

FREEDOM OF SPEECH AND THE INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS TORT

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I. THE TROUBLE WITH AN “OUTRAGEOUSNESS” STANDARD

The defendants’ speech in *Snyder v. Phelps*<sup>1</sup> is uncommonly contemptible. But many more ideas than just the Phelpsians’ would be endangered if the Court allowed the intentional infliction of emotional distress tort to cover the expression of offensive ideas.

Many statements might be labeled “outrageous” by some judge, jury, university administrator, or other government actor.<sup>2</sup> Publishing the

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<sup>1</sup> 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010); *see also* *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008).

<sup>2</sup> Any speech that is unprotected against liability would be unprotected against university discipline as well. *See, e.g.*, *College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1012 (N.D. Cal. 2007) (noting that speech that falls within a general First Amendment exception to protection may also be restricted by a public university). And some universities already try to frame their speech codes in terms borrowed from the emotional distress tort. *Cf., e.g.*, *McCauley v. Univ. of Virgin Islands*, No. 2005-188, 2009 WL 2634368, at \*19 (D.V.I. Aug. 21, 2009) (discussing and upholding against a First Amendment challenge a university speech code that restricted speech that “causes emotional distress”); WASH. ADMIN. CODE § 504-26-222 (LexisNexis 2010) (Washington State University student conduct policy banning all “[c]onduct by any means,” which would include speech, “that is severe, pervasive, or persistent, and is of such a nature that it would cause a reasonable person in the victim’s position [and actually does cause the victim] substantial emotional distress and [would and does] undermine his or her ability to work, study, or participate in his or her regular life activities or participate in the activities of the university”); UNIV. OF OKLA., STUDENT CODE: 2009-2010 tit. 16, ¶ 21, (2009), *available at* [http://judicial.ou.edu/images/stories/student\\_codebook20092010.pdf](http://judicial.ou.edu/images/stories/student_codebook20092010.pdf) (banning, among other things, “[m]ental harassment, being intentional conduct extreme or outrageous . . . of such a nature that a reasonable person would not tolerate it”); S.D. BD. OF REGENTS, STUDENT CONDUCT CODE § 2.B.6.a.ii (2009), *available at* [http://www.sdbor.edu/policy/3-Student\\_Affairs/documents/3-4.pdf](http://www.sdbor.edu/policy/3-Student_Affairs/documents/3-4.pdf) (banning “conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person’s ability to participate in or to realize the intended benefits of an institutional activity, employment or resource”); Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 381-82 (1991) (“A student who intentionally or recklessly uses hate speech [‘any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation’] under such circumstances

Mohammed cartoons outrages millions. So does burning an American flag. So might stepping on a Hamas flag, which contains a passage from the Koran.<sup>3</sup> So might saying that “affirmative action results in a situation where minorities are competing with people who are better prepared to be there”<sup>4</sup> (a statement that could be seen as applying to an offended person personally, as well as to minorities generally).

So might arguing that a government program director is unfit for a job because she’s not a U.S. citizen.<sup>5</sup> So might arguing in favor of a government policy of retaliating against civilians during wartime.<sup>6</sup> So might harsh, *Hustler-v.-Falwell*-like ridicule of a university professor, a community activist, or someone who was convicted of a crime but who nonetheless arouses the sympathy of a jury or a university administrator (perhaps because of the political valence of the criminal statute that the person had violated).<sup>7</sup>

And the speakers might know that the statements are likely to inflict such distress.<sup>8</sup> If *Snyder* allows liability for supposedly outrageous statements that recklessly inflict severe emotional distress, then all the speech mentioned above could lead to liability, university disciplinary sanctions, or in principle even jail time (should a state choose to criminalize such speech).<sup>9</sup> And such liability may become especially likely because denying such liability might itself seem outrageous, once liability in *Snyder* is allowed. Many Muslims, for instance, might be doubly outraged and distressed if the cartoons that so offend them are allowed but the picketing in *Snyder* is punished: They might be outraged, first, by the cartoons themselves, and, second, by the law’s failure to give their feelings the same protection that the law would give Snyder’s feelings.

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that another student is likely to suffer serious emotional distress or be intimidated from full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value.”). These rules might be quite proper when applied to non-speech conduct; the First Amendment problem arises when such rules apply to speech that is supposedly “outrageous” or causes “emotional distress” because of the message that the speech conveys.

<sup>3</sup> See Jason Shuffler, *ASI Passes Resolution Against Flag Stomping*, GOLDEN GATE [X]PRESS, Nov. 28, 2006, <http://xpress.sfsu.edu/archives/news/007652.html> (reporting on San Francisco State University student government’s resolution condemning this as “hateful religious intolerance”).

<sup>4</sup> Editorial, *Smith’s Challenge; New Justice Now Has a Broader Constituency*, DALLAS MORNING NEWS, Nov. 18, 2002, at 16A (condemning this statement as “outrageous”).

<sup>5</sup> *Dominguez v. Stone*, 638 P.2d 423, 426-27 (N.M. Ct. App. 1981) (concluding that such speech may lead to liability under the intentional infliction of emotional distress tort).

<sup>6</sup> *Citizen Publ’g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005) (reversing trial court decision that would have allowed a lawsuit based on this speech to proceed).

<sup>7</sup> See *infra* notes 24-26 and accompanying text for an explanation of why the subjects of such cartoons would likely be seen as private figures under libel law.

<sup>8</sup> Under Maryland law, as under the law of most states, defendants may be liable for intentional infliction of emotional distress tort when they act “intentionally or recklessly.” *Snyder v. Phelps*, 533 F. Supp. 2d 567, 580 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010); see also RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>9</sup> See, e.g., Leslie Yalof Garfield, *Intentional Infliction by Internet: The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress* (July 3, 2009) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1517951](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517951).

Moreover, the vagueness of the “outrageousness” standard exacerbates the risk that the emotional distress tort will deter such speech. “[W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”<sup>10</sup> What is true as to vague statutes is equally true as to the vague outrageousness-based emotional distress tort.

Yet all this speech must remain constitutionally protected, for reasons that the Court described well in *Hustler v. Falwell*.<sup>11</sup> “There is no doubt,” the Court began, “that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described [earlier in the opinion], and a rather poor relation at that.”<sup>12</sup> There is likewise no doubt that the Phelpsians’ antics are quite far from normal political speech, even normally provocative and iconoclastic political speech. But, as the *Hustler* Court observed, in terms that likewise apply to *Snyder* and to the other examples I give above:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm.

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<sup>10</sup> Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (footnotes omitted).

<sup>11</sup> The states’ amicus brief in support of *Snyder* tries to limit the impact of *Hustler v. Falwell* by arguing that “No decision of [the Supreme] Court has ever exempted a non-media defendant from generally applicable state tort law on First Amendment grounds.” Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 18, 27, *Snyder v. Phelps*, No. 09-751 (U.S. June 1, 2010), 2010 WL 2224733 (hereinafter States’ Amicus Brief). That assertion is factually mistaken: *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), held that non-media defendants could not be held liable for their speech under the generally applicable state tort law of interference with business relations. But beyond this, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 905-06 (2010), expressly “reject[s] the proposition that the institutional press has any constitutional privilege beyond that of other speakers” (quoting and adopting the reasoning of Justice Scalia’s dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990), and also citing as support Justice Brennan’s dissent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985); *Dun & Bradstreet* involved state tort law).

The brief also seemingly tries to undermine *Hustler v. Falwell* with the more originalist-minded or tradition-minded Justices by arguing that, “Until the Court’s decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law . . . .” States’ Amicus Brief, *supra*, at 3; *see id.* at 24-26. This is literally true as to the First Amendment, since in 1964 the Amendment had not long been incorporated against the states, and the Court had not squarely dealt with First Amendment arguments for limiting state tort law. But the states’ assertion could also be read as suggesting that until 1964 American law had generally refused to view constitutional free speech protections as applicable to tort lawsuits, and that Justices who are interested in an original meaning approach to constitutional law should take such an approach. And such a suggestion would be historically mistaken; constitutional constraints on speech-based civil liability have deep roots, going back to the Framing era, as is discussed in Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626294](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626294).

<sup>12</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

But we doubt that there is any such standard, and we are quite sure that the pejorative description “outrageous” does not supply one. “Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. 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. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action”). And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978):

“[T]he fact that 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. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” *Id.*, at 745-746.

See also *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers”).<sup>13</sup>

To be sure, some might view the subjectivity of the “outrageousness” standard as a virtue: “The determination of when [funeral picketing] crosses the line into outrageous conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability.”<sup>14</sup> “Civil action judgments ‘reflect social conventions and tend to reflect what the majority believes to be acceptable behavior.’”<sup>15</sup> But the Supreme Court has long, and correctly, held that such subjectively defined speech restrictions are not permitted under the First Amendment:

[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.<sup>16</sup>

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<sup>13</sup> *Id.* at 55-56 (first paragraph break added).

<sup>14</sup> Chelsea Brown, Note, *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).

<sup>15</sup> *Id.* at 232 n.144 (citation omitted).

<sup>16</sup> *Grayned*, 408 U.S. at 108-09 (footnote omitted).

## II. THE IRRELEVANCE OF THE PUBLIC FIGURE/PRIVATE FIGURE DISTINCTION TO A POSSIBLE “OUTRAGEOUS SPEECH” EXCEPTION

Elsewhere in *Hustler*, the Court does describe the question in that case as being “whether a *public figure* may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.”<sup>17</sup> The plaintiff in *Snyder*, the father of the fallen marine Lance Corporal Matthew Snyder, is not a public figure, and some have argued that this makes the reasoning of *Hustler* inapplicable.<sup>18</sup> Nonetheless, the underlying rationale of *Hustler*, and especially of the passage quoted above, applies to all speech on matters of public concern<sup>19</sup>—whether the plaintiff is a public figure or a private figure, and whether the speech is about a public figure, a private figure, or no particular person at all.<sup>20</sup>

Speech about private figures is generally constitutionally protected. Libel law, in which the public figure/private figure distinction is legally relevant, is constitutional only because of the Court’s judgment that “there is no constitutional value in false statements of fact,”<sup>21</sup> regardless of who the plaintiff might be. (When false statements are protected, they are protected only because of the danger that restricting some unintentional falsehoods might deter even true statements.<sup>22</sup>) This is why the public/private figure distinction bears only on the degree of culpability required to allow compensatory damages for the constitutionally valueless false statements of fact. It does not justify

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<sup>17</sup> *Id.* at 50 (emphasis added).

<sup>18</sup> See, e.g., *Snyder v. Phelps*, 533 F. Supp. 2d 567, 577-78 (D. Md. 2008); Brief for Petitioner at 22-26, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010), 2010 WL 2145497; States’ Amicus Brief, *supra* note 11, at 24-26; Brief of Senators Harry Reid, Mitch McConnell, and 40 other Members of the U.S. Senate as *Amici Curiae* in Support of Petitioner at 20-23, *Snyder v. Phelps*, No. 09-751 (U.S. May 28, 2010), 2010 WL 2173511 (hereinafter Senators’ Amicus Brief); Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN. ST. L. REV. 381, 400, 403 & n.129 (2008); Jason M. Dorsky, Note, *A New Battleground for Free Speech: The Impact of Snyder v. Phelps*, 7 PIERCE L. REV. 235, 244-45 (2009).

<sup>19</sup> Speech is treated as being on a matter of public concern if it deals with political, religious, scientific, or social questions, even if it is said on the occasion of an injury to a particular private person and refers to that person. This was made clear by *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989), which held that an article about a rape, which mentioned the name of the rape victim, constituted speech on a matter of public concern: As *Florida Star* held, the public-concern nature of the speech turns on whether “the article generally, as opposed to the specific identity contained with it” dealt with a socially significant matter; in *Florida Star* the matter was “the commission, and investigation, of a violent crime,” and in *Snyder* it was American policy towards homosexuality.

<sup>20</sup> For an example of an emotional distress claim brought by a private figure based on speech that is about no particular person, see *Citizen Publ’g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005).

<sup>21</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>22</sup> *Id.* at 341. Note that even if the public/private figure distinction is indeed imported into the intentional infliction of emotional distress tort by analogy to libel law, the analogy wouldn’t support punitive damages for outrageous speech: The rules for punitive damages in libel law are the same for private figures and public figures. *Id.* at 349.

liability for statements other than false statements of fact.

In fact, in the same passage where the Court said that false statements of fact have no constitutional value, the Court also concluded that, “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>23</sup> Even outrageous and rightly morally condemned ideas are thus constitutionally protected. That too is true regardless of who the plaintiff might be: Private figure plaintiffs should be unable to suppress outrageous ideas, just as under *Hustler* public figure plaintiffs are unable to do so.

And this makes sense, especially because the category of private figures includes many people—civil rights lawyers, authors, civic group officers, professors, criminals, and more—who are involved with matters of public concern. Thus, for instance, a lawyer who had “long been active in community and professional affairs,” “served as an officer of local civic groups and of various professional organizations,” and “published several books and articles on legal subjects” was held to be a private figure, even with regard to a politically charged civil rights lawsuit in which he represented the plaintiffs.<sup>24</sup>

A director of research at a state mental hospital who was also an adjunct university professor was also held to be a private figure, even with regard to a controversy stemming directly from his research.<sup>25</sup> And the Court has concluded that criminals might well remain private figures, even with regard to issues related to their crimes.<sup>26</sup> Moreover, speech that is about public figures may also often involve private figures, or may distress private figures: Even the speech in *Hustler* could easily have inflicted emotional distress on Falwell’s mother, had she been alive at the time, and might have distressed his wife and sons as well.

Perhaps these people should be able to recover compensatory damages for defamation based on a showing of the defendant’s negligence in investigating the facts. Defamation claims, after all, involve constitutionally valueless false statements of fact that could wrongfully ruin someone’s career or break up a family.

But that such private figures may be protected against negligent falsehoods hardly means that they should be protected against supposedly outrageous expressions of opinion, even ones that refer to them personally.<sup>27</sup> A student journalist or Web site operator who ridicules an allegedly foolish or rude or narrow-minded professor shouldn’t have to worry about being held civilly liable under the vague

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<sup>23</sup> *Id.* at 339-40.

<sup>24</sup> *Id.* at 351.

<sup>25</sup> *Hutchinson v. Proxmire*, 443 U.S. 111, 114-17 (1979).

<sup>26</sup> *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 162-68 (1979).

<sup>27</sup> See generally Clay Calvert, *War, Death, Politics & Religion: An Emotionally Distressing Amalgamation for Freedom of Speech and the Expression of Opinion*, 30 WHITTIER L. REV. 207 (2008).

“outrageousness” standard. Neither should a person who harshly criticizes a controversial student activist,<sup>28</sup> or sharply condemns someone who has been convicted of illegal entry to the United States or criminal copyright infringement, or argues that some professor shouldn’t hold some post because he’s not a citizen.<sup>29</sup> Nor should students have to worry about facing suspension or expulsion for such speech, if university administrators (or self-selected student disciplinary committee members) applying a speech code based on the emotional distress tort<sup>30</sup> conclude that the speech is “outrageous.”

None of this disposes of the constitutionality of a content-neutral rule that restricts demonstrations in a narrow zone outside a funeral, whether the funeral is of a private figure or a public figure. But *Snyder* doesn’t involve a challenge to such a law; *Snyder* involves an “outrageousness” standard that is neither content-neutral nor narrowly limited to funerals.

### III. PROXIMITY TO A FUNERAL / TIME, PLACE, OR MANNER RESTRICTIONS

In my experience, defenders of liability in *Snyder v. Phelps* generally agree that the speech in the scenarios I describe (for instance, publication of the Mohammed cartoons) should remain protected. They generally argue that the emotional distress tort clearly doesn’t cover such speech, and that the Phelpsians’ speech is actionable only because the picketing was in the vicinity of Cpl. Snyder’s funeral. Such a judgment, the argument goes, doesn’t depart from “neutral[ity] in the marketplace of ideas”<sup>31</sup>—it simply condemns one especially offensive place and time of expressing the idea.<sup>32</sup>

In particular, the defenders of the verdict sometimes appeal to the “time, place, and manner restrictions” doctrine, arguing that it is permissible to restrict the time, place, and manner of speech so long as the restriction leaves open ample alternative channels.<sup>33</sup> But this

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<sup>28</sup> See Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, 313-17 (2000) (describing the U.S. Department of Education Office for Civil Rights investigation of a community college that declined to suppress speech harshly critical of a controversial student activist, and the Department’s pressuring the college into settling the activist’s claims for \$15,000 and instituting an online speech code that would punish future instances of such speech). Given that the plaintiff in *Gertz v. Robert Welch, Inc.*—a civil rights lawyer, author, and civic group officer—was held to be a private figure, the student activist would likely be a private figure as well.

<sup>29</sup> *Dominguez v. Stone*, 638 P.2d 423 (N.M. Ct. App. 1981) (concluding that such speech may constitute intentional infliction of emotional distress).

<sup>30</sup> See *supra* note 2.

<sup>31</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978)).

<sup>32</sup> See, e.g., Larry A. Hicks, *Court Adds Insult to Injury*, YORK DISPATCH (Penn.), Mar. 31, 2010.

<sup>33</sup> See, e.g., David Ziemer, *Honor, Solemnity Must Be Protected*, WISC. L.J., Nov. 16, 2009;

doctrine applies only to restrictions that cover speech for reasons unrelated to the content of the speech, for instance because the speech is too loud or because it blocks traffic.<sup>34</sup> And the outrageousness of the Phelpsians' speech was related to its content: Signs expressing condolences, or even signs expressing criticism unrelated to the deceased (such as labor picketing aimed at the funeral home's employment practices<sup>35</sup>) would not be outrageous.<sup>36</sup> An ordinance restricting all picketing within, say, fifty feet of a funeral would be content-neutral and probably constitutional.<sup>37</sup> The tort law involved here, though, is not such an ordinance.

Now perhaps the "time, place, and manner restrictions" doctrine is just being appealed to by analogy: Though content-based restrictions are presumptively unconstitutional, the argument would go, this presumption is rebutted here, partly because the restriction here is neutral as to the viewpoint of the speech, and limits only the time, place, and manner of the speech.

Yet nothing in the emotional distress tort, or in the instructions that the *Snyder* jury was given, constrains the jury to focus only on time, place, and manner, to the exclusion of viewpoint.<sup>38</sup> It seems

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Hannah Miyamoto, *\$11 Million Verdict Rightly Expresses Nation's Outrage Toward Hatemongers*, KA LEO O HAWAII, Nov. 7, 2007; see also Jury Instructions, at 27, *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. Nov. 2, 2007) (No. 1:06-cv-01389-RDB), available at <http://www.law.ucla.edu/volokh/snyderjuryinstructions.pdf> (Court's Instruction No. 21) ("The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed. These restrictions must be narrowly tailored, and should balance the interests of all the people involved. Speech that is 'vulgar,' 'offensive,' and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances.").

<sup>34</sup> Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1303-11 (2005).

<sup>35</sup> See, e.g., Joseph Berger, *Workers Strike at 11 Cemeteries in New York Area*, N.Y. TIMES, May 12, 1985, at 36; John Feinstein, *Rabbis Back Undertaker Strike Effort; Largest Jewish Operation in Area Faces a Boycott*, WASH. POST, Jan. 5, 1979, at B1; see also Jorge Casuso, *Foes Vow to Thwart Crematorium's Return*, CHI. TRIB., Feb. 15, 1989, at C8 (noting neighbors' picketing of a funeral home, because of their view that it is improper to have a crematorium in a residential area).

<sup>36</sup> Nor does the "secondary effects" doctrine justify treating the law as content-neutral. "[T]he emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality), and citing *id.* at 334 (Brennan, J., concurring in part and concurring in the judgment)).

<sup>37</sup> See, e.g., *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

<sup>38</sup> See Jury Instructions, *supra* note 33, at 27. The instruction does say, near the beginning, that: "The Defendants have the right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message." *Id.* But it then goes on to say that "[s]peech that is 'vulgar,' 'offensive,' and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances." *Id.* Nothing in that sentence suggests that the offensiveness of speech, and its shocking nature, must be determined without regard to the viewpoint of the message. Likewise, later in the instruction, the court says, "When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech," and "you must then determine whether [defendants'] actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be

perfectly possible that the jury concluded that the outrageousness stems not just from the time and place of the speech, but also partly from the viewpoint: from the anti-American nature of the message, the approbation of the death of an American soldier, the message of hatred (not just moral disapproval) of gays, or the sacrilegious suggestion that God endorses the speakers' hatred.

If the picketing and online criticism had been triggered by the funeral of a recently killed enemy fighter—for instance, an American traitor who went to Iraq to kill other Americans but was brought back to America for burial—it's far from certain that the jury would have found the speech to be "outrageous."<sup>39</sup> In fact, the instructions' reference to "outrageousness" invited jurors to consider all the factors that can make speech outrageous, and to many people that may well include the viewpoint that the speech expresses.

Even if a First Amendment specialist, steeped in the First Amendment insistence on viewpoint neutrality, might set aside the viewpoint of speech in deciding whether the speech is outrageous, there's no reason to be confident that a lay juror will do the same. "If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."<sup>40</sup> Likewise, if a jury instruction's reference to "outrageousness" can be read as either authorizing the consideration of the viewpoint or as limiting the jury to other factors, there's no reason to assume that this ambiguity will be resolved in favor of viewpoint neutrality.

And the \$2.9 million compensatory damages award in *Snyder* suggests that the jurors were indeed influenced by the Phelpsians' viewpoint. Of course, the speech here was extremely offensive, and in my view entirely unjustified. And of course the plaintiff, being a grieving parent, was especially emotionally vulnerable. Yet even a grieving father likely wouldn't be damaged to the tune of \$2.9 million by speech (1) that he saw once (albeit on a very emotionally significant day), not before or during the funeral but later in the day, on television,<sup>41</sup> (2) that he knew was not remotely reflective of the views of his community, and (3) that he knew was said by people who are held in contempt by the community.

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entitled to First Amendment protection." *Id.* at 27-28. Nothing in those phrases suggests that "the nature" of the speech, or whether it is "extreme and outrageous" or "offensive and shocking," must be determined without regard to the viewpoint that the speech expresses.

<sup>39</sup> In fact, the states' amicus brief in support of *Snyder* suggests that the result might have been different if the Phelpsians' ideas were different. "The Phelpsians are not war protesters . . . . It is important for the Court to recognize and appreciate that the Phelpsians' methods are unprecedented in American history; do not mistake them for Vietnam War protesters . . ." States' Amicus Brief, *supra* note 11, at 6.

<sup>40</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

<sup>41</sup> "[I]t was established at trial that *Snyder* did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral." *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

The speech wasn't threatening. It didn't damage the father's reputation. It didn't even damage the reputation of his late son (partly because the speakers and their arguments so utterly lacked credibility with the public). It wasn't constantly repeated. It seems unlikely that it would much exacerbate the father's grief—a grief that stems from his son's death, not from the speech of a small minority of hateful, anti-American kooks and publicity hounds.

The speech doubtless enraged the father, and rightly so. But is \$2.9 million a sensible compensation for the emotional distress caused by such rage? Or does it reflect the jury's contempt for the Phelpsians' viewpoint—for its being unpatriotic, hateful, or antigay, or for its perverting Christian thinking for hateful purposes—and not just the viewpoint-neutral facts that the Phelpsians (1) held up signs 1000 feet away from a funeral, and (2) posted a Web page about the deceased on the occasion of a funeral?<sup>42</sup>

What's more, if the jury determined the amount of compensatory damages based partly on the defendants' viewpoint, and not just on the actual emotional distress inflicted on the plaintiff, then this means that the jury was so swayed by the viewpoint that it misapplied the instructions: The viewpoint isn't legally relevant to the magnitude of compensatory damages. So it seems likely that many jurors would be equally willing, or even more willing, to consider the defendants' viewpoint in deciding whether the speech was "outrageous," a consideration that actually would be consistent with the jury instructions.

Now it's theoretically possible that the jurors sincerely concluded that the speech inflicted \$2.9 million worth of emotional distress on Mr. Snyder, and would have done so regardless of the viewpoint of the speech. But even if you think this is what happened, the earlier point still stands: We can't say with any confidence that juries in emotional distress cases *don't* consider the viewpoint of speech in determining whether the speech is outrageous. Again, a "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>43</sup> These dangers alone are enough to make such a potentially viewpoint-discriminatory law unconstitutional.

So if ideological neutrality, and a focus on restricting only speech that is very near (in time or space) to a funeral, can make punishing the Phelpsians constitutional, the legal system should insist that they be punished under a law that requires juries to decide on those grounds. A targeted ban on funeral picketing might qualify.<sup>44</sup> The emotional distress tort does not.

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<sup>42</sup> *Id.* at 230-31 (Shedd, J., concurring in the judgment).

<sup>43</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

<sup>44</sup> *See, e.g., Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

## IV. RELIGIOUS FREEDOM

Some, including the plaintiff,<sup>45</sup> defend the verdict on the ground that it protects the plaintiff's own freedom to conduct his own religious ritual—a funeral—without interference.<sup>46</sup> And indeed a content-neutral law that banned, say, loud noises outside a funeral would be constitutional.<sup>47</sup>

But nothing in the emotional distress tort limits liability to such situations. Nothing in these jury instructions instructed the jurors to impose liability only if they found that the speech interfered with a religious ritual. And the picketing and the Web page in this case did not audibly or physically interrupt the funeral.<sup>48</sup>

At most, the speech was implicitly critical of the religious service, and might have made the religious service less psychologically satisfying even for someone—like the plaintiff—who first saw the picketing on television after the funeral.<sup>49</sup> That is hardly a legally cognizable interference with plaintiff's religious practices.

And if the speech here is treated as a punishable interference with others' religious practices, then the threshold for such interference would have to be set so low that a wide range of speech would likewise become restrictable. Publishing the Mohammed cartoons could lead to liability on the theory that the cartoons interfere with Muslims' religious practices because remembering the cartoons disturbs Muslims' prayers at mosque. The same could be said of speech harshly condemning or mocking Christianity, or Scientology.

If the tendency of speech to emotionally disturb a plaintiff for religious reasons, and affect the spiritual or emotional value that a plaintiff gets from a religious service, suffices to justify restricting speech, then half-century-old precedents protecting blasphemous and otherwise religiously offensive speech—landmark cases such as *Cantwell v. Connecticut*,<sup>50</sup> *Kunz v. New York*,<sup>51</sup> and *Joseph Burstyn, Inc. v. Wilson*<sup>52</sup>—would have to be overturned. And religious ideologies would acquire striking, and improper, new protection from criticism and ridicule.

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<sup>45</sup> Brief for Petitioner at 55-58, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010), 2010 WL 2145497.

<sup>46</sup> See, e.g., Brown, *supra* note 14, at 233 (“[T]he evaluation of the WBC’s conduct in a civil action proceeding and the rejection of the Free Exercise Clause defense in this case serves to protect the Snyders’ own choice of worship . . .”).

<sup>47</sup> See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ordinance banning loud demonstrations outside schools).

<sup>48</sup> *Snyder v. Phelps*, 580 F.3d 206, 211-12 (4th Cir. 2009).

<sup>49</sup> See *supra* note 41.

<sup>50</sup> 310 U.S. 296 (1940).

<sup>51</sup> 340 U.S. 290 (1951).

<sup>52</sup> 343 U.S. 495 (1952).

## V. INVASION OF PRIVACY

The *Snyder v. Phelps* jury held defendants liable not just for intentional infliction of emotional distress, but also for invasion of privacy. It seems unlikely that the Court will consider the invasion of privacy claim, because it doesn't seem to be within the scope of the questions presented by the certiorari petition.<sup>53</sup> Nonetheless, the Senators' amicus brief defends the jury verdict on this theory.<sup>54</sup>

"Invasion of privacy" covers several torts, but only one led to liability in *Snyder*: "intrusion upon seclusion."<sup>55</sup> The intrusion upon seclusion tort generally focuses on conduct that is offensive regardless of the message it expresses, or even of whether it expresses a message at all. The Restatement illustrations for the tort are entering a patient's hospital room to take a photograph over the patient's objection, photographing through someone's bedroom window using a telescope, tapping someone's phone, getting someone's bank records using a forged court order, and telephoning someone every day for a month at inconvenient times.<sup>56</sup> The tort is constitutionally sound precisely because it focuses on physical conduct, not on communication.<sup>57</sup>

In *Snyder*, though, the claimed intrusion stemmed not just from the proximity of the picketing to the funeral, but also from the message of the picketing. There must have been a good deal of speech within 1000 feet of the church at which the funeral service was being conducted, and surely one wouldn't call all of it a "highly offensive" intrusion upon seclusion.<sup>58</sup>

Applying the intrusion tort in *Snyder* thus raises much the same overbreadth, vagueness, and viewpoint discrimination problems as does applying the emotional distress tort. The intrusion tort may be a little narrower than the emotional distress tort if one interprets the intrusion tort as requiring some sort of physical proximity to the plaintiff (though then the Web page would have to be excluded). But it's also broader because it doesn't even require a finding of outrageousness, only of the intrusion being "highly offensive to a reasonable person."<sup>59</sup> And in any case the narrowing is slight, if speech within 1000 feet of the funeral

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<sup>53</sup> Petition for a Writ of Certiorari at i-ii, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009), 2009 WL 5115222; *Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule . . . we do not decide issues outside the questions presented . . .").

<sup>54</sup> See Senators' Amicus Brief, *supra* note 18, at 20-23.

<sup>55</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 580-82 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

<sup>56</sup> RESTATEMENT (SECOND) OF TORTS § 652B, illus. 1-5 (1977).

<sup>57</sup> See, e.g., Melville B. Nimmer, *The Right to Speak From Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968).

<sup>58</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>59</sup> *Id.*

qualifies as physical proximity.<sup>60</sup>

One can also see how dangerous this tort, if applicable in *Snyder*, could potentially be: It could conceivably lead to massive liability for antiabortion picketing within 1000 feet of abortion clinics, on the theory that people who are going in for emotionally draining and possibly life-altering medical procedures are just as entitled to “seclusion” as people who are going to a funeral. It could lead to massive liability for protests within 1000 feet of churches (including anti-Phelpsian protests outside any church the Phelpsians themselves might use), mosques, and synagogues, on the theory that people are entitled to “seclusion” in their ordinary religious services as well as in funeral religious services.<sup>61</sup> It could lead to universities’ being allowed to punish students for distributing or posting allegedly offensive materials near dorms;<sup>62</sup> and more.

So allowing liability on an intrusion upon seclusion theory in *Snyder* would be as improper as allowing liability on an intentional infliction of emotional distress theory. Again, a narrowly crafted, content-neutral rule restricting picketing immediately outside funerals might well be a constitutionally permissible means of protecting grieving families’ seclusion. But there’s nothing narrowly crafted or content-neutral about the two torts as they were applied in *Snyder*.

#### CONCLUSION

*Hustler v. Falwell*<sup>63</sup> got it right, and so did the Fourth Circuit in *Snyder v. Phelps*.<sup>64</sup> That speech expresses outrageous ideas can’t justify its being suppressed. And if funeral picketers are to be restricted at particular narrowly and precisely defined times and places, they should be restricted by clear and content-neutral ordinances, not by the vague and potentially viewpoint-based emotional distress tort.

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<sup>60</sup> Cf. *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 774-75 (1994) (holding that even a 300-foot no-picketing zone around abortion providers’ residences was too broad to be constitutional).

<sup>61</sup> Cf. Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 290, 292-96 (1999) (arguing that the interest in protecting “religious privacy” should justify restrictions on speech outside churches, though making this argument only as to a narrow range of content-neutral restrictions).

<sup>62</sup> Cf., e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 456 n.101 (1990) (arguing in favor of the constitutionality of campus speech codes, partly because students in a dorm might be a “captive audience,” and “might have a justifiable expectation that they would not be subjected to this sort of vilification in what was now their home”).

<sup>63</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>64</sup> 580 F.3d 206 (4th Cir. 2009).