving out necessary spaces of refuge in public"); MCCARTHY, *supra* note 72, § 5:98 (noting that zones of seclusion are a product of "custom and usage" rather than of objective factors).

focused almost entirely on the potential outrageousness and offensiveness of the Phelpses' expression, despite the common law elements of the tort.[98] It is unsurprising, then, that the jury returned a verdict in Snyder's favor.

Ultimately, tort liability based solely upon speech that offends or outrages others would chill speech because of its arbitrary and unpredictable nature. Responses to speech are particularized and personal. Anyone may respond with anger, and a lawsuit, to speech they consider demeaning and personally offensive. To be sure, most offensive speech will not satisfy the elements of IIED or invasion of privacy. But any contentious speech perceived to be personally directed—such as criticism of one's religion, criticism of military efforts, or burning the flag—could be the basis for a tort suit. The capricious nature of such lawsuits would cast a pall over public debate.[99]

The existence of a jury, which should filter truly frivolous claims of offense or outrage, also cannot prevent this chilling effect. Juries cannot prevent the potential filing of such lawsuits, which alone chills public discourse.[100] Additionally, although juries might filter the most specious claims, they may facilitate censorship in other ways. In fact, the more society perceives speech to violate or disrespect widely held social norms, the more likely a jury will sympathize with the plaintiff. As one noted psychologist found:

> The arousal of moralistic anger is not confined to injustices perpetrated against one's self. Witnessing the harming of a third party can also arouse strong feelings of anger and injustice. . . . Individuals are committed to the "ought forces" of their moral community . . . and people believe these forces deserve respect from all members of the community. The violation of these forces represents an insult to the integrity of the community and provokes both moralistic anger and the urge to punish the offender in its members.[101]

A jury will most likely experience "moralistic anger" when a speaker violates otherwise widely held social norms, such as protesting near another's funeral. While the emotional response of jurors may be an issue in any trial, it is uniquely concerning in First Amendment cases. Juries in civil tort suits are

98. *See supra* note 25 and accompanying text.

99. Like a vague statute, the lack of notice associated with lawsuits based on offensive speech subjects potential defendants to arbitrary and inconsistent enforcement. Smith v. Goguen, 415 U.S. 566, 573–74 (1974) (finding that a flag contempt statute "fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not"); *see also* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 302 (2010) ("[T]he vagueness of the 'outrageousness' standard exacerbates the risk that the emotional distress tort will deter . . . speech.").

100. N.Y. Times v. Sullivan, 376 U.S. 254, 278 (1964) (discussing how the threat of litigation may create a "pall of fear and timidity imposed upon those who would give voice to public criticism" and "an atmosphere in which the First Amendment freedoms cannot survive").

101. Miller, *supra* note 86, at 535.

likely to punish unpopular speakers precisely because they are unpopular. Such a result runs counter to First Amendment tenets because it silences particular viewpoints[102] and "lead[s] to standardization of ideas . . . by courts [and] dominant political or community groups."[103]

CONCLUSION

If the Phelpses were noisy or disruptive, officials could justifiably regulate their protests. Civil liability for IIED and invasion of privacy might also be appropriate if the Phelpses' expression contained threats, intentional lies, or other external indicia of harm.[104] But the speech here did not involve those circumstances. It involved offensive messages. For good reason, the Court's doctrine has never allowed regulation of speech solely on that basis. Because of the nature of emotional reactions to offensive speech, allowing plaintiffs to rely on offense alone turns civil lawsuits into potential tools of suppression. While the law has never shown much solicitude for the intentional infliction of emotional harm or invasion of privacy,[105] the Court's First Amendment jurisprudence surely does not countenance the primacy of these torts.

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102. Edwards v. South Carolina, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to . . . [punish] the peaceful expression of unpopular views.").

103. Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949); *see also* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 632 (1990).

104. *See, e.g.*, Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps at 26–32, Snyder v. Phelps, No. 09-751 (U.S. July 14, 2010) (discussing appropriate standards for imposing IIED and invasion of privacy liability on speech); Brief of the American Civil Liberties Union and the American Civil Liberties Union of Maryland as *Amici Curiae* in Support of Respondents at 26–27, Snyder v. Phelps, No. 09-751, (U.S. July 14, 2010) (embracing Fourth Circuit's "provably false" statement of fact standard).

105. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).