Sticks and Stones: IIED and Speech after Snyder v. Phelps
Heath Hooper
NOTE

Sticks and Stones: IIED and Speech After
Snyder v. Phelps


HEATH HOOPER*

I. INTRODUCTION

On March 3, 2006, Marine Lance Corporal Matthew Snyder died while serving a tour of duty in Iraq.1 After hearing of his funeral, members of the Kansas-based Westboro Baptist Church attended and protested the Maryland ceremony bearing graphic photos and signs declaring “Thank God for IEDs” and “Thank God for Dead Soldiers.”2 The church members did so in reflection of their religious belief that God has doomed America and its military missions because of the country’s tolerance for homosexuality.3 Following the protest, Matthew Snyder’s father, Albert Snyder, sued the Westboro Baptist Church for a variety of civil wrongs, including intentional infliction of emotional distress,4 thus setting up a conflict pitting free speech against tort liability that ultimately reached the United States Supreme Court.

The tort of intentional infliction of emotional distress, commonly known as IIED, is a relatively new type of civil wrong, and one to which courts have not been terribly friendly.5 An early problem with IIED was “the fear that the

---

* B.A., Mercer University, 1998; M.A., University of Amsterdam, 2002; M.A. University of South Florida, 2006; J.D. Candidate, University of Missouri School of Law, 2014; Ph.D. Student, University of Missouri School of Journalism, 2014; Associate Editor, Missouri Law Review, 2011-12. I am grateful to Professor Wells for her help and advice and to my family for their support. Much of this work is based on research initially done as an assistant to Professor Wells for an amicus curiae brief in Snyder v. Phelps. See Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps at 1, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2811209, at *1.
1. Snyder v. Phelps, 580 F.3d 206, 211 (4th Cir. 2009), aff’d, 131 S. Ct. 1207.
2. Snyder, 131 S. Ct. at 1213.
3. Id.
4. Id. at 1214.
protection of interests in mental peace of mind would be ‘the “wide door” which might be opened, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners.’” While courts have allowed prosecutions under the tort since its recognition by the American Law Institute in 1948, prosecutions based on speech have been relatively rare.

Prior to the Court’s decision in Snyder v. Phelps, it had only once, in Hustler Magazine, Inc. v. Falwell, considered an IIED claim based on speech. The Court in Hustler decided against the plaintiff, using what appeared to be a modified defamation standard, but the decision nonetheless left open a hole in speech jurisprudence. Hustler’s plaintiff, televangelist Jerry Falwell, was a public figure, a kind of person the Court in other defamation rulings held to a higher standard than private figures like Albert Snyder. The question remained whether the same IIED standard would apply to both public and private figures.

Although Albert Snyder succeeded at the trial level, the Supreme Court ultimately ruled against him. The Court did so because the speech did not target the mourning family nor did it “in any way interfere[] with the funeral service itself.” The Court did not, however, specify the standard under which Snyder’s claim could have been successful. This Note attempts to fill the hole left by the Court’s reticence to name an IIED standard for private figures. It argues that the public/private figure distinction on which many relied to dismiss Falwell as a precedent in Snyder is irrelevant in an IIED claim involving speech on a matter of public concern given the nature of the harm at issue.

Building on the work of First Amendment scholars Christina Wells and Robert Post, along with a thorough examination of the Court’s relevant First

6. Cavico, supra note 5, at 112.
7. Id.
9. Id. at 57.
10. See infra Part III.D.
11. See, e.g., Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 662 (1990) [hereinafter Concept] (“Falwell is drafted quite narrowly and holds only that nonfactual ridicule is constitutionally privileged from the tort of intentional infliction of emotional distress if the plaintiff is a public figure or public official, and if the ridicule occurs in publications such as the one here at issue.” (internal quotation marks omitted)).
13. Id. at 1219.
14. Id. at 1220.
Amendment cases, this Note argues that *Hustler* did not simply import the “actual malice” defamation standard into IIED cases involving public figures.\(^{16}\) Instead, the IIED tort itself demands these elements be added to adequately protect speech on matters of public concern, regardless of the addressee’s status. As the Court has long recognized, offensive speech requires significant protection to be free from censorship under community norms.\(^{17}\) The very nature of the harm in IIED, emotional distress, is simply not capable, without more, of providing protection against such subjective censorship. Ultimately, the Court’s standards in *Hustler* were not simply “defamation” standards; they are historically recognized tests necessary under an IIED claim to make potentially protected speech on matters of public concern actionable when made against any individual.

II. FACTS AND HOLDING

Following twenty-year-old\(^{18}\) Matthew Snyder’s death in Iraq, his father, Albert Snyder (Snyder), chose to have his son’s funeral service in a Catholic church in their hometown of Westminster, Maryland.\(^{19}\) Snyder posted notices of his son’s funeral service in the local newspapers.\(^{20}\) Members of the Westboro Baptist Church of Topeka, Kansas, noticed the time and location of the funeral.\(^{21}\) The church, headed by the Rev. Fred Phelps, believes “God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military.”\(^{22}\) For more than twenty years, the Westboro Baptist Church has publicized its message by picketing funerals, including several military ceremonies.\(^{23}\)

Fred Phelps, along with two of his daughters and four other members of his congregation, travelled to Westminster to picket Matthew Snyder’s funeral.\(^{24}\) The group carried signs bearing the church’s slogans, including “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Thank God for Dead Soldiers,” and “Thank God for IEDs.”\(^{25}\) Standing on a plot of public


16. See infra Part V.


20. Id.

21. Id.

22. Id.

23. Id.

24. Id.

25. Id.
land adjacent to a public street, the group picketed and sang hymns for about 30 minutes before the service began.26 The Westboro protestors contacted the police prior to the protest and stood more than 1000 feet from the location of the service.27 The funeral procession, in which Albert Snyder rode, passed within 300 feet of the Westboro protestors.28 Snyder later testified that he could see the tops of the protestors’ signs, but he did not see the messages until after the funeral while watching a newscast covering the protest.29

Snyder sued the Westboro Baptist Church in the United States District Court for the District of Maryland alleging defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.30 Westboro motioned for summary judgment, claiming the speech fell under the First Amendment’s protection.31 The District Court granted Westboro’s request on the claims of defamation and publicity given to private life, finding the torts’ necessary elements could not be proven.32 A jury found the Westboro Baptist Church liable on the claims of IIED and intrusion into seclusion, awarding Snyder “$2.9 million in compensatory damages and $8 million in punitive damages.”33 The District Court later lowered the punitive damages to $2.1 million but did not otherwise disturb the verdict.34

The Westboro Baptist Church appealed to the United States Court of Appeals for the Fourth Circuit, again claiming the protests were protected under the First Amendment.35 The Fourth Circuit, after concluding that the Church’s signs contained speech on matters of public concern, reversed the jury’s verdict “because those statements . . . were not provably false, and were expressed solely through hyperbolic rhetoric.”36

Snyder petitioned the Supreme Court for certiorari,37 and the Court granted the petition on three issues:

26. Id.
27. Id.
28. Id.
29. Id. at 1213-14.
30. Id. at 1214; see also Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008), rev’d, 580 F.3d 206 (4th Cir. 2009), aff’d, 131 S. Ct. 1207 (2011). Snyder sued not only for the protest itself but also for an Internet publication known as the Epic, which was posted to the church Website in the weeks following the funeral. See Snyder, 131 S. Ct. at 1214 n.1; Snyder, 533 F. Supp. 2d at 572. The Court decided that the Epic was not properly before the court due to the lack of attention it received in Snyder’s brief and petition for certiorari. Snyder, 131 S. Ct. at 1214 n.1.
31. Snyder, 131 S. Ct. at 1214; see also Snyder, 533 F. Supp. 2d at 572.
32. Snyder, 131 S. Ct. at 1214; see also Snyder, 533 F. Supp. 2d at 572-73.
33. Snyder, 131 S. Ct. at 1214; see also Snyder, 533 F. Supp. 2d at 573.
34. Snyder, 131 S. Ct. at 1214; see also Snyder, 533 F. Supp. 2d at 597-98.
35. Snyder, 131 S. Ct. at 1214; see also Snyder, 580 F.3d at 211.
36. Snyder, 131 S. Ct. at 1214; see also Snyder, 580 F.3d at 222-24.
37. Snyder, 131 S. Ct. at 1215.
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?38

The Supreme Court heard oral arguments on October 6, 2010, and issued an opinion on March 2, 2011.39 The opinion cleared the Westboro Baptist Church of all liability, holding that “[w]hat Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.”40

III. LEGAL BACKGROUND

A. Regulable Speech

According to the First Amendment of the United States Constitution, “Congress shall make no law . . . abridging the freedom of speech.”41 Despite the strong protections afforded to speech via the so-called “speech clause,” the Court has consistently recognized that not all speech is afforded absolute protection. The speech clause does not, for instance, protect someone who falsely shouts “Fire!” in a crowded theater.42 Such speech creates a substantial danger of a harmful situation, namely a stampede toward the exits in which an attendee might be hurt.43 A truthful shout of fire under the same circumstances would, however, clearly not be actionable. Through the years, the Court has named particular kinds of speech as falling outside the First Amendment’s protection, refusing to acknowledge any ad hoc “balancing

40. Snyder, 131 S. Ct. at 1219. The Court also addressed Snyder’s contention that the funeral attendees constituted a captive audience, thus enabling otherwise-prohibited limitations on speech. Id. at 1219-20. The majority, for reasons outside the scope of this Note, also denied Snyder’s captive audience claim. Id. at 1220.
41. U.S. CONST. amend. I.
43. See id.
test” for speech protection.\textsuperscript{44} Indeed, recognizable, distinct categories of regulable and unregulable speech have been a cornerstone of the Court’s modern First Amendment jurisprudence.

The Court has recognized that the First Amendment protects most strongly speech on matters of public concern.\textsuperscript{45} Speech on matters of public concern is speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community”\textsuperscript{46} or speech regarding “legitimate news,” defined as “a subject of general interest and of value and concern to the public.”\textsuperscript{47} In particular, the Court’s First Amendment jurisprudence indicates a pattern of protecting speech from particular community norms when that speech adds to the public discourse.\textsuperscript{48} As the Court recognized in \textit{Hustler}, “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”\textsuperscript{49}

According to the Court, speech, particularly that which adds to the public discourse, must be regarded as independent from community norms to afford it full First Amendment protection.\textsuperscript{50} The Court protects speech on matters of public concern primarily because such protections ultimately serve the democratic principles enshrined in the Constitution. As Robert Post argues, the First Amendment carves out exceptions to “civility rules” within public discourse.\textsuperscript{51} Civility rules, Post says, are “legally enforced community norms that constitute individual and collective identity.”\textsuperscript{52} In other words, civility rules are legally enshrined tenets on what can be considered proper behavior.

Forcing individuals to speak within the bounds of those legally enforceable community norms, however, would fatally constrain wide-open debate on how the polity should be governed.\textsuperscript{53} Constraining individuals not only alienates the individual but ultimately works against participation in self-

\textsuperscript{44} See United States v. Stevens, 130 S. Ct. 1577, 1584-86 (2010).


\textsuperscript{46} Snyder v. Phelps, 131 S. Ct 1207, 1216 (2011) (citing Connick v. Myers, 461 U.S. 138, 146 (1983)).

\textsuperscript{47} \textit{Id.} (quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)) (internal quotation marks omitted).

\textsuperscript{48} See Bender, \textit{supra} note 15, at 495-96.


\textsuperscript{50} See \textit{id.} at 50-51.

\textsuperscript{51} \textit{Bender, supra} note 15, at 495-96 (“[T]he First Amendment suspends the enforcement within public discourse of civility rules . . . .”).

\textsuperscript{52} \textit{Id.} at 496.

\textsuperscript{53} \textit{Community, supra} note 15, at 481.
The governance. As Post explains, promotion of individual participation is necessary in a society that defines itself by ideals of democratic self-governance. “Collective self-determination,” however, occurs when through participation or potential participation in public discourse, the citizens of a state come to identify with the actions and decisions of their government. The First Amendment protects public discourse to safeguard the legitimacy and possibility of democratic self-governance. If the state censors the speech of a citizen within public discourse, it cuts that citizen off from the possibility of participating in collective self-determination.

B. Communicative Impact

The Court has historically found that mischievous utterances that do not contribute in any way to meaningful discourse and are designed to provoke an unthinking, immediate response can be regulated. The Court reasons that the benefit of preventing the harm caused by such speech simply outweighs the low value of the speech itself. Ultimately, the Court has determined the First Amendment protects speech unless the speech meets very specific criteria and thus qualifies as low-value speech, or speech that is “no essential part of any exposition of ideas.” The Court has over the years gone to great lengths to shelter speech from the whims of community disfavor, allowing limitations in only the narrowest of circumstances. Even expressions that are likely to disturb the peace are protected when they add to the public discussion on matters of public concern.

The Court’s precedents demonstrate that regulation of speech is allowed in only very specific and narrowly tailored circumstances. The Court recognizes seven speech categories as capable of restriction: incitement to violence, defamation, fraud, threats, obscenity, speech integral to criminal con-

54. Id.
55. See id.
56. Id.
57. See, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919) (“[T]he character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” (internal citations omitted)).
58. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).
59. Id. at 572.
duct, and "fighting words." Despite finding some particular speech categories capable of regulation, the Court's First Amendment jurisprudence indicates that government regulations on even so-called low-value speech survive First Amendment scrutiny "only if they are narrowly tailored to specific interests, such as preventing violence; they cannot broadly regulate speech because people are offended." In short, the government cannot regulate speakers merely because of an audience's response to the speaker's message. Indeed, even speech that leads to great anger cannot be regulated "simply because it might offend a hostile mob."

A detailed reading of the Court's prior rulings shows that speech cannot be legitimately regulated based solely on its communicative impact. In Brandenburg v. Ohio, for instance, the Court ruled that officials can punish advocacy of illegal conduct only if it is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." Likewise, fighting words cannot merely be spoken; they must be targeted and "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed. The Court has been careful to narrowly define regulated categories, allowing regulation only if there are strong external indicia of harm. In essence, the Court has found speech capable of regulation only when there is something more than the speech itself at issue.

C. Offensive Speech

Ultimately, the Court has carved out very narrow exceptions regarding speech limitations, striking a delicate balance between the need to protect speech and the need to protect individuals from injury. In developing these very limited categories, the Court effectively barred punishment of speech based purely upon the audience's negative emotional response to its content, shielding the speech from problematic community norms. Thus, the

62. Id.
63. Chaplinsky, 315 U.S. at 572.
64. Privacy, supra note 15, at 162.
65. Id.
67. See Privacy, supra note 15, at 162.
69. Id. at 447.
71. See Privacy, supra note 15, at 164-65.
72. Id. at 162. This analysis was recently given credence by the U.S. Court of Appeals for the Ninth Circuit. See United States v. Alvarez, 617 F.3d 1198, 1209 (9th Cir. 2010) (holding that statutes regulating false statements of fact must require some kind of measurable harm to survive First Amendment scrutiny), cert. granted, No. 11-210, 2011 WL 3626544 (U.S. Oct. 17, 2011).
73. Offensiveness, supra note 15, at 86.
Court strongly protects offensive speech, particularly when it consists of speech on matters of public concern.  

The Court protects offensive speech for two primary reasons. First, offensive speech on matters of public concern retains its value and therefore must be constitutionally protected, even when delivered in a problematic manner. Offensive and disagreeable speech is a "necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve." As Justice Brennan said when upholding the right to burn an American flag in protest in Texas v. Johnson,

\[
\text{\element{[i}{]] it would be odd indeed to conclude both that 'if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection' and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.}
\]

Simply because an idea or expression is offensive does not mean it loses its ability to contribute to public debate.

Second, the Court has found that attempts to regulate offensive speech are too often at their core attempts to censor ideas with which people disagree. For example, the Court has noted that a statute punishing "annoying" speech is "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by [a] majority of their fellow citizens." As the Court held in Terminiello v. City of Chicago, "a function of free speech under our system of government is to invite dispute. It may in-

---

74. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (holding that only acts that "would incite violence and breaches of the peace" are justified in being regulated).
76. See infra note 84 and accompanying text; see also Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps, supra note 75, at 6.
79. Id. at 409 (citation omitted) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)).
deed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."\(^83\)

That speech is delivered in an offensive way does not mean that the delivery diminishes its value as public discourse.\(^84\) To allow an individual to bring a claim because of the very effects the Court has held up for protection would have a significant chilling effect on public discourse, something the Court has long sought to avoid. As the Court noted in *Hustler*, "if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."\(^85\)

**D. Defamation**

The Court has long held that the state can regulate false statements that cause reputational harm to citizens.\(^86\) However, in its defamation rulings, the Court has carefully carved out narrow exceptions regarding speech limitations in an effort to strike a balance between protecting speech and protecting individuals from injury. In *New York Times Co. v. Sullivan*, the Court set a high burden of proof for public officials seeking to recover damages for defamatory statements.\(^87\) Not only must officials prove that a published statement was false, they must also prove that there was reasonable doubt about the truthfulness of the statement in the mind of a publisher when he or she published the statement.\(^88\) The Court felt that any less than this “actual malice” standard would prove to have a chilling effect on the press, forcing them to hold stories for fear of crushing tort liability.\(^89\) In ruling so, the Court sought to protect public comment from the whims of an official who not only invited such content by the nature of her position, but by that same position was in a good place to combat the comment’s harmful effect.\(^90\)

Following the *Sullivan* decision, amid concerns about the press abusing its power, the Court in *Gertz v. Robert Welch, Inc.* lowered the barrier to a defamation claim for private figures.\(^91\) These individuals have a lower burden of proof to prevail in a libel lawsuit and need only show a publication

\(^83\) 337 U.S. 1, 4 (1949).

\(^84\) *See id.* (“Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”).


\(^87\) 376 U.S. at 279-80.

\(^88\) *Id.*

\(^89\) *Id.* at 280-81.

\(^90\) *Id.* at 282-83.

\(^91\) *Gertz*, 418 U.S. at 348.
negligently published a false statement of fact about an individual. 92 The Gertz Court was careful, however, to point out that damage to reputation is both judicially measurable and quantifiable. 93 The Gertz court limited damages for negligent behavior to actual damages under the lower standard. 94 To receive punitive damages, a plaintiff must still meet the higher Sullivan standard, again offering protection from overwhelming, and thus chilling, tort liability for negligent speech. 95

The Court has for both public and private figures required a false statement of fact as a threshold element in defamation claims. 96 Without meeting that threshold requirement, no defamation claim is possible. 97 The Court’s ruling in Philadelphia Newspapers, Inc. v. Hepps 98 demonstrates just how seriously the Court takes this requirement when a situation involves speech on matters of public concern. In Hepps, the Court held in a plurality opinion that it is better to allow a defamatory yet unprovably false statement of fact on a matter of public concern against a private citizen to go unpunished, even when the statement in question causes reputational harm. 99 The plurality did so because the chilling effect of doing otherwise “would be antithetical to the First Amendment’s protection of true speech on matters of public concern.” 100 A rule allowing unprovably false claims to be punished would inevitably allow some unmeritorious claims to succeed, creating an unacceptable risk of punishing protected speech. 101 Thus, the Court put the burden of proving a statement’s falsity on the plaintiff despite recognizing that doing so would deny some deserving plaintiffs recovery. 102

E. IIED and Speech

The Maryland law at issue in Snyder required a plaintiff to prove the defendants “intentionally or recklessly[] engaged in extreme and outrageous

92. Id. at 353 (Blackmun, J., concurring).
93. Id. at 350 (majority opinion).
94. Id. at 349.
95. Id. at 350 (holding that punitive damages are “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence” and are not allowed absent a showing of actual malice).
97. Id.
98. 475 U.S. 767 (1986) (plurality opinion).
99. Id. at 777-78.
100. Id. at 777.
101. Id. at 777-78.
102. Id. at 778.
conduct that caused the plaintiff to suffer severe emotional distress.” In *Hustler*, the Court addressed a similar claim by the televangelist Jerry Falwell. In that case, Falwell claimed that an ad parody, which suggested that Falwell was an alcoholic who had an incestuous relationship with his mother, was so grievously offensive as to be actionable.104

Falwell sued under a Virginia law that made a person’s conduct punishable if it “(1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff’s emotional distress; and (4) caused emotional distress that was severe.”105 The Court denied Falwell’s claim because he failed to demonstrate that a false statement of fact was made with actual malice in addition to the elements of IIED.106

In rejecting Falwell’s claim, the Court ruled the “outrageousness” standard contained within the Virginia IIED law

would allow a jury to impose liability on the basis of jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs 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.107

In short, an outrageousness standard allows prosecutions merely because people are offended. Allowing a prosecution for such speech, without more, violated decades of First Amendment jurisprudence that specifically protects against the censorship of offensive speech.108 In other words, under the Court’s historical standards, speech adding to the public discourse must be regarded as independent from community norms in order to protect the marketplace of ideas to which such speech contributes.109

In order to shelter speech from the whims of community norms, the Court has read the Constitution to protect both the cognitive and emotive force of speech, even when the speech is delivered in a provocative man-

105. Id. at 50 n.3 (citations omitted).
106. Id. at 56-57.
107. Id. at 55 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982)).
108. See, e.g., Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").
109. See Concept, supra note 11, at 647; see also supra Part III.A.
To render speech actionable, the Court requires some kind of "external indicia of harm resulting from speech or from actions that are independently harmful, such as threats or lies." In the context of *Hustler*, emotional damage was not a harm historically recognized by the court as capable of rendering speech unprotected. As such, the Court added two historically recognized indicia — a false statement of fact made with actual malice — to ensure that the regulation gave "adequate 'breathing space' to the freedoms protected by the First Amendment."

IV. INSTANT DECISION

A. Majority Opinion

Chief Justice John Roberts, writing for the eight-justice majority, stated that the crucial question in the case was "whether [Westboro's] speech is of public or private concern." Chief Justice Roberts defined speech on issues of public concern as that which is particularly newsworthy or which "relat[es] to any matter of political, social, or other concern to the community." That the speech is "inappropriate or controversial" is irrelevant to its classification. Chief Justice Roberts defined speech on issues of private concern primarily by example, listing an individual's credit report and videos of private sexual acts as exemplars of private concerns. Limiting speech on private concerns, Chief Justice Roberts explained, does not bring up the same constitutional concerns as limiting speech on public concerns. However, one determines the category of particular speech only after examining the "content, form, and context . . . as revealed by the whole record."

Examining the content of Westboro's message, Chief Justice Roberts determined that the overall theme of the demonstration was to address broader public issues, even if a few of the signs could be viewed as specifically

---

110. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944))).


112. See *Hustler*, 485 U.S. at 53.

113. Id. at 56.


115. Id. at 1216 (citations omitted).

116. Id.

117. Id.

118. Id. at 1215.

119. Id. at 1216 (citations omitted).
targeting the Snyders. That the demonstration occurred in the context of a funeral did not change the fact that the Westboro protestors, who stood on a sidewalk, engaged in speech in a traditional public forum. Further, Chief Justice Roberts determined that the long history of such acts by the Westboro Baptist Church, including multiple protests on the same day as the Snyder funeral, demonstrated a lack of "pre-existing relationship" that would indicate this particular protest was specifically targeted at the family. Given that the Westboro protestors had followed all the rules, were out of the sight of the location where the funeral was held, and were neither violent, unruly, nor loud, "the church members had the right to be where they were."  

Chief Justice Roberts determined that Snyder's complaint really turned on the content of the Westboro Baptist Church's message. Ruling against Snyder, Chief Justice Roberts found that "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt." As the Court did previously in Hustler, Chief Justice Roberts found the outrageousness standard of IIED allows jurors to decide based on their tastes, views, or dislike of the protestors' message. Ultimately, Chief Justice Roberts determined the risk of allowing such a claim to proceed on the facts presented was "unacceptable."

B. Concurrence

Chief Justice Roberts's opinion emphasized the Court's holding was narrow. Justice Breyer, concurring in the holding, stressed that narrowness, adding "[a] State can sometimes regulate picketing, even picketing on matters of public concern." A speaker could not, for instance, cloak otherwise actionable behavior with protected speech. Should a court, after examining the entire record, determine that a speaker was attempting to mask
an assault behind protected speech, it could then allow the State to take action to protect the speaker’s victim.\textsuperscript{131} Justice Breyer did not, however, believe that was the case under Snyder’s specific circumstances.\textsuperscript{132}

C. Dissent

Justice Alito, the lone dissenter, lamented that the Court’s decision held “the First Amendment protected respondents’ right to brutalize Mr. Snyder.”\textsuperscript{133} Justice Alito described the protest as a “malevolent verbal attack” on the family “at a time of acute emotional vulnerability.”\textsuperscript{134} Given the ample other protected avenues, including books, videos, media outlets, and other venues through which the Westboro Baptist Church could express their views, Justice Alito would not have protected the church’s “vicious verbal attacks that make no contribution to public debate.”\textsuperscript{135}

Justice Alito characterized IIED as “a very narrow tort with requirements that are rigorous, and difficult to satisfy.”\textsuperscript{136} To succeed in a claim, a speaker must “go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community.”\textsuperscript{137} Justice Alito determined that the Westboro Baptist Church had abandoned any challenge to the sufficiency of Snyder’s evidence on the IIED claim when it argued that “the First Amendment gave them a license to engage in such conduct.”\textsuperscript{138} Justice Alito would not have granted them any such license.\textsuperscript{139} He felt that it was clear that liability for IIED by speech was possible under the First Amendment.\textsuperscript{140} Citing other instances, such as fighting words, which are unprotected under the First Amendment, Justice Alito determined that Westboro’s speech would be actionable as an exploitive attack on the Snyders.\textsuperscript{141}

Justice Alito wrote that a reasonable bystander seeing the protest would have likely determined both the protest and the Epic\textsuperscript{142} were targeted at the

\begin{itemize}
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id. at 1221-22.
\item \textsuperscript{133} Id. at 1222 (Alito, J., dissenting).
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 1223 (citations omitted) (internal quotation marks omitted).
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 1223 (“When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”).
\item \textsuperscript{142} Justice Alito chose to address the Epic, chiding the majority for so easily dismissing what he saw as a part of “a single course of conduct.” Id. at 1225 n.15.
\end{itemize}
Justice Alito found that Westboro's protest went "far beyond commentary on matters of public concern, [and] specifically attacked Matthew Snyder."\textsuperscript{144} This, Justice Alito wrote, was precisely the instance hypothesized in Justice Breyer's concurrence - a personal attack cloaked in protected speech.\textsuperscript{145} That it was targeted, according to Justice Alito, along with the exploitive nature of the protest, overruled any concerns that it took place in a public forum.\textsuperscript{146} As such, Justice Alito would have found for Snyder on his IIED claim.\textsuperscript{147}

\section*{V. Comment}

The Court's precedents demonstrate a clear Constitutional mandate favoring open debate on matters of public concern regardless of the speech's palatability or delivery method.\textsuperscript{148} The decision in \textit{Snyder v. Phelps} strongly reiterates this position and makes it clear that the speech of Westboro Baptist Church, without more, cannot add up to an actionable claim for IIED. The Court did little, however, to clear up the primary questions left by the \textit{Hustler} decision: namely, what kinds of speech might actually be actionable under IIED.

No obvious standard for IIED emerged from the \textit{Snyder} opinion. However, when read in the light of the Court's previous opinions, it becomes clear that imposing tort liability for IIED, without more, is inconsistent with the Court's long-held position that the First Amendment protects offensive speech when it pertains to public discourse, regardless of to whom it is spoken. The common law tort of IIED standing alone falls short of the Court's mandate that laws that encroach on the speech rights of citizens must be "carefully drawn so as not unduly to impair liberty of expression."\textsuperscript{149}

\textsuperscript{143} ld. at 1225.
\textsuperscript{144} ld. at 1226.
\textsuperscript{145} ld.
\textsuperscript{146} ld. at 1227 ("[T]here is no reason why a public street in close proximity to the scene of a funeral should be regarded as a fire-free zone in which otherwise actionable verbal attacks are shielded from liability.").
\textsuperscript{147} ld. at 1228-29.
\textsuperscript{148} Madsen v. Woman's Health Ctr., Inc., 512 U.S. 753, 774 (1994) ("[I]n public debate . . . citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)) (internal quotation marks omitted)); see also Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.").
The Court, by imposing onto the tort of IIED the high "actual malice" standard in Hustler, sought to remove the decision from subjective censorship by community standards.\textsuperscript{150} There, the Court removed the determination of liability from the baseline standard of moral acceptability, raising it to the higher standard necessary from a policy standpoint to both protect the individual and preserve speech standards.\textsuperscript{151} In doing so, the Court was able to "give adequate 'breathing space' to the freedoms protected by the First Amendment."\textsuperscript{152}

The Court in Hustler recognized the "demarcation of a distinct realm of speech within which legal application of the ordinary norms of community life is constitutionally suspended[;] . . . [a] constitutional separation of public discourse from community life."\textsuperscript{153} The "outrageousness" standard inherent in the tort itself is subject to precisely those subjective community norms from which the Court has long shielded speech on issues of public concern. Chief Justice Roberts, citing Hustler, explained in Snyder that

"[o]utrageousness," . . . is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasant'" expression. Such a risk is unacceptable.\textsuperscript{154}

To guard against such a risk, the Court's jurisprudence requires recognized external indicia of harm, such as an intent to cause likely immediate violence, harassment, or a measurable pecuniary damage to reputation.\textsuperscript{155} The emotional impact element of the tort is simply not the kind of measurable objective indicia historically recognized by the Court.\textsuperscript{156} Indeed, in developing the limited categories of permissible speech regulation, the Court effec-

\textsuperscript{150} See Concept, supra note 11, at 649.
\textsuperscript{151} See id.
\textsuperscript{153} Concept, supra note 11, at 604-05.
\textsuperscript{155} Defamation standards, for instance, require damage to reputation that is measurable and quantifiable, something the Gertz Court was careful to point out when disallowing punitive damages under the lower defamation standard required for private citizens. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).
\textsuperscript{156} See Offensiveness, supra note 15, at 73 ("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.").
tively barred punishment of speech based purely upon the audience’s negative emotional response to its content. 157 IIED, without more, involves none of the Court’s historically recognized external indicia necessary to make otherwise protected speech actionable.

Despite arguing that the IIED tort itself contains a high enough bar to protect speech, 158 Justice Alito in his dissent appears to at least tacitly acknowledge that more may be necessary. He constantly defines the speech in question as an attack targeted at the family, attempting to draw parallels between Westboro’s speech and the Court’s recognized fighting words and defamation indicia. 159 Chief Justice Roberts answers this contention in a footnote, restating the Fourth Circuit’s finding that “there is ‘no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or “fighting words.”’” 160 In other words, none of the historically recognized and necessary external indicia are present in the current case. Given the Court’s stated reticence to create new categories of unprotected speech, 161 such indicia would be necessary to render Westboro’s speech actionable.

Such was also the case in Hustler. Ultimately what the Court did in Hustler was not simply import the Sullivan standard onto IIED for public figures. Instead, the tort itself demanded those elements under the facts in that case as historically recognized, legally measurable external indicia necessary so as to adequately protect speech on matters of public concern. Courts apply these standards precisely because they are historically recognized and measurable external indicia of harm. The standards are not simply “defamation” standards; they are structural free speech tests that signal when otherwise protected speech on matters of public concern is actionable when made against individuals.

Both Hustler and Snyder rightly dismissed the unmodified IIED claim because the claim’s standard runs completely contrary to the Court’s precedents protecting such speech unless the speech falls into certain categories as indicated by historically recognized indicia. The Snyder opinion does little to elaborate on what other elements might be necessary to give rise to an IIED claim. However, given the nature of the harm, the Court may not have felt a need to do so. As in Hustler, the unmodified IIED standard was simply too lax to withstand First Amendment scrutiny.

157. See id. at 86.
158. See Snyder, 131 S. Ct. at 1222 (Alito, J., dissenting) (“This is a very narrow tort with requirements that ‘are rigorous, and difficult to satisfy.’” (citation omitted)).
159. Id. at 1227.
160. Id. at 1215 n.3 (majority opinion) (citing Snyder v. Phelps, 580 F.3d 206, 218 (4th Cir. 2008)).
161. United States v. Stevens, 130 S. Ct 1577, 1586 (2010) (“Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).
The _Snyder_ opinion’s relative silence on the public/private figure distinction may be indicative that the Court thought little about such distinction.\textsuperscript{162} This makes sense given that the same concerns that arise out of this issue apply equally to public and private figures when the speech in question is on a matter of public concern given the nature of the harm.\textsuperscript{163} Given its highly personal nature, emotional harm caused to a public figure is no different than that caused to a private figure. However, emotional harm is difficult to measure for actual damages, so any non-punitive damages would be dangerously speculative.

Here, the basis for the _Hustler_ standard starts to become clear. A false statement of actual fact is often the first hurdle to damages of any kind when dealing with speech on matters of public concern that harms an individual.\textsuperscript{164} Once a false statement is found, courts then examine the culpability of the speaker and potential harm to the individual.\textsuperscript{165} The greater the potential harm, the less culpable the speaker has to be.\textsuperscript{166} Under defamation, the potential reputational harm to private individuals is greater than to public individuals.\textsuperscript{167} Therefore, the required culpability is lower.\textsuperscript{168}

However, IIED differs significantly from defamation given that the emotional harm, unlike reputational harm, is the same for both public and private figures. Public figures, given their stature and recognition, have an

\textsuperscript{162} Scholars, however, certainly gave the distinction serious thought, as evidenced by the numerous amicus briefs that dealt with the issue. See, e.g., Brief of the American Civil Liberties Union and the American Civil Liberties Union of Maryland as Amici Curiae in Support of Respondents at 20, _Snyder_, 131 S. Ct. 1207 (No. 09-751), 2010 WL 2811208 at *20; Brief Amici Curiae of the Reporters Committee for Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents at 20, _Snyder_, 131 S. Ct. 1207 (No. 09-751), 2010 WL 2811207 at *20; Brief of Senators Harry Reid, Mitch McConnell, and 40 other Members of the U.S. Senate as Amici Curiae in Support of Petitioner at 17, _Snyder_, 131 S. Ct. 1207 (No. 09-751), 2010 WL 2173511, at *17; Brief for the State of Kansas, 47 other States, and the District of Columbia as Amici Curiae in Support of Petitioner at 24, _Snyder_, 131 S. Ct. 1207 (No. 09-751) 2010 WL 2224733, at *24.

\textsuperscript{163} See Clay Calvert, _War & (Emotional) Peace: Death in Iraq and the Need to Constitutionalize Speech-Based IIED Claims Beyond Hustler Magazine_ v. Falwell, 29 N. ILL. U. L. REV. 51, 62 (2008) (discussing a recently-dismissed IIED claim brought by the parents of a deceased soldier who objected to their son’s name being used as part of a political message on a T-shirt); see also Read v. Lifeweaver, LLC., No. 2:08-CV-116, 2010 WL 1798704, at *10 (E.D. Tenn. May 5, 2010).

\textsuperscript{164} See supra Part III.D.


\textsuperscript{167} _Gertz_, 418 U.S. at 348.

\textsuperscript{168} Id. at 353 (Blackmun, J., concurring).
enhanced ability to counter reputational harm.\textsuperscript{169} Emotional harm, on the other hand, is equally damaging, equally hard to overcome, and equally difficult to measure. Thus, the actual malice requirement simply makes sense. Such a requirement clears the way for punitive damages under the Court’s speech jurisprudence as both public and private figures require a showing of actual malice before punitive damages can be awarded.\textsuperscript{170} Such a requirement would render moot the problem of hard-to-measure damages, clearing the way for a meaningful award while still allowing speakers significant protection.

This is precisely what the Fourth Circuit attempted to do when it held that Snyder was required to prove that the statements in question made provably false factual assertions in addition to his IIED claim.\textsuperscript{171} By requiring, just as the \textit{Hustler} Court did, that the plaintiff meet the same standard as a public figure, that court continued the Supreme Court’s legacy of protecting speech on issues of public concern from the whims of an offended community.

The Court did not follow the Fourth Circuit’s reasoning. Nonetheless, in his opinion, Chief Justice Roberts did plant some hints as to the kind of speech that might give rise to an actionable claim. As the Chief Justice stated in the majority opinion, “[t]here was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro’s speech on public matters was intended to mask an attack on Snyder.”\textsuperscript{172} Chief Justice Roberts commented on the lack of evidence of targeting the Snyder family\textsuperscript{173} or physical or aural disruption of the funeral.\textsuperscript{174} Attacks, targeting, and aural or physical disruptions are all elements historically recognized as external indicia that would allow the regulation of otherwise protected speech.\textsuperscript{175} Therefore, it seems that a claim for IIED is not limited simply to the additional elements outlined in \textit{Hustler}. Instead, at least some of the other historically recognized indicia, if present in concert with the other necessary elements of IIED, could give rise to an action for IIED.

\textsuperscript{169} The Court has recognized this crucial distinction. \textit{See}, \textit{e.g.}, \textit{Sullivan}, 376 U.S. at 304-05.
\textsuperscript{170} \textit{See supra} Part III.D.
\textsuperscript{171} Snyder v. Phelps, 580 F.3d 206, 218 (4th Cir. 2009) (“[T]he Court has recognized that there are constitutional limits on the type of speech to which state tort liability may attach. . . . [T]he First Amendment will fully protect ‘statements that cannot ‘reasonably’ [be] interpreted as stating actual facts’ about an individual.”) (third alteration in original) (citations omitted), aff’d, 131 S. Ct. 1207 (2011).
\textsuperscript{172} \textit{Snyder}, 131 S. Ct. at 1217.
\textsuperscript{173} \textit{See id.} at 1218.
\textsuperscript{174} \textit{Id.} at 1218-19.
Justice Alito’s dissent essentially argues that funerals are special locations for which an exception should be made. “At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. . . . Allowing family members to have a few hours of peace without harassment does not undermine public debate.”

Justice Alito is partially correct, and had there been evidence that the Church intended to specifically target and harass the Snyder family in their time of grief, the Court would likely have found the protest actionable. However, although the Court couched its opinion as fact-specific, IIED alone will likely never be found to be protective enough to give rise to an actionable claim when aimed at speech on issues of public concern. Without evidence of the historically recognized external indicia of harm there is simply too great a danger that people would impose liability simply because they find the content distasteful.

To allow a claim on these highly subjective standards would run directly afoul of the Court’s mandate that laws that encroach on the speech rights of citizens must be “carefully drawn so as not unduly to impair liberty of expression.”

Ultimately, the Snyder decision makes clear that the tort of IIED as applied to speech requires additional elements to adequately protect speech. The Court does not create new categories of unprotected speech. Instead, it merely acknowledges traditional categories of unprotected speech. Thus, historically recognized external indicia are critical to rendering speech actionable. While similar standards to defamation are appropriate, they are not the only possible external indicia. Threats, harassment, or some form of intentional incitement to violence would also likely be enough to render otherwise protected speech actionable. Emotional harm alone, however, does not fall into any of the Court’s traditional categories of recognized indicia of

176. Snyder, 131 S. Ct. at 1227-28 (Alito, J., dissenting).
177. Id. at 1220 (majority opinion).
178. The court has, however, repeatedly held that the graphic and offensive nature of the speech in question in no way diminishes its value as political speech in need of protection, nor does it matter that expression comes at the expense of our most sacred symbols. See, e.g., Texas v. Johnson, 491 U.S. 397, 417 (holding that “[I]t is not the function of the government to impose precise standards on the content of political speech, or to preserve it by enacting laws that would impose liability on those who find the content offensive or distasteful.
180. See United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (“Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).
181. Id. at 1584.
182. See Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps, supra note 75, at 26
183. See id. at 21.
184. See id. at 25-26.
Unless the speech at issue bears the marks of some historically-recognized external indicia of unprotected speech, it simply cannot be actionable under the First Amendment. As the Court said in Snyder,

[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

VI. CONCLUSION

While one may desperately wish that the Phelps and members of their church would find other, less offensive ways to spread their particular message, the First Amendment does not allow the State to force them to do so based on their message’s emotional impact. Unless the speech devolves into speech containing historically recognized elements of unprotected speech, such as harassment or threats, it cannot be actionable. Although Albert Snyder, and those like him, are an extremely sympathetic group, under the Court’s First Amendment jurisprudence they simply had no legal claim under IIED.

185. Id. at 26.
187. See Privacy, supra note 15, at 228; see also Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).
188. See Privacy, supra note 15, at 232.