

2011

Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?

Mark Strasser

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aclr>



Part of the [Law Commons](#)

Recommended Citation

Strasser, Mark (2011) "Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?," *American University Law Review*: Vol. 61: Iss. 2, Article 5.

Available at: <http://digitalcommons.wcl.american.edu/aclr/vol61/iss2/5>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?

Abstract

In *Snyder v. Phelps*, the United States Supreme Court struck down a damages award against Reverend Fred Phelps Sr. and the Westboro Baptist Church for picketing a military funeral. Although the Court asserted that its holding was narrow and the legal issues involved were straightforward, this Article argues that Phelps ultimately raises more questions than it answers and almost guarantees increased confusion in First Amendment jurisprudence. The Court in Phelps explained that the First Amendment prohibits tort damages when the comments at issue involve matters of public concern, yet failed to explain whether private speech that was juxtaposed with public, political speech also warranted the protection of the First Amendment. The Court also neglected to provide guidance on how its holding fits into the current defamation and privacy jurisprudence; in addition, it left unanswered pertinent questions about the constitutionality of a growing number of funeral protest statutes. Lower courts are likely to feel frustrated by this decision and, consequently, a relatively clear area of the law is likely to become muddled.

FUNERAL PROTESTS, PRIVACY, AND THE CONSTITUTION: WHAT IS NEXT AFTER *PHELPS*?

MARK STRASSER*

In Snyder v. Phelps, the United States Supreme Court struck down a damages award against Reverend Fred Phelps Sr. and the Westboro Baptist Church for picketing a military funeral. Although the Court asserted that its holding was narrow and the legal issues involved were straightforward, this Article argues that Phelps ultimately raises more questions than it answers and almost guarantees increased confusion in First Amendment jurisprudence. The Court in Phelps explained that the First Amendment prohibits tort damages when the comments at issue involve matters of public concern, yet failed to explain whether private speech that was juxtaposed with public, political speech also warranted the protection of the First Amendment. The Court also neglected to provide guidance on how its holding fits into the current defamation and privacy jurisprudence; in addition, it left unanswered pertinent questions about the constitutionality of a growing number of funeral protest statutes. Lower courts are likely to feel frustrated by this decision and, consequently, a relatively clear area of the law is likely to become muddled.

TABLE OF CONTENTS

Introduction.....	280
I. The Funeral and the Possible Torts Implicated	281
A. Background	281
B. Tort Law	283
II. Tort Damages and the First Amendment	286
A. The Developing Defamation Jurisprudence	286
1. Public officials, public figures, and defamation	286
a. Demonstrating actual malice	288
b. Proving recklessness as actual malice	289
2. Private actors and defamation: The <i>Rosenbloom</i>	

* Trustees Professor of Law, *Capital University Law School*, Columbus, Ohio. I would like to thank Professors Susan Gilles, Daniel Kobil, and James Beattie for helpful discussions on these and related issues.

standard.....	290
3. Rejecting <i>Rosenbloom</i> : easing defamation requirements for private individuals.....	292
B. Constitutional Limitations on Other Torts.....	296
1. The actual malice standard and the tort of intentional infliction of emotional distress	296
2. The privacy interest and tortious injury.....	299
a. <i>Zacchini</i> , the right of publicity, and funeral protests.....	302
b. <i>Pacifica Foundation</i> , offensive speech, and the duty to avert one's attention	307
C. Reconciling the Different Cases with <i>Phelps</i>	309
1. Compliance with the law: a vaccine against tortious liability?.....	310
2. A balance of interests: Snyder's right to privacy and the Church's right to protest	315
3. <i>Phelps</i> 's captive audience problem	317
4. <i>Phelps</i> 's impact on the regulation of funeral picketing.....	321
Conclusion	324

INTRODUCTION

In *Snyder v. Phelps*,¹ the United States Supreme Court issued a much-anticipated decision, striking down a damages award against Reverend Fred Phelps, Sr. and the Westboro Baptist Church for picketing the funeral of a Marine killed in Iraq. In a relatively short opinion, the Court suggested that the legal issues were straightforward—the First Amendment precludes the imposition of tort damages when the comments at issue involve matters of public concern.² Yet, the Court failed to explain whether comments that were not of public concern were somehow immunized by those that were. The Court also failed to explain how the holding fits into current defamation and privacy jurisprudence. The opinion raises more questions than it answers, and is sufficiently opaque that one cannot tell whether it marks a sea-change in the jurisprudence or, instead, is a straightforward application of it.

Part I of this Article offers a brief discussion of the background behind *Phelps* and of the torts asserted by the father of Lance Corporal Matthew Snyder against Phelps and the Westboro Baptist Church. Part II discusses the constitutional limitations imposed on torts involving defamation, invasion of privacy, and intentional

1. 131 S. Ct. 1207 (2011).

2. *Id.* at 1215 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 758–59 (1985)).

infliction of emotional distress that were recognized prior to *Phelps*. Part II also explains why these limitations might have cast light upon, but could not determine, the correct resolution of a case involving the imposition of damages for funeral picketing. The Article concludes by explaining that although *Phelps* resolved very little, it nonetheless almost guarantees increased confusion in First Amendment jurisprudence.

I. THE FUNERAL AND THE POSSIBLE TORTS IMPLICATED

Matthew Snyder's funeral was picketed by a group protesting, among other things, Catholicism and equality policies across the country.³ That same group posted various hurtful comments about Snyder on their website; as a result, Albert Snyder—the father of the deceased Marine—sued the group, asserting various claims in tort.⁴ While some of these claims were found to be without merit as a matter of law, others were left to the jury to decide, resulting in a substantial verdict.⁵ This section includes a brief discussion of the background of the case and the various tort theories asserted.

A. Background

On March 3, 2006, Matthew Snyder died fighting for his country in Iraq.⁶ A notice regarding the time and place of the funeral was placed in local papers in Westminster, Maryland.⁷ Five days later, Phelps, the pastor of the Westboro Baptist Church, became aware of the funeral and issued a news release announcing that he and his family would picket the funeral.⁸

The plaintiff and the defendants differed on why the funeral was being picketed. The defendants said that they “traveled to Matthew Snyder's funeral to publicize their message of God's hatred of

3. See *id.* at 1226 (Alito, J., dissenting) (noting that the Phelps family had discussed, among other issues, “homosexuality, the Catholic Church, and the United States military”).

4. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008) (noting that the case proceeded to trial on the issues of intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

5. See *Phelps*, 131 S. Ct. at 1214 (“A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.”). The district court reduced the punitive damages award to \$2.1 million. *Id.*

6. *Phelps*, 533 F. Supp. 2d at 571.

7. *Id.*

8. *Id.*

America for its tolerance of homosexuality.”⁹ The defendants admitted that “their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years.”¹⁰ Albert Snyder argued that the defendants transformed the “funeral for his son into a ‘media circus for their benefit.’”¹¹

The defendants picketed the funeral at a location that was in accord with local law and police instructions.¹² Phelps and his family held up several signs, some of which expressed general points of view, such as “God Hates the USA,” “America is doomed,” “Pope in hell,” and “Fag troops.”¹³ However, some of the other signs could have been construed as having been directed at Matthew Snyder and his parents,¹⁴ such as “You are going to hell”¹⁵ and “God hates you.”¹⁶ By the same token, while some of the comments on the Westboro Baptist Church website might have been characterized as generalized opinions about the United States,¹⁷ others might have been perceived as being directed at the family in particular,¹⁸ for example that “Matthew Snyder was raised for the devil and was taught to defy God.”¹⁹

Albert Snyder only became aware of the signs that had been near his son’s funeral after the funeral had taken place.²⁰ Later still, he became aware of the comments that the Westboro Church published on their website in an “epic” about his son.²¹

Snyder testified that he suffered great harm as a result of the picketing and posting of the epic on the Church’s website.²² Expert testimony corroborated the long-lasting and detrimental effects

9. *Id.* at 571–72.

10. *Id.* at 571.

11. *Id.* at 572.

12. *Id.*

13. *Id.*

14. *Id.* at 578.

15. *Id.*

16. *Id.*

17. For example, a later posting on their site makes the more general claim that God is killing our soldiers out of wrath. *See* News Release, Westboro Baptist Church, God Hates America & is Killing Our Troops in His Wrath (May 12, 2011), http://www.godhatesfags.com/fliers/20110512_Dead-Soldiers-MI-Friese-OR-Lara.pdf (“GOD HATES AMERICA & IS KILLING OUR TROOPS IN HIS WRATH.”).

18. *Phelps*, 533 F. Supp. 2d at 578.

19. *Id.*

20. *See id.* at 572 (explaining that Snyder was unaware of the content of the signage used by the Church “until he saw a television program later that day with footage of the Phelps family at his son’s funeral”).

21. *Id.*

22. *See id.* (describing Snyder’s reaction to the epic, which included vomiting and weeping).

caused by the church members' actions.²³ The issue at hand was whether the Phelps family could be held liable in tort for the injury that their speech had caused.

B. Tort Law

The comments on the protesters' signs and the church's website potentially implicated a number of tort-related issues, including whether Matthew Snyder and his parents had been defamed. Yet, there are a number of reasons why a defamation action under these circumstances was unlikely to succeed. First, in many states, a defamation action cannot be brought on behalf of an individual who is deceased,²⁴ so such an action could not be maintained on behalf of Matthew Snyder by his father. If the claim was that the parents had been defamed, it would then be necessary to determine the content of the allegedly defamatory statements. Suppose, for example, that the defendants' comments were construed as merely suggesting, in an admittedly offensive way, that the Snyders had raised their son as a Catholic.²⁵ In that event, the comments would not be defamatory.²⁶

Another tort claim asserted unsuccessfully by Albert Snyder was that Phelps wrongfully made private facts public.²⁷ The district court rejected this claim, at least in part, because the information revealed was already a matter of public record.²⁸

While the trial court granted the defendants' motions for summary judgment with respect to defamation and publication of private facts, the court permitted the jury to decide Snyder's claims of intrusion

23. *Id.*

24. See *Johnson v. KTBS, Inc.*, 889 So. 2d 329, 332 (La. Ct. App. 2004) ("Once a person is dead, there is no extant reputation to injure or for the law to protect."); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 940 n.1 (Tex. 1988) (noting that a cause of action cannot be brought "for the defamation of a person already dead"); see also *Gruschus v. Curtis Publ'g Co.*, 342 F.2d 775, 776 (10th Cir. 1965) (explaining that the common law did not permit the reflection "in the reputation of another[,]"; and thus "the action did not survive the death of the defamed party"); *Fitch v. Voit*, No. CV 92-063, 1993 WL 141588, at *5 (Ala. Cir. Ct. 1993) (observing that Alabama's "survival statute" made no allowance for a libel action brought by the surviving relative of the defamed dead), *aff'd*, 624 So. 2d 542 (Ala. 1993).

25. The signs included "Pope in Hell," "You're Going to Hell," and "God Hates You." *Snyder v. Phelps*, 580 F.3d 206, 223–24 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The "epic" included the comment, "[The Snyders] also, in supporting satanic Catholicism, taught Matthew to be an idolater." *Id.* at 225. These all might be understood to be condemning the Snyders for having raised Matthew as a Catholic.

26. Cf. *Phelps*, 533 F. Supp. 2d at 572–73 (observing that there was no defamatory communication because the posted "epic" was "Phelps-Roper's religious opinion").

27. See *id.* at 572 (noting that this was one of Snyder's claims).

28. *Id.* at 573 (noting that the allegedly private facts were already a matter of public record).

upon seclusion, intentional infliction of emotional distress, and civil conspiracy.²⁹ The jury found for the plaintiff on all three, although it was unclear whether Snyder met his burden of proof on any of these claims under existing state law.³⁰

Consider the damages awarded for intentional infliction of emotional distress. To successfully bring an intentional infliction of emotional distress claim, “a plaintiff must demonstrate that the ‘defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.’”³¹

Extreme and outrageous conduct involves a standard that is by no means easy to meet.³² There are numerous cases in which individuals have engaged in objectionable conduct that nonetheless did not meet the relevant standard.³³ That said, however, there are a number of cases recognizing that individuals are particularly vulnerable when there has been a death in the family,³⁴ and may be even more vulnerable when attending a funeral,³⁵ so behavior that is typically not

29. See *id.* (determining that these three claims raised genuine issues of material fact).

30. See *Phelps*, 580 F.3d at 227 (Shedd, J., concurring) (positing that Snyder failed to provide “sufficient evidence to support the jury verdict on any of his tort claims”).

31. *Phelps*, 533 F. Supp. 2d at 580 (citing *Miller v. Bristol-Myers Squibb Co.*, 121 F. Supp. 2d 831, 839 (D. Md. 2000)).

32. But see Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 300-01 (2010) (explaining that outrageousness is a subjective standard that can be perceived differently by “some judge, jury, university administrator, or other government actor”).

33. See *Crockett v. Essex*, 19 S.W.3d 585, 590 (Ark. 2000) (admonishing a funeral home and its director for conduct that was “rude and illustrative of a lack of professionalism,” but declining to hold that such conduct was “so extreme and outrageous as to be beyond all possible bounds of decency, and to be utterly intolerable in a civilized society”); *Stahl v. Health Alliance Plan*, No. 179879, 1996 WL 33323984, at *2 (Mich. Ct. App. 1996) (citing *Tope v. Howe*, 445 N.W.2d 452 (Mich. Ct. App. 1989)) (dismissing a “crass and insensitive” claim for failing to “rise to the level of extreme and outrageous” because “mere insults, indignities . . . and other trivialities” could not warrant liability); see also *Phelps*, 580 F.3d at 232 (Shedd, J., concurring) (contending that, whatever the propriety of the Phelps’ protest, “this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law”).

34. See, e.g., *Thomas v. Hosp. Bd. of Dirs. of Lee Cnty.*, 41 So. 3d 246, 256 (Fla. Dist. Ct. App. 2010) (declaring that “the action of providing false information concerning the loved one’s cause of death meets the standard for a claim of outrage (intentional infliction of emotional distress)” because of the heightened sensitivity of the survivor to emotional distress).

35. See, e.g., *Phelps-Roper v. Strickland*, 539 F.3d 356, 372 (6th Cir. 2008) (discussing the Funeral Protest Provision, which had the purpose of protecting funeral attendees from “the harmful psychological effects of unwanted communication when they are most captive and vulnerable”); *Thomas*, 41 So. 3d at 256 (explaining that “the appellees’ conduct in making false statements—which led to the interruption of Mildred Thomas’s funeral and the return of her body for a second, more thorough autopsy—rises to the level of atrocious and utterly

thought of as extreme and outrageous might be found to be so in the special circumstances surrounding the death of a loved one.³⁶

Even in instances in which the behavior at issue is beyond all possible bounds of decency, a separate question is whether the injury itself is sufficiently severe to meet the requirements of the tort.³⁷ Even if the degree of severity can be established, the plaintiff must show that it was the defendant's action, rather than something else, that caused the harm. For example, it might be argued that Snyder's harm was more aptly attributed to the loss of his son than to the actions of the Phelps family.³⁸ In this case, however, testimony established that the defendants' actions "had a significant impact,"³⁹ causing the plaintiff to suffer "'severe and specific' injuries."⁴⁰

The Fourth Circuit did not address whether Snyder met his burden under state law because the defendants had not addressed that issue on appeal⁴¹ and were held to have waived that basis for challenging the award.⁴² The appellate court instead examined whether the First Amendment precluded the imposition of liability under any of the tort theories asserted,⁴³ ultimately concluding that the imposition of tort damages in this case was precluded by constitutional guarantees.⁴⁴ Snyder petitioned for certiorari, and the United States

intolerable behavior which cannot be condoned in a civilized community"); *see also* Alan Brownstein & Vikram David Amar, *Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?*, 2010 CARDOZO L. REV. DE NOVO 368, 370 (2010) (discussing "the unique vulnerability of audience members in special locations and times such as funerals, and the uniquely demeaning way in which these funeral hecklers were trying to use the mourners as stage props rather than an audience").

36. *Cf.* Brownstein & Amar, *supra* note 35, at 377–78 (arguing that courts frequently recognize recovery under the tort of intentional infliction of emotional distress for deliberate interference with funerals).

37. *See, e.g.,* Dale v. Thomas Funeral Home, Inc., 466 N.W.2d 805, 808 (Neb. 1991) (dismissing the plaintiff's claim for intentional infliction of emotional distress because even though the plaintiff was "perturbed, worried, and upset," she failed to demonstrate that her emotional distress was so severe that no reasonable person could endure it).

38. *See* Volokh, *supra* note 32, at 309 ("It seems unlikely that [the speech at issue] 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.").

39. Snyder v. Phelps, 533 F. Supp. 2d 567, 580 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

40. *Id.* at 580–81.

41. *See* Snyder v. Phelps, 580 F.3d 206, 216 (4th Cir. 2009) (observing that "the Defendants do *not* challenge the sufficiency of the evidence"), *aff'd*, 131 S. Ct. 1207 (2011).

42. *Id.*

43. *See id.* at 218 (declaring that the First Amendment could be invoked as a defense against a plaintiff seeking "damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech").

44. *Id.* at 226.

Supreme Court took up the case to address whether, under the First Amendment, “Westboro must be shielded from tort liability for its picketing in this case.”⁴⁵

II. TORT DAMAGES AND THE FIRST AMENDMENT

Cases like *Phelps*, where tort claims and the First Amendment intersect, raise two important inquiries. One issue involves whether a particular plaintiff has met his burden with respect to establishing all the elements of the tort claims asserted. Even if a plaintiff meets those state tort law requirements, a separate issue is whether the United States Constitution will allow the plaintiff to recover damages. As this portion of the Article will demonstrate, the constitutional jurisprudence in this area is far from clear, which is one reason the *Phelps* decision was greatly anticipated.⁴⁶

A. *The Developing Defamation Jurisprudence*

When attempting to determine whether the speech at issue in *Phelps* is constitutionally protected, one should consider the jurisprudence in several related areas. The inquiry should begin by examining defamation jurisprudence. While defamation cases do not address all the issues raised in *Phelps*, this jurisprudence might nonetheless cast light on how this case should be decided because the defamation case law is more developed and has been used to inform constitutional limitations imposed on other related torts.⁴⁷

1. *Public officials, public figures, and defamation*

The Court established in *New York Times Co. v. Sullivan*⁴⁸ that a public official cannot recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴⁹ An important purpose of the opinion was to preclude “the possibility

45. *Snyder v. Phelps*, 131 S. Ct. 1207, 1212 (2011).

46. See generally Sean Gregory, *Inside the Supreme Court’s Free Speech Showdown*, TIME (Oct. 6, 2010) <http://www.time.com/time/nation/article/0,8599,2024062,00.html> (suggesting that *Snyder v. Phelps* had received more public attention than any other Supreme Court case that term).

47. See Howard C. Nielson, Jr., Comment, *Recklessly False Statements in the Public-Employment Context*, 63 U. CHI. L. REV. 1277, 1297 (1996) (discussing “the Supreme Court’s well developed body of defamation jurisprudence”).

48. 376 U.S. 254 (1964).

49. *Id.* at 279–80.

that a good-faith critic of government will be penalized for his criticism.”⁵⁰

In *Garrison v. Louisiana*,⁵¹ the Court explained why the actual malice standard should be employed in cases involving an alleged defamation of a public official. Where the “criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.”⁵² Even where false claims had indeed been made, the Constitution prohibits “attaching adverse consequences to any [such claims] except [those made with] knowing or reckless falsehood.”⁵³ Were a different standard used, such as common law actual malice, then a speaker who honestly believed that a public official engaged in wrongdoing might be deterred from speaking out, because she might fear that her dislike of the official might be established in court and somehow used to impose liability for the expression of sincerely held (but possibly mistaken) beliefs. Use of the common law malice standard might thus undermine the free exchange of ideas and the discovery of truth.⁵⁴

An individual who asserts her sincerely held but mistaken belief about a public official might spur an investigation, which might lead to the discovery of the truth about the official or, perhaps, about the wrongdoing incorrectly attributed to the official. Yet, the same point might be made about an individual who makes statements that she knows to be false—these statements might also spur an investigation and discovery of the truth. Nonetheless, the Court rejected that the twin rationales of promoting the free exchange of ideas and the discovery of truth should also justify immunizing assertions of known falsehoods.⁵⁵ The Court’s rejection reflected its belief that that the knowing falsehood was of such little value that it did not enjoy constitutional protection.⁵⁶

50. *Id.* at 292.

51. 379 U.S. 64 (1964).

52. *Id.* at 72–73.

53. *Id.* at 73.

54. *See id.* (“Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”).

55. *See id.* at 75 (noting that an “honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech,” but that “it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity”).

56. *See id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (categorizing calculated falsehoods as “fall[ing] into that class of utterances which

The Court later expanded the scope of the protections discussed in *New York Times* beyond public officials to include public figures, explaining that public figures command “sufficient continuing public interest and ha[ve] sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”⁵⁷ Public figures, like public officials, have access to the media and will be afforded the opportunity to rebut false statements made about them. Because public figures are afforded a forum where they can deny false accusations and attempt to undo the damage resulting from false assertions, there is less of a need to afford them the opportunity to receive tort damages to compensate them for the wrong associated with false accusations that damage reputation. Because that is so, tort damages can be reserved for the most egregious kinds of defamatory statements, e.g., those that are asserted notwithstanding the speaker’s knowledge or strong suspicion that the statements are false.

a. Demonstrating actual malice

The actual malice standard is a daunting one. To show that the defendant published false statements with actual malice, there “must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”⁵⁸ In *St. Amant v. Thompson*,⁵⁹ the Court offered some examples in which a jury might reasonably conclude that the defendant had not believed the truth of his allegation.⁶⁰ The Court explained that “[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [and] is the product of his imagination.”⁶¹ Of course, even in the extreme case of a fabricated story, matters may not be so clear-cut. For example, notwithstanding an inability to uncover the relevant evidence, an individual might still be certain that a public official has committed wrongdoing. That individual might express her sincere suspicions, both because she believes them and because she hopes that others will step forward to

‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality’”).

57. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (citing *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring)).

58. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

59. 390 U.S. 727 (1968).

60. *Id.* at 732.

61. *See id.* at 732 (adding that an assertion of good faith is also inadequate when a story is based entirely on an unverified, anonymous telephone call, or when the allegations made are so improbable as to be reckless).

help substantiate the accusations.

Suppose that an individual publicly expresses her suspicions about an official's wrongdoing, undeterred by the lack of hard evidence to substantiate those allegations. Suppose further that the official has in fact been falsely accused and has thereby suffered harm. One might say that anyone who publishes an accusation without substantiation should be potentially liable for any harm that might be caused. While that would be a possible position, it does not reflect the current system in the United States, because such a system would likely have the undesirable effect of greatly chilling speech.⁶² This reflects the Court's fear that a rule that "compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."⁶³

Use of the actual malice standard is intended to limit the degree to which publishers or broadcasters engage in voluntary self-censorship. As long as the publisher neither knows that the statement at issue is false nor has a reckless disregard for its truth, the publisher will not be held liable for false and possibly defamatory statements about a public figure.⁶⁴

b. Proving recklessness as actual malice

The recklessness prong requires further explication. The *St. Amant* Court explained that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."⁶⁵ However, the Court was not suggesting that recklessness will be established whenever there is good reason to believe that the official has been wrongly accused. To the contrary, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."⁶⁶ Instead, there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."⁶⁷ Thus, the recklessness prong of the actual malice standard will not be met merely by showing that a reasonable person would not have been confident that the claims at

62. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (explaining that punishing an erroneous statement would "run[] the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press").

63. *Id.*

64. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1969) (stating that the Constitution requires an actual malice standard).

65. *St. Amant*, 390 U.S. at 732.

66. *Id.* at 731.

67. *Id.*

issue were accurate.⁶⁸ Even the recklessness prong of the actual malice standard is quite difficult to meet.

2. *Private actors and defamation: The Rosenbloom standard*

In both *New York Times*⁶⁹ and *Curtis Publishing Co. v. Butts*,⁷⁰ the Court emphasized that the actual malice standard should be used when allegedly defamatory comments have been made about a public figure.⁷¹ However, the actual malice standard was also used in a case in which a private figure was allegedly defamed while matters of public concern were being addressed. In *Rosenbloom v. Metromedia, Inc.*,⁷² the Court considered “whether the *New York Times*’ knowing-or-reckless-falsity standard applie[d] in a state civil libel action brought not by a ‘public official’ or a ‘public figure’ but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual’s involvement in an event of public or general interest.”⁷³ George Rosenbloom argued that a broadcast claiming that he was arrested for selling obscene materials was false and defamatory, as established by his subsequent acquittal.⁷⁴

While “the police campaign to enforce the obscenity laws was an issue of public interest,”⁷⁵ an important issue was whether Rosenbloom’s status as a private citizen would lower the requisite threshold to impose damages for the broadcast of libelous comments. The *Rosenbloom* plurality responded in the negative, reasoning that “if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”⁷⁶ Because that is so, the plaintiff’s “prior anonymity or notoriety”⁷⁷ is of secondary importance.

Yet, the justifications for applying the actual malice standard in cases involving public figures do not seem as applicable in cases involving private figures. A private figure might not have the same kind of access to the media as would a public figure, which would

68. See *New York Times*, 376 U.S. at 279 (declining to adopt a rule requiring a critic of official conduct to guarantee the truth of his assertions).

69. 376 U.S. 254 (1964).

70. 388 U.S. 130 (1967).

71. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155; *New York Times*, 376 U.S. at 279–80.

72. 403 U.S. 29 (1971) (plurality opinion), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

73. *Id.* at 31–32.

74. *Id.* at 36.

75. *Id.* at 40.

76. *Id.* at 43.

77. *Id.*

make it harder for the plaintiff to counter the allegedly false and defamatory claims.⁷⁸ A private individual also does not assume the risk public figures take that others might publish negative and possibly defamatory statements.⁷⁹

The *Rosenbloom* plurality offered a somewhat surprising response to the claim that public and private figures were distinguishable. The plurality essentially pointed out that some public figures also do not have access to the media because such access might depend upon the “media’s continuing interest in the story.”⁸⁰ The Court further noted that even in those instances in which public figures were accorded access to the media, they may be unable to undo the damage.⁸¹ Rather than permitting tort damages to be awarded when defamatory statements are negligently made about a private figure, the plurality suggested that states instead should simply assure that such individuals would have access to the media to correct the inaccurate assertions,⁸² notwithstanding the plurality’s own point that such access might well prove unavailing.

The argument that private figures should also be afforded access to the media does not address the rationale that public figures voluntarily enter into the limelight and thus should have less access to tort damages for defamatory statements made about them.⁸³ The plurality offered two observations about such a claim. First, it characterized the “idea that certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view” as a legal fiction.⁸⁴ The plurality also feared that emphasizing the distinction between public figures and private individuals might have the “paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of

78. *Id.* at 45–46 (reasoning that even some lesser-known public figures do not command the same media attention as public figures that are very prominent).

79. *Id.* at 45 (noting that the petitioner, in seeking a lower threshold to impose damages, argued that the private individual “has not assumed the risk of defamation by thrusting himself into the public arena”).

80. *Id.* at 46.

81. *See id.* (explaining that “[d]enials, retractions, and corrections are not ‘hot’ news” as they “rarely receive the prominence of the original story”).

82. *Id.* at 47 (“If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.”).

83. *Id.*

84. *Id.* at 48.

the lives of ‘public figures’ that are not in the area of public or general concern.”⁸⁵

One difficulty with the *Rosenbloom* rationale is that the plurality seemed to undercut the justification for using the actual malice standard even in cases involving public figures. Suppose the *Rosenbloom* plurality is correct that public figures are not accurately thought to have assumed the risk that they would be publicly subjected to possibly false and unfair criticism.⁸⁶ Suppose further that the plurality is correct to doubt that public figures have enhanced access to the media and that they will be able to repair reputational damage even when they are accorded that access.⁸⁷ In that event, it would seem inaccurate to claim that public figures generally can adequately defend themselves and thus do not need the tort system for compensation for injury to their reputations.

3. *Rejecting Rosenbloom: easing defamation requirements for private individuals*

In any event, as the Court subsequently made clear,⁸⁸ the *Rosenbloom* plurality position was rejected in *Gertz v. Robert Welch, Inc.*⁸⁹ At issue in *Gertz* was a published article that contained serious and defamatory inaccuracies about the plaintiff, Elmer Gertz.⁹⁰ The magazine editor denied any knowledge that the allegations in the article were false and, further, claimed to have relied on the author’s reputation and

85. *Id.*

86. *Id.* at 47–48.

87. *Id.* at 46–47.

88. This clarification was best expressed in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), where the Court observed that:

Were we to accept [that mere interest to the public qualifies an issue as a public controversy], we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that “extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.”

Id. at 454 (citing *Gertz v. Welch, Inc.*, 418 U.S. 323, 346 (1974)); see also W. Wat Hopkins, Snyder v. Phelps, *Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMENDMENT L. REV. 149, 162 (2010) (explaining that the theory that the First Amendment “requires a heightened burden of proof in tort actions related to matters of public concern[,]” notwithstanding “the public private or status of a plaintiff[,] is contrary to the holdings of the Supreme Court”).

89. 418 U.S. 323 (1974).

90. See *id.* at 326 (describing the false claims about Gertz, including that he was a criminal, a Communist, and involved in the attack on the Chicago police that occurred during the 1968 Democratic Convention).

on the author's history of submitting accurate articles.⁹¹ Reliance on reputation was part of the justification for refusing to hold the publisher liable in *New York Times*,⁹² and one of the issues that arose in *Gertz* was whether the *New York Times* standard was applicable in a defamation suit brought by a plaintiff who was a private individual.⁹³ While a libel award to a private individual was struck down in *Rosenbloom*, no controlling rationale existed in that opinion.⁹⁴

The *Gertz* Court found the *Rosenbloom* plurality's rationale unpersuasive and refused to extend the *New York Times* First Amendment protections to cases involving private individuals. The Court then analyzed how defamation involving a private individual should be approached.

The *Gertz* Court explained that under the First Amendment "there is no such thing as a false idea,"⁹⁵ and that no matter how "pernicious an opinion may seem, its correction should be founded upon 'the competition of other ideas,' not the 'conscience of judges and juries.'"⁹⁶ However, the Court reasoned that "there is no constitutional value in false statements of fact[.]" as "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."⁹⁷ Not only are such statements viewed as lacking in value, but they are not even viewed as instrumentally likely to lead to the discovery or reinforcement of truth.⁹⁸ The Court classified such statements as "belong[ing] to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"⁹⁹

91. *Id.* at 328.

92. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964).

93. *Id.* at 332 ("The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.").

94. *Id.* at 333; see also Leslie C. Griffin, *Snyder v. Phelps: Searching for a Legal Standard*, 2010 CARDOZO L. REV. DE NOVO 353, 357 (2010) (arguing that the Court "never adopted the *Rosenbloom* plurality's standard" and that instead, "defamation law became linked to some mixture of public and private figures with public and private concerns").

95. See *Gertz v. Welch, Inc.*, 418 U.S. at 339 (detailing the different opinions contained in *Rosenbloom* and their inability to be reconciled with one another).

96. *Id.* at 339–40.

97. *Id.* at 340 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

98. *Id.* at 340.

99. *Id.* at 339–40 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Rejecting the *Rosenbloom* emphasis on whether the issue at hand was a matter of public concern, the *Gertz* Court instead reaffirmed the importance of considering the type of individual who had allegedly been defamed.¹⁰⁰ The Court believed that upholding a heightened standard for public figures “administers an extremely powerful antidote to the inducement to media self-censorship.”¹⁰¹ However, affording robust protections of free expression concerning public figures has a downside; namely, “it exacts a correspondingly high price from the victims of defamatory falsehood,”¹⁰² because “many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”¹⁰³ The Court viewed the constitutional guarantees of free expression as involving a balancing on the one hand of the “interest of the press and broadcast media in immunity from liability”¹⁰⁴ and on the other of the “*limited* state interest present in the context of libel actions brought by public persons.”¹⁰⁵ The Court then suggested that “the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.”¹⁰⁶

It might seem surprising that the state’s interest would differ depending on the nature of the individual allegedly defamed.¹⁰⁷ However, to justify this dichotomy, the Court reaffirmed the pre-*Rosenbloom* rationale that “public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements [than] private individuals normally enjoy.”¹⁰⁸ Precisely because public figures and private individuals are dissimilar with respect to their ability to engage in self-help, private individuals are “more vulnerable

100. See *id.* at 342 (“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 343.

105. *Id.* (emphasis added).

106. *Id.*

107. See generally *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (recognizing a “pervasive and strong [state] interest in preventing and redressing attacks upon reputation”); *id.* at 92 (Stewart, J., concurring) (“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”).

108. *Gertz*, 418 U.S. at 344.

to injury, and the state interest in protecting them is correspondingly greater.”¹⁰⁹

The Court offered another reason to distinguish between these two types of plaintiffs besides their differing abilities to access the media to counter defamatory claims, namely, that public scrutiny naturally follows deliberate exposure to the public limelight.¹¹⁰ In contrast, the private individual “has relinquished no part of his interest in the protection of his own good name, and consequently, he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”¹¹¹ The Court concluded its discussion by noting that “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”¹¹²

Because the Court concluded that public and private plaintiffs occupied different legal positions, it rejected the *Rosenbloom* analysis, concluding that “the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”¹¹³ Had the Court held that any defamatory assertions involving a matter of public interest were subject to the actual malice standard, then “a private individual whose reputation [was] injured by defamatory falsehood that [did] concern an issue of public or general interest [would have] no recourse unless he [could] meet the rigorous requirements of *New York Times*.”¹¹⁴ But this would not permit the state to offer adequate protection for the reputations of private individuals. To accomplish that particular objective, the *Gertz* Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”¹¹⁵

At least with respect to defamation, the current jurisprudence does not solely focus on whether the matter at issue is of public or private concern. Instead, other factors are also considered, including the type of individual who was allegedly victimized. It was thus surprising that the *Phelps* Court concluded that the question of whether the

109. *Id.*

110. *Id.* (observing that an individual seeking governmental office “must accept certain necessary consequences of that involvement in public affairs” and “runs the risk of closer public scrutiny than might otherwise be the case”).

111. *Id.* at 345.

112. *Id.*

113. *Id.* at 345–46.

114. *Id.* at 346.

115. *Id.* at 347–48.

“First Amendment prohibits holding Westboro liable for its speech . . . turn[ed] largely on whether that speech is of public or private concern”¹¹⁶ and that liability could not be imposed because, as a nation, we have chosen to “protect even hurtful speech on public issues to ensure that we do not stifle public debate.”¹¹⁷ Such an oversimplified view neither reflects the current state of defamation jurisprudence nor First Amendment jurisprudence more generally.

B. Constitutional Limitations on Other Torts

One reason that *Phelps* is somewhat difficult to analyze is that there is no case on point. While there is a developing defamation jurisprudence, the damage award in *Phelps* was not based on injury to reputation, but instead on injury resulting from the intentional infliction of emotional distress.¹¹⁸ There have been a number of other cases in which the Court has attempted to establish the constitutional limits imposed on recovery for related kinds of torts, although the core issues in those cases are distinguishable in important ways from the issues implicated in *Phelps*. This portion of the Article discusses those cases and their potential applicability to *Phelps*.

1. *The actual malice standard and the tort of intentional infliction of emotional distress*

Consider one of the Court’s classic cases involving intentional infliction of emotional distress, *Hustler Magazine v. Falwell*,¹¹⁹ which involved a suit by the fundamentalist preacher Jerry Falwell against Larry Flynt’s *Hustler Magazine*. At issue was a parody of a Campari advertisement in which Falwell was depicted as describing his “first time” with his mother in an outhouse.¹²⁰ The magazine labeled the advertisement as a parody,¹²¹ and it was not thought to be making any factual claims.¹²² Nonetheless, Falwell found the parody offensive, and *Hustler*’s satire was perceived as “doubtless[ly] gross and repugnant in the eyes of most.”¹²³

The *Falwell* Court noted that “the law does not regard the intent to

116. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

117. *Id.* at 1220.

118. *See id.* at 1214 (noting that the trial court held that there was no defamation as a matter of law).

119. 485 U.S. 46 (1988).

120. *Id.* at 48.

121. *Id.*

122. *Id.* at 50 (noting that the “speech could not reasonably have been interpreted as stating actual facts about the public figure involved”).

123. *Id.*

inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently ‘outrageous.’”¹²⁴ Nonetheless, the Court also cautioned that “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.”¹²⁵ As a result, some commentators have suggested that *Falwell* should be understood to immunize discussions about public affairs from tort liability even if such discussions are about a private individual, as long as actual malice cannot be established.¹²⁶ However, when the Court’s comments are considered in context, a less robust interpretation seems more plausible.¹²⁷

One of the concerns that militated in favor of striking down the intentional infliction of emotional distress award against *Hustler Magazine* was the malleability of the outrageousness standard.¹²⁸ As the *Falwell* Court explained, “‘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.”¹²⁹ Because of this malleability, the Court imposed the actual malice requirement for claims made by “public figures and public officials [such as *Falwell*] . . . for the tort of intentional infliction of emotional distress by reason of publications [such as *Hustler Magazine*’s satirical advertisement].”¹³⁰ It is simply unclear whether, as a constitutional matter, the Court’s refusal to uphold an award on the basis of outrageous political or social discourse should be understood to be limited to contexts involving public figures or whether, instead, that concern has a much broader reach.

Like *Phelps*,¹³¹ *Falwell* was argued in the Fourth Circuit.¹³² When the

124. *Id.* at 53.

125. *Id.*

126. See Volokh, *supra* note 32, at 304–05 (explaining that defamatory statements are often equally as offensive to private figures as public ones, although only negligently made).

127. See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 491 (2011) (criticizing the “*Falwell*-based defense of the *Phelps*’ position” because it was not a “tenable reading” of the Court’s decision in that case).

128. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

129. *Id.*

130. See *id.* at 56 (describing actual malice as having “knowledge that the statement was false” or making a statement with “reckless disregard as to whether or not it was true”).

131. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

132. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev’d sub nom. Hustler*

Fourth Circuit analyzed whether the award against Hustler Magazine should be upheld, the court recognized that Falwell was a public figure and that the *New York Times* standard would play some role.¹³³ Indeed, the Fourth Circuit attempted to apply the actual malice standard in the context of intentional infliction of emotional distress.¹³⁴ However, the court rejected “the literal application of the actual malice standard”¹³⁵ as inappropriate; under such a literal application, liability could only attach if the parody was published notwithstanding the publisher’s knowledge that the parody was false or made with reckless disregard for its truth.¹³⁶ Were that the standard, Hustler Magazine certainly would have not been liable because it made no assertions of fact, much less assertions of fact that were tortious in light of the actual malice standard.¹³⁷

The Fourth Circuit reasoned that requiring a plaintiff to “prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this particular tort, and alter its nature.”¹³⁸ The court instead incorporated actual malice into the intentional infliction context by requiring that the defendant’s misconduct be intentional or reckless.¹³⁹ In such instances, the court reasoned, the “first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress.”¹⁴⁰ Because Larry Flynt had intentionally published the parody and testified that he intended to cause Falwell emotional distress,¹⁴¹ the Fourth Circuit suggested that the jury might have found that the first element of the tort had been satisfied.¹⁴²

The Supreme Court, in deciding *Falwell*, rejected the Fourth

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

133. *Id.* at 1274.

134. *Id.* (“The defendants are, therefore, entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell’s claim for libel.”).

135. *Id.*

136. *See id.* (examining Hustler’s contention that Falwell had to “prove that the parody was published with knowing falsity or reckless disregard for the truth”).

137. *See id.* at 1273–74 (noting Hustler’s contention that, as “the jury found that the parody was not reasonably believable,” the statements contained within the parody could not be statements of fact “but must be opinion and are, therefore, completely shielded by the first amendment”).

138. *Id.* at 1275.

139. *See id.* (observing that Virginia law on intentional infliction of emotional distress first “require[d] that the defendant’s misconduct be intentional or reckless”).

140. *Id.*

141. *Id.* at 1276.

142. *Id.*

Circuit's method of incorporating the actual malice standard into the intentional infliction of emotional distress context.¹⁴³ The Court explained that it was insufficient for a state to assert that it was "protecting public figures from emotional distress" in denying "First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved."¹⁴⁴ In effect, the Court was preventing public figures from doing an end run around First Amendment protections.¹⁴⁵

There are several ways to read *Falwell* and apply it to *Phelps*. If the *Falwell* decision emphasizes the limitations on when *public* figures can recover damages for intentional infliction of emotional distress, the case would seem to have little import for whether Albert Snyder could collect such damages,¹⁴⁶ since he does not qualify as a public figure.¹⁴⁷ If, however, the crux of *Falwell* is the Court's focus on and distrust of the outrageousness standard and its suggestion that the First Amendment provides robust protection for discussions of public affairs, then *Falwell* might support protection of at least some of the statements of the Phelps family.¹⁴⁸

2. *The privacy interest and tortious injury*

Because *Falwell* is distinguishable from *Phelps* in that the former involved a public figure,¹⁴⁹ it does not provide clear guidance with respect to the proper resolution of *Phelps*. Several other cases may be

143. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

144. *Id.*

145. See Arlen W. Langvardt, *Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects*, 26 AM. BUS. L.J. 665, 668 (1989) (asserting that the Court virtually eradicated public figures' opportunity to receive tort damages for defamatory statements through an emotional distress claim).

146. But see Volokh, *supra* note 32, at 304–05 ("[T]he underlying rationale of *Hustler* . . . applies to all speech on matters of public concern—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.").

147. *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) ("Petitioner Albert Snyder is not a public figure."); see also Richard Weisberg, *Two Wrongs Almost Make a "Right": The 4th Circuit's Bizarre Use of the Already Bizarre "Milkovich" Case in Snyder v. Phelps*, 2010 CARDOZO L. REV. DE NOVO 345, 347 (2010) (asserting that the Snyders were private figures).

148. But see *infra* notes 208–211 and accompanying text (suggesting that the Court's comment about public affairs was intended to refer to contexts involving public figures).

149. Compare *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) ("Here it is clear that respondent Falwell is a 'public figure' for purposes of First Amendment law"), with *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) ("Petitioner Albert Snyder is not a public figure.").

helpful to consider, including some involving the publication of private information.

Consider *Cox Broadcasting Corp. v. Cohn*,¹⁵⁰ which involved the publication of the name of a seventeen-year-old victim who was raped and murdered.¹⁵¹ Georgia law made it a misdemeanor to publish the name or identity of a rape victim.¹⁵² A reporter, Thomas Wassell, learned the name of the victim from an indictment that was available for inspection.¹⁵³ That night, he included the victim's name in a television news report about the proceedings, which was aired again the following day.¹⁵⁴ The victim's father sued the station for invasion of privacy.¹⁵⁵ The tort of public disclosure, recognized in Georgia, protected the plaintiff's "right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities."¹⁵⁶

The *Cohn* Court recognized that "powerful arguments can and have been made that 'there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.'"¹⁵⁷ However, the Court also recognized that important interests were served by protecting the press in their accurate reporting about matters of public concern.¹⁵⁸ Because there were important and competing interests at stake,¹⁵⁹ the Court framed the issue narrowly—"whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."¹⁶⁰ The Court answered that question in the negative.¹⁶¹

Several other cases established that the state must satisfy a very high burden before it can prevent the publication of truthful

150. 420 U.S. 469 (1975).

151. *Id.* at 471.

152. *Id.* at 471–72.

153. *Id.* at 472–73.

154. *Id.* at 473–74.

155. *Id.* at 474.

156. *Id.* at 489.

157. *Id.* at 487.

158. *Id.* at 490–91.

159. *See id.* at 491 (recognizing a "sphere of collision between claims of privacy and those of the free press," as both interests were "plainly rooted in the traditions and significant concerns of our society").

160. *Id.*

161. *Id.*

information.¹⁶² One case in particular bears examination here, if only because the publication of the information at issue both foreseeably and actually caused great harm.

In *The Florida Star v. B.J.F.*,¹⁶³ the Court addressed a Florida statute prohibiting the publication of the name of a victim of a sexual offense.¹⁶⁴ The Florida Star published a rape victim's name obtained from a police report.¹⁶⁵ The victim testified that she had suffered greatly from the publication of her name—she was forced to “change her phone number and residence, to seek police protection, and to obtain mental health counseling.”¹⁶⁶ Presumably, one reason Florida statutorily prohibited divulging the name of a sexual assault victim was to prevent certain foreseeable harms. For example, the individual who committed the assault might be induced to threaten the victim further or, perhaps, others reading about the assault might make such threats, either as a prank or with the intent of perpetrating additional harm.¹⁶⁷

The *B.J.F.* Court explained that “the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”¹⁶⁸ In this case, the Court held that the First Amendment precluded the imposition of liability.¹⁶⁹ In doing so, the Court reasoned that in instances “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability . . . under the facts of this case.”¹⁷⁰

162. See, e.g., *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 310 (1977) (per curiam) (holding that “the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information [the name and photo of a minor charged in a shooting] obtained at court proceedings which were in fact open to the public”); see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105–06 (1979) (“At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.”).

163. 491 U.S. 524 (1989).

164. See *id.* at 526.

165. *Id.* at 527.

166. *Id.* at 528.

167. E.g., *id.* at 542–43 (White, J., dissenting) (stating that, in the aftermath of the publication of her identity, “B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again”).

168. *Id.* at 533.

169. *Id.* at 541.

170. *Id.*; see also *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001) (holding that the

The cases above are open to numerous interpretations. For example, it might be thought that the First Amendment offers special protection to publishing and broadcast media.¹⁷¹ The Court has often discussed the importance of preventing voluntary self-censorship by the press¹⁷² and has further suggested that the press sometimes functions as the public's "eyes and ears."¹⁷³ Were this the correct reading of the cases protecting the right to publish accurate information, it would not seem to help the Phelps family very much, both because the Phelps family was not acting as the press reporting on events and because what they said, while perhaps not false, is better construed as not asserting facts about the Snyders at all rather than as making accurate assertions about them.¹⁷⁴

Even if the First Amendment were thought to give the press and media special protection, it would be inaccurate to believe that the First Amendment gives the news media a carte blanche.¹⁷⁵ A few important cases involving protection of the media are relevant for purposes of the discussion here.

a. Zacchini, the right of publicity, and funeral protests

At first blush, *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁷⁶ would seem unhelpful in determining the constitutional limitations on tort liability for funeral protests, as *Zacchini* involved a broadcast of an individual's entire circus act during a news program.¹⁷⁷ The

First Amendment protected the disclosure of an illegally intercepted cell phone conversation where those disclosing the information played no role in illegally intercepting it).

171. *But cf.* *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (denying newsmen a "constitutional right of access to the scenes of crimes or disaster when the general public is excluded"); *id.* at 685 (affirming the ability of states to prohibit the news media from "attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal").

172. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

173. *E.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

174. The Fourth Circuit, for example, construed the statements as simply not making factual assertions about the Snyders at all. *See* *Snyder v. Phelps*, 580 F.3d 206, 223 (4th Cir. 2009) (noting that "no reasonable reader" would interpret the signs held by the Phelps as "asserting actual and objectively verifiable facts about Snyder or his son"), *aff'd*, 131 S. Ct. 1207 (2011).

175. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–72 (1991) (rejecting an argument that the First Amendment precluded the imposition of damages against the defendant newspapers for publishing the identity of a confidential source); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989) (affirming a libel verdict against the defendant newspaper under the *New York Times* standard).

176. 433 U.S. 562 (1977).

177. *Id.* at 563–64.

accompanying commentary about the circus act was favorable,¹⁷⁸ so it would have been unreasonable for the individual to assert that he or his act were unfairly maligned.¹⁷⁹ However, Ohio law specified that “one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one.”¹⁸⁰ As a result, the broadcaster “would be liable for the appropriation over [the performer’s] objection and in the absence of license or privilege, of [the performer’s] right to the publicity value of his performance.”¹⁸¹ The issue before the Court was whether “the First and Fourteenth Amendments immunized [the broadcaster] from damages for its alleged infringement of [the performer’s] state-law ‘right of publicity.’”¹⁸²

The case would have been very different if the television station “had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television.”¹⁸³ But by televising the entire act, the station had done much more.¹⁸⁴

The Ohio Supreme Court held that the station was “constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose.”¹⁸⁵ The Ohio court wrongly assumed that the Constitution required use of the actual malice standard in any case involving publication on a matter of public interest.¹⁸⁶ But, as *Gertz* makes clear, the United States Supreme Court had never envisioned that the actual malice standard would be used in all tort actions in which compensation was sought for harms allegedly resulting from a wrongful publication concerning the plaintiff.¹⁸⁷

When deciding *Zacchini*, the Ohio Supreme Court had been misled by the United States Supreme Court’s decision in *Time, Inc. v. Hill*,¹⁸⁸ which established that in false light cases involving matters of public

178. *Id.* at 564 n.1.

179. *See id.* at 572–73 (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 400 (1960)) (describing how the law of privacy is divided into four types of intrusions of four different interests, only some of which require injury to reputation).

180. *Id.* at 565.

181. *Id.*

182. *Id.*

183. *Id.* at 569.

184. *See id.* at 576 (describing the effect of broadcasting the whole performance as “similar to preventing petitioner from charging an admission fee”).

185. *Id.* at 569.

186. *See id.* at 571–72.

187. For a discussion of *Gertz*, see *supra* notes 88–115 and accompanying text.

188. 385 U.S. 374 (1967).

interest,¹⁸⁹ the actual malice standard should be employed even if the plaintiff is a private individual.¹⁹⁰ But false light cases implicate a reputational interest,¹⁹¹ whereas the interest at issue in a right of publicity case involves “the right of the individual to reap the reward of his endeavors.”¹⁹² Because the interests implicated are different, there is no constitutional requirement that the actual malice standard be used in these distinct kinds of torts.

The *Zacchini* Court noted that in “‘false light’ cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in ‘right of publicity’ cases the only question is who gets to do the publishing.”¹⁹³ Basically, the Court implied that awarding damages in false light cases serves the function of chilling reputation-harming speech, whereas awarding damages in right of publicity cases serves the function of redistributing monies from the undeserving defendant to the deserving plaintiff.¹⁹⁴ In the right of publicity cases, the communication of ideas is not chilled, although the misappropriation of others’ work is disincentivized.

Cases centered around false light or the right of publicity are not directly on point in a funeral-picketing case. Reputational interests were not at issue in *Phelps*, and the whole point in the funeral protest case is not to minimize publication per se but, instead, to limit where the protest occurs so that the funeral is not disrupted and so that participants in the funeral are not subjected to an attack at a time and in a place where the individuals are most vulnerable.¹⁹⁵

189. False light cases involve “publicity that places the plaintiff in a ‘false light’ in the public eye.” *Zacchini*, 433 U.S. 562 at n.7 (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960)).

190. See *Zacchini*, 433 U.S. at 570–71 (noting that the Ohio court “relied heavily” on *Hill* and that the *Hill* Court held “the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth”); see also *Hill*, 385 U.S. at 387–88 (explaining that First Amendment protections prohibited application of a state statute allowing for “redress [of] false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”).

191. See *Zacchini*, 433 U.S. at 573 (quoting William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 400 (1960)) (“‘The interest protected’ in permitting recovery for placing the plaintiff in a false light ‘is clearly that of reputation, with the same overtones of mental distress as in defamation.’”). Even if one limits the focus to cases involving a reputational interest, *Gertz* makes clear that it is inaccurate to believe that the actual malice standard must be met whenever matters of public concern are at issue.

192. *Id.*

193. *Id.*

194. *Id.*

195. But cf. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1218 (2011) (noting that the church told authorities of its intent to picket, remained on public land, and did not yell or use violence).

Arguably, *Zacchini* and funeral protest cases are both about control of the conditions under which certain contents are communicated; however, there are important aspects in which the analogy between the two cases breaks down. For example, the *Zacchini* Court suggested that an “entertainer . . . usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication.”¹⁹⁶ However, Snyder was not seeking the commercial rewards of the funeral protest. Instead, he would have preferred that the funeral protest had never taken place.

The *Zacchini* Court’s analysis of the harm to the plaintiff is interesting to note. The Court reasoned that the “effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee,”¹⁹⁷ positing that “if the public can see the act free on television, it will be less willing to pay to see it at the fair.”¹⁹⁸ Of course, seeing such an act on television might not be as enjoyable as seeing it in person, and the favorable publicity from the news broadcast might have increased circus attendance. Be that as it may, the *Zacchini* Court accepted the legitimacy of the goal of “preventing unjust enrichment,”¹⁹⁹ and the Court implied that the television station was unjustly enriched by broadcasting the entire act.²⁰⁰ Arguably, individuals who protest at funerals to get free publicity might be viewed as being unjustly enriched,²⁰¹ and *Zacchini* provides not only a possible rationale for imposing liability under such circumstances but also a method of computing damages—one might have experts testify in light of industry standards about how much the free publicity would have cost had it been purchased.²⁰² Indeed, Justice Alito noted that on other occasions the Phelps family had agreed not to protest in exchange for free air time,²⁰³ which

196. *Zacchini*, 433 U.S. at 573.

197. *Id.* at 576.

198. *Id.* at 575.

199. *See id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?* 31 L. & CONTEMP. PROB. 326, 331 (1966)) (“No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”).

200. *See id.* at 575–76.

201. *See, e.g.,* *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (stating that there was “no doubt that Westboro chose to stage its picketing at . . . Matthew Snyder’s funeral to increase publicity for its views”).

202. *Cf.* Lisa Greene, *Helmets of sand still grind on skeptics*, ST. PETERSBURG TIMES 1, Mar. 27, 2001, at 4B (discussing how much certain free publicity would have cost if purchased).

203. *See Phelps*, 131 S. Ct. at 1224 (Alito, J., dissenting) (explaining that the church agreed not to picket the funeral of a young girl killed in a Tucson shooting in exchange for “free air time on the radio”); *id.* at 1225 (observing that in 2006, “the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman”).

suggests that the Church is gaining a benefit (exposure that would presumably be very costly to purchase) at the expense of others when they are most vulnerable.

States differ about what must be shown in order for an unjust enrichment claim to be brought successfully. For example, suppose that under state law a plaintiff cannot prevail on an unjust enrichment claim unless she can show that the defendant received a benefit for which the plaintiff expected to receive compensation or would have expected to receive compensation had the plaintiff known the facts.²⁰⁴ In such a state, an unjust enrichment action brought by a funeral protest victim would likely be unsuccessful because the plaintiff would not have expected to be paid for the free publicity accorded to the funeral protesters.

Yet some state courts have described the elements of unjust enrichment rather broadly. The Iowa Supreme Court offered the basic elements of an unjust enrichment case as requiring that: "(1) [the] defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances."²⁰⁵ The Colorado Supreme Court similarly described unjust enrichment as requiring a showing that "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying."²⁰⁶ A family victimized by a funeral protest could perhaps successfully bring an unjust enrichment claim in light of these elements, but only if the enrichment enjoyed by the defendant (free publicity) was understood to be at the family's "expense" in the relevant legal sense.²⁰⁷

In his own Supreme Court case, Jerry Falwell argued that *Zacchini* supported his intentional infliction of emotional distress claim because "the State [sought] to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication."²⁰⁸ The Court rejected Falwell's

204. See, e.g., *Fasching v. Kallinger*, 510 A.2d 694, 699–700 (N.J. Super. Ct. App. Div. 1986) (holding that survivors of a murder victim were precluded from recovering damages from murderer's biographer because survivors conferred no benefit on murderer and expected no remuneration).

205. Dep't of Human Servs. ex rel. *Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154–55 (Iowa 2001).

206. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1007 (Colo. 2008) (en banc) (citing *DCB Constr. Co., Inc. v. Cent. City Dev. Co.*, 965 P.2d 115, 119–20 (Colo. 1998)).

207. See *id.* (requiring that the unjust enrichment be at the plaintiff's expense).

208. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (citing *Zacchini v.*

argument primarily because “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.”²⁰⁹ However, in discussing debates about public affairs, the *Falwell* Court made clear that it specifically had discussions about public officials in mind, citing *Garrison* in support.²¹⁰ This explains the *Falwell* Court’s conclusion that “while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, . . . the First Amendment prohibits such a result in the area of *public debate about public figures*.”²¹¹

Basically, *Falwell* was not helped by the *Zacchini* rejection of the actual malice standard in a non-defamation tort context, because *Falwell* was a public figure. But *Zacchini*’s categorization and distinguishing of torts might be very important in an intentional infliction of emotional distress action involving a private individual, especially given *Gertz*’s recognition that the state has different interests implicated when protecting private individuals rather than public figures.²¹²

b. Pacifica Foundation, offensive speech, and the duty to avert one’s attention

A much different case involving the media that would seem to have relevance here is *FCC v. Pacifica Foundation*.²¹³ That case involved a complaint about the broadcast of George Carlin’s “Filthy Words” monologue on the radio during the middle of the afternoon.²¹⁴ The Court held that the “indecent” speech at issue,²¹⁵ although afforded constitutional protection,²¹⁶ nonetheless could be restricted so that it would only be broadcast at a time when children would be less likely

Scripps-Howard Broad. Co., 433 U.S. 562 (1977)).

209. *Id.* at 53.

210. See *id.* (discussing *Garrison v. Louisiana*, 379 U.S. 64 (1964)). For a discussion of *Garrison*, see *supra* notes 51–56 and accompanying text.

211. *Falwell*, 458 U.S. at 53 (emphasis added).

212. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341–45 (differentiating the state’s interests in protecting the reputations of private and public individuals by the latter group’s voluntary exposure and greater opportunity for rebuttal, and by the need to balance the interest in protecting public figures against the interest in an “vital and uninhibited” press).

213. 438 U.S. 726 (1978).

214. *Id.* at 729.

215. See *id.* at 741 (noting that there was “no basis for disagreeing with the . . . conclusion that indecent language was used in this broadcast”).

216. *Id.* at 744 (declaring that Carlin’s monologue was “unquestionably ‘speech’ within the meaning of the First Amendment”).

to listen.²¹⁷ The Court employed a “nuisance rationale,”²¹⁸ explaining that “[w]ords that are commonplace in one setting are shocking in another . . . one occasion’s lyric is another’s vulgarity.”²¹⁹

The *Pacifica Foundation* Court understood that its holding might seem to contradict its decision²²⁰ in *Cohen v. California*.²²¹ At issue in *Cohen* was the conviction of an individual who had been in a courthouse wearing a jacket with the words “Fuck the Draft” written on it.²²² The *Cohen* Court suggested that those objecting to the message could simply avert their eyes.²²³ Analogously, a parent who did not want her child to hear Carlin’s monologue might either change the station or turn off the radio.²²⁴ The *Pacifica Foundation* Court rejected the proposition that the ease with which one might turn off the radio either negated the harm or provided an adequate remedy.²²⁵

Pacifica Foundation suggests that some kinds of expression, while protected, may nonetheless be channeled in a manner where the communication can still take place at certain times and in certain places but will not have the undesirable effects that might occur absent the channeling.²²⁶ Thus, for example, the Court upheld in

217. See *id.* at 750 (observing the Commission’s placement of emphasis on the time of day); *id.* at 749 (concluding that “Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant”); see also *id.* at 757 (Powell, J., concurring) (“The Commission’s primary concern was to prevent the broadcast from *reaching* the ears of unsupervised children who were likely to be in the audience at that hour.”) (emphasis added).

218. *Id.* at 750.

219. *Id.* at 747.

220. See *id.* at 747 n.25 (describing contextual factors supporting the Court’s holding that Cohen’s speech was protected despite the fact that it might offend unwilling viewers); *id.* at 749 n.27 (explaining that the burden is sometimes on the offended listener to turn away from offensive speech).

221. 403 U.S. 15 (1971).

222. *Id.* at 16.

223. See *id.* at 21 (noting that those offended in the courthouse “could effectively avoid further bombardment of their sensibilities simply by averting their eyes”); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (citing *Cohen v. California*, 403 U.S. 15, 21) (observing that the Constitution generally places the burden on the unwilling viewer of offensive material “to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes’”).

224. See *Pacifica Found.*, 438 U.S. at 765–66 (Brennan, J., dissenting) (discussing “the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the ‘off’ button”).

225. See *id.* at 748–49 (explaining that the suggestion of “avoid[ing] further offense by turning off the radio when he hears indecent language is like saying the remedy for an assault is to run away after the first blow”); see also Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 330 (2008) (declaring that *Cohen* is distinguishable from funeral picketing in the ability to avert one’s attention).

226. See *Pacifica Found.*, 438 U.S. at 750 (explaining that the context of the speech is “all important”).

*Grayned v. City of Rockford*²²⁷ an ordinance that prohibited disruptive demonstrations during public school hours.²²⁸ Under the ordinance, individuals were permitted to engage in protests; their speech was not chilled.²²⁹ However, they were not permitted to hold such protests during school hours because doing so might disrupt the classes in session.²³⁰ At least one question raised by *Phelps* involves the permissible steps that might be taken to prevent funeral picketing,²³¹ so as not to disturb the peace and tranquility of the mourners while also allowing ample alternatives so that the desired messages could still be communicated.²³²

C. *Reconciling the Different Cases with Phelps*

Prior to *Phelps*, the existing case law did not clearly dictate a particular result in a funeral-picketing case where defamation was not at issue. Where there has been no injury to reputation, defamation cases are not clearly on point, although the jurisprudence might nonetheless suggest how such a case should be decided. Although *Falwell* also involved an intentional infliction of emotional distress claim, it, too, is not clearly on point because it was brought by a public figure and the holding seemed designed to preclude an end run around First Amendment protections.²³³ Precisely because *Snyder* was a private individual rather than a public figure and because damages would be imposed because of the outrageousness of where the protest took place rather than solely what was said, *Falwell* would seem distinguishable.

Some cases have spoken to the great importance of protecting free expression. For example, the *Cohen* Court cautioned that one “cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”²³⁴

227. 408 U.S. 104 (1972).

228. See *id.* at 121 (1972) (holding that the antinoise ordinance was not invalid on its face).

229. See *id.* at 119–21 (holding that the antinoise ordinance was not overbroad).

230. *Id.* at 107–08.

231. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (noting that “Westboro’s choice of where and when to conduct its picketing [was] not beyond the Government’s regulatory reach”).

232. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 366 (6th Cir. 2008) (recognizing the state’s ability to protect those who are engaged in “collective, shared grief . . . [in paying] their final respects to the deceased and to offer comfort to one another”).

233. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (holding that speech does lose its First Amendment protection when it is motivated by an intent to cause severe emotional distress).

234. *Cohen v. California*, 403 U.S. 15, 25 (1971).

Since it is “often true that one man’s vulgarity is another’s lyric”²³⁵ and because one cannot “forbid particular words without also running a substantial risk of suppressing ideas in the process . . . [and providing] a convenient guise for banning the expression of unpopular views,”²³⁶ the Court must keep a watchful eye on those who would countenance the imposition of burdens on expression. Yet, the *Pacifica Foundation* Court seemed to view *Cohen* with a jaundiced eye,²³⁷ and funeral picketing might be understood as a variant of *Pacifica Foundation* in which speech should be prohibited in one place at a particular time, justified by a nuisance theory. Basically, the claim would be that funeral picketing should be precluded regardless of the content of the speech. Indeed, many of the statutes aimed at prohibiting funeral picketing are written in content-neutral terms²³⁸ that restrict all speech at a particular place during particular times.²³⁹

1. *Compliance with the law: a vaccine against tortious liability?*

The *Phelps* Court emphasized that the “church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged.”²⁴⁰ Further, much of what the Church said involved “matters of public import,”²⁴¹ notwithstanding that some of their comments might have been thought to have involved matters of purely private concern.²⁴²

Regrettably, the Court was too reticent when explaining why it

235. *Id.*

236. *Id.* at 26.

237. See *supra* notes 220–25 and accompanying text (discussing the *Pacifica Foundation* Court’s rejection of the avert-your-eyes remedy suggested by *Cohen*).

238. See, e.g., *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 985 (E.D. Ky. 2006) (examining a Kentucky funeral picketing statute and declaring it to be content neutral, “motivated by the need to prevent all interferences with all funerals regardless of the content or creator of the interference . . . [and] to the extent that the provisions are justified by the need to prevent citizens from being subjected to all unwanted communications, regardless of the content or communicator”).

239. See Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 173 (2008) (suggesting that funeral picketing statutes will likely be treated as “facially content-neutral because, by their terms, they do not regulate content”); see also Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 580 (2007) (noting that most state picketing restrictions are specific in that they create buffer zones for a specific time period around a specific location).

240. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

241. *Id.* at 1217.

242. *Id.* at 1226 (Alito, J., dissenting) (contending that the attack on the Snyders “was not speech on a matter of public concern”). But see *id.* at 1217 (majority opinion) (asserting that the placards in question highlighted “issues of public import,” such as “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy”).

mattered that the Phelps family followed police directions. It is almost as if the Court was estopping the state from punishing members of the Phelps family because they complied with the instructions of the police.²⁴³ Yet, at issue was not the violation of a criminal statute but, instead, the potential liability of the defendants for the intentional infliction of emotional distress. By telling the Phelps family where they should stage their demonstration, the police were not implicitly promising immunity from a civil suit. If the defendants had made defamatory statements from that location, they would not have been immunized by following police directions.²⁴⁴ The defendants also would not have been immunized if the protest had been so loud that those participating in the funeral could not help but hear the protests.²⁴⁵

The *Phelps* Court understood that “Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially Matthew’s father.”²⁴⁶ Indeed, the Court had recently recognized that family members “have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”²⁴⁷ Yet, the Court seemed to belie its appreciation of the harm done to Matthew Snyder’s father with respect to the comments that might have been interpreted as being directed specifically at the Snyder family.

243. See *Cox v. Louisiana*, 379 U.S. 559, 570–71 (1965) (explaining that it was improper to convict a demonstration leader for violating a statute punishing picketing near a courthouse when police had granted the demonstrators permission to meet across the street from a courthouse and the demonstration was confined to that area); cf. *Commonwealth v. Twitchell*, 617 N.E.2d 609, 618–19 (Mass. 1993) (affording the defendants an affirmative defense against a manslaughter charge because the Attorney General had issued a potentially misleading opinion regarding the legal obligations of Christian Science parents with respect to the refusal of medical treatment for their children).

244. See *Phelps*, 131 S. Ct. at 1214 (noting that the necessary elements of defamation could not be established). Had those elements been established, the defamatory comments would not have been protected merely because they had not been made too close to the funeral.

245. See *id.* at 1220 (noting that the speech “did not itself disrupt the funeral”); cf. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (declaring that it is a “permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interests, amplified to a loud and raucous volume, from the public ways of municipalities”); see also Zachary P. Augustine, Comment, *Speech Shouldn’t Be “Free” at Funerals: An Analysis of the Respect for America’s Fallen Heroes Act*, 28 N. ILL. U. L. REV. 375, 397 (2008) (denoting the use of sound amplification devices at funeral protests).

246. *Phelps*, 131 S. Ct. at 1217.

247. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004).

While many of the comments on the defendants' signs involved matters of public concern,²⁴⁸ some did not. The Court seemed to recognize this when noting that "even if a few of the signs—such as 'You're Going to Hell' and 'God Hates You'—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."²⁴⁹ However, as Justice Alito points out in his dissent, it was utterly unclear why comments discussing matters of purely private concern were not considered actionable.²⁵⁰

One can contrast the *Phelps* Court's discussion of the signs "You're Going to Hell" and "God Hates You" with the analysis offered by the Fourth Circuit of those same signs. The Fourth Circuit concluded that "these two signs cannot reasonably be interpreted as stating actual facts about any individual."²⁵¹

Certainly, courts will sometimes construe statements in a particular way as a matter of law, jury construction to the contrary notwithstanding. For example, consider the comments made about a particular individual, Charles Bresler, at a public meeting.²⁵² Bresler sought a zoning variance from the local city council.²⁵³ He also owned land that the city wished to purchase for a new high school.²⁵⁴ Bresler was apparently driving a hard bargain and was accused during the meeting of engaging in blackmail.²⁵⁵ That accusation was later published in a local newspaper.²⁵⁶ The question before the Court was whether the charge against Bresler could reasonably be construed as a claim that he committed a felony.²⁵⁷ The Court held that the charge could not reasonably have been so construed,²⁵⁸ notwithstanding that

248. See *Phelps*, 131 S. Ct. at 1216–17 (listing some of the signs including: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell").

249. *Id.* at 1217.

250. *Id.* at 1227 (Alito, J., dissenting) ("I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently.").

251. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

252. *Greenbelt Coop. Publ'g. Ass'n v. Bresler*, 398 U.S. 6, 7 (1970).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 13.

258. *Id.* at 14 (expressing disbelief that a reader would not have understood the term "blackmail" in the contested articles to mean that "it was Bresler's public and

the term “blackmail” can refer to a criminal act depending upon the context.

Yet, the *Bresler* Court was on firmer ground when it construed the blackmail charge as not involving a claim about the commission of a felony than was the Fourth Circuit in *Phelps* when it denied that any matters of purely private concern had been addressed. As Justice Alito suggested in his dissent, some of the signs at the funeral and some of the comments on the website seemed to be directed at the Snyders in particular and might quite reasonably have been construed as not involving any matters of public concern.²⁵⁹ Those comments might instead have been interpreted to be brutal attacks upon Matthew Snyder that were “almost certain to inflict injury.”²⁶⁰ Indeed, the Fourth Circuit at one point admitted in passing that “[a] reasonable reader could interpret these signs . . . as referring to Snyder or his son only”²⁶¹

The United States Supreme Court should be commended for admitting that some of the material might have been construed not to involve a matter of public concern,²⁶² but the Court should have taken up Justice Alito’s challenge²⁶³ and addressed the possible tort ramifications of the Phelps family saying to the deceased’s family that the deceased was going to hell. The Court could have argued that the jury was and would be presented with an impossible task. Not only would they have been asked to determine whether the defendants’ actions, rather than Matthew Snyder’s death, had caused

wholly legal negotiating proposals that were being criticized”); *see also* Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 285 (1974) (noting that it was “impossible to believe” that a reader of the newsletter in question was accusing “the appellees with committing the criminal offense of treason”).

259. *Snyder v. Phelps*, 131 S. Ct. 1207, 1225–26 (2011) (Alito, J., dissenting); *see also* Jason M. Dorsky, Note, *A New Battleground for Free Speech: The Impact of Snyder v. Phelps*, 7 PIERCE L. REV. 235, 240–41 (2009) (suggesting that it was a “particularly egregious miscalculation” for the Church “to include signs and chants aimed directly at the family of Matthew Snyder”).

260. *Phelps*, 131 S. Ct. at 1223–24 (Alito, J., dissenting); *cf.* Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 336 (2010) (claiming that the state has no interest in protecting statements designed for wounding private individuals).

261. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

262. *See Phelps*, 131 S. Ct. at 1217 (2011). It is not always easy to tell whether something is a matter of public concern; *cf.* *Florida Star v. B.J.F.*, 491 U.S. 524, 553 (1989) (White, J., dissenting) (“There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime . . .”).

263. *Phelps*, 131 S. Ct. at 1228 (Alito, J., dissenting) (“I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.”).

Albert Snyder's severe harm, but they would also have been asked to determine which statements—protected versus unprotected—had caused that harm. That kind of delimitation might have been thought an impossible task.

Suppose the jury could somehow decide how much of the harm was caused by unprotected expression that targeted the family rather than protected expression that focused on matters of public concern. The facts of *Phelps* raise another difficulty: some of the expressions on the signs were also included in the epic on the Church's website.²⁶⁴ Even if it was permissible to make certain kinds of speech at the funeral site subject to tort liability, such a cause of action could fail to reach the expressions included on the website. If, indeed, the Court were to hold that the statements made on the website were protected,²⁶⁵ then the jury's job would be that much harder because particular contents on the website would be protected even though those very same statements would not be protected if they were made on the day of the funeral. The jury would then have the very difficult, if not impossible, task of determining which of the distasteful, personally-directed statements caused the father's continuing anguish—the protected, distasteful comments on the website or the unprotected statements at the funeral.

There is precedent for the Court's striking down a damages award because of the insuperably difficult question of damages presented. For example, in *NAACP v. Claiborne Hardware Co.*²⁶⁶ the Court considered "the effect of [its decision] that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected."²⁶⁷ The *Claiborne Hardware* Court explained that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."²⁶⁸ The Court cautioned that only those damages caused by conduct outside First Amendment protection could be awarded,²⁶⁹ and

264. The *Phelps* Court did not discuss the additional difficulties created by the website because Snyder did not address it in his petition for certiorari. See *id.* at 1214 n.1 ("The epic is not properly before us and does not factor in our analysis.").

265. But see *id.* at 1222 (Alito, J., dissenting) ("It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.").

266. 458 U.S. 886 (1982).

267. *Id.* at 916.

268. *Id.* at 916–17.

269. See *id.* at 918 ("Only those losses proximately caused by unlawful conduct may

explained that any consideration of liability “on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment— . . . [should be approached with] extreme care.”²⁷⁰ Basically, because it could not be shown that an unprotected part of Charles Evers’ “[s]trong and effective extemporaneous rhetoric”²⁷¹ proximately caused the illegal acts at issue,²⁷² the Court rejected the imposition of liability against him.²⁷³ Perhaps the *Phelps* Court was similarly concerned about limiting the ways that public rhetoric was used.

The *Phelps* Court did address some of the ramifications of its opinion. For example, the Court explained that the decision did not address “speech on public matters [that] was in any way contrived to insulate speech on a private matter from liability.”²⁷⁴ Consider what the Court might have had in mind. Suppose that an individual was speaking to a group that happened to include a divorced parent of a child who had recently committed suicide. Knowing of the parent’s vulnerable state, the individual started talking about how society should make divorce more difficult to obtain, because of the untold harms that no-fault divorce imposes on children, sometimes even causing them to commit suicide. Further assume that the reason this discussion was put forward was not to discuss a matter of public concern, but to inflict great harm on the mourning parent by causing the parent to blame herself for her child’s suicide. The *Phelps* Court implies that an intentional infliction of emotional distress award based on such a scenario might pass constitutional muster, assuming all the elements of the tort were met in light of local law.

2. *A balance of interests: Snyder’s right to privacy and the Church’s right to protest*

Ample evidence suggests that the Phelps family was not targeting the Snyders in particular²⁷⁵ as opposed to other families of soldiers who had died in war or other individuals whose funerals could be picketed to gain public exposure.²⁷⁶ The Court was clear about why

be recovered.”).

270. *Id.* at 926–27.

271. *Id.* at 928.

272. *See id.*

273. *See id.* at 929 (noting the constitutional inadequacy of the findings supporting a damage award).

274. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011).

275. *See, e.g., id.* (highlighting the lack of a pre-existing conflict between the church and Snyder that could suggest that Westboro was merely intending to mask a private attack against Snyder).

276. *See id.* at 1224 (Alito, J., dissenting) (elaborating upon the Church’s strategy

the funerals were being picketed—as a method by which Phelps and the Church would get increased publicity.²⁷⁷ Snyder argued that it was important to consider the context in which the picketing occurred—his son’s funeral.²⁷⁸ The Court rejected that the context changed the character of the speech from a matter of public concern to one of private concern.²⁷⁹

A different way to understand the point about context is to consider the *Pacifica Foundation* analogy to nuisance law—even speech protected by the First Amendment may be restricted in where or when it is delivered.²⁸⁰ Traditional time, place, and manner restrictions impose some limitations on where speech can be delivered. Such restrictions are valid, provided that “they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”²⁸¹ Indeed, the Court was careful to note that it was not discussing the constitutionality of the various state statutes imposing content-neutral restrictions on funeral picketing.²⁸²

Consider a state law that prohibits demonstrations near funerals. The Phelps family might challenge the constitutionality of such a law, arguing that the Church would not have adequate alternative channels of communication, since the Church would not get the same media attention if prevented from spreading its message at funerals.²⁸³ However, as the Court has pointed out elsewhere, “the

of protesting military funerals, the funerals of public safety officers, and the victims of “natural disasters, accidents, and shocking crimes”).

277. *Id.* at 1217 (“There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder’s funeral to increase publicity for its views.”); see also Dorsky, *supra* note 259, at 243 (positing that the Church did not select its venues because of religious purposes, “but rather by the desire to be noticed”). The Eighth Circuit characterized the purpose of the Church’s picketing somewhat differently. See *Phelps-Roper v. Nixon*, 509 F.3d 480, 483 (8th Cir. 2007) (acknowledging the appellant’s claim that “funerals are the only place where her religious message can be delivered in a timely and relevant manner”).

278. *Phelps*, 131 S. Ct. at 1217.

279. *Id.* (noting that the context of Lance Corporal Snyder’s funeral did not “by itself transform the nature of Westboro’s speech”).

280. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 731–32, 750 (1978).

281. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

282. *Phelps*, 131 S. Ct. at 1218 (“Maryland now has a law imposing restrictions on funeral picketing To the extent [this law is] content neutral, [it] raise[s] very different questions from the tort verdict at issue in this case [W]e have no occasion to consider whether it or other similar regulations are constitutional.”); see also *Rutledge*, *supra* note 225, at 318 (arguing that the picketing statutes would “probably be considered content neutral”).

283. See *Phelps-Roper v. Nixon*, 509 F.3d 480, 488 (8th Cir. 2007) (acknowledging

First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."²⁸⁴ For example, in *Heffron v. International Society for Krishna Consciousness, Inc.*,²⁸⁵ the Court upheld a restriction that prevented Krishnas from walking around a state fair asking for donations,²⁸⁶ notwithstanding testimony that the group's mission would be severely impaired were it so constricted²⁸⁷ and that the implicated speech was unquestionably protected by the First Amendment.²⁸⁸ But if preventing the Krishnas from utilizing the most effective form of communication did not violate constitutional guarantees, then preventing the Phelps family from utilizing the most effective method might also pass constitutional muster.²⁸⁹ It seems likely that a content-neutral funeral-picketing law would be upheld as a valid time, place, manner restriction.²⁹⁰

3. Phelps's *captive audience* problem

Snyder, who was awarded damages for intrusion upon seclusion,²⁹¹ argued that he was "a member of a captive audience at his son's funeral."²⁹² However, the Court rejected the use of the captive

that Phelps-Roper had a "fair chance" of proving, for preliminary injunction purposes, that there were insufficient alternative channels of communication to funeral picketing, as the picketers "wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message"). *But see* Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008) (rejecting Phelps-Roper's contention that there were no alternative channels of communication, as she could picket at other times and had other means of communicating her message via the church's website).

284. *Heffron v. Int'l Soc'y. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (citing *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966)).

285. 452 U.S. 640 (1981).

286. *See id.* at 654 (accepting "the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations" as a significant governmental interest that can be pursued through a reasonable time, place, and manner restriction); *id.* at 655 (noting that the Krishnas could arrange for their own booth and sell their literature from within rather than on the fairgrounds itself).

287. *Id.* at 653 ("ISKCON desires to proselytize at the fair because it believes it can successfully communicate and raise funds. In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature.").

288. *Id.* at 647 (acknowledging the state's concession that the Krishnas' activities fell within the protection of the First Amendment).

289. *See* Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008) (citing *Heffron*, 452 U.S. at 647) (noting that Phelps-Roper was "not entitled to her best means of communication").

290. *See* Edwards v. City of Santa Barbara, 150 F.3d 1213, 1215 (9th Cir. 1998) (per curiam) (upholding an ordinance that "prohibit[ed] all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed").

291. *See supra* notes 29–30 and accompanying text.

292. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1219–20 (2011).

audience doctrine,²⁹³ because “Snyder could see no more than the tops of the signs when driving to the funeral . . . [and] there [was] no indication that the picketing in any way interfered with the funeral service itself.”²⁹⁴ The Court explained that the captive audience doctrine is applied “only sparingly to protect unwilling listeners from protected speech,”²⁹⁵ such as when it is forced upon a listener in his own home. In *Rowan v. United States Post Office Department*,²⁹⁶ the Court noted that individuals in their own homes are free to refuse to receive unwanted information,²⁹⁷ but explained that merely because individuals are sometimes a captive audience within the home does not mean individuals necessarily share in that protection outside the home.²⁹⁸ For example, individuals do not have a constitutional right to be free from an unwanted radio broadcast on a public streetcar,²⁹⁹ although Justice Douglas suggested in his dissent in *Public Utilities Commission v. Pollak* that individuals who take streetcars are a “captive audience” and should not be forced to be subjected to unwanted messages.³⁰⁰ He offered a similar analysis in a concurrence over twenty years later when discussing some of the protections that should be accorded to commuters using public transportation.³⁰¹

It is unclear whether the Court would have been willing to apply the captive audience doctrine had the funeral been interrupted or, perhaps, had the signs been noticeably and disruptively visible.³⁰² Ironically, when upholding the Ohio funeral-picketing law, the Sixth

293. *Id.* at 1220 (declining to apply the captive audience doctrine because the doctrine is used “only sparingly”).

294. *Id.*; see also Wells, *supra* note 239, at 155 (“Peaceful protests do not invade funerals in the sense that this term is traditionally understood. They are neither noisy nor disruptive. They do not necessarily impede funeral services. Nor do they involve harassment causing attendees to avoid the service. In other words, peaceful protests do not invade funeral-goers’ seclusion.”).

295. *Phelps*, 131 S. Ct. at 1220.

296. 397 U.S. 728 (1970).

297. *Id.* at 738 (rejecting the proposition that “a vendor has a right under the Constitution . . . to send unwanted material into the home of another”).

298. *Id.* at 738.

299. *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 454 (1952).

300. *Id.* at 468 (Douglas, J., dissenting).

301. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (4–1–4 decision) (Douglas, J., concurring) (“In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.”).

302. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (explaining that “Snyder could see no more than the tops of the signs when driving to the funeral [and that] there [was] no indication that the picketing in any way interfered with the funeral service itself”); cf. *Action v. Gannon*, 450 F.2d 1227, 1233 (8th Cir. 1971) (en banc) (dismissing the defendants’ claim that they had “a right to enter the cathedral and disrupt the church services of the plaintiffs” as this was “an intolerable violation of the rights of those engaged in worship”).

Circuit included within its justification the fact that the picketers had not been prevented from communicating with the mourners by making use of very large signs.³⁰³

Suppose, then, that Snyder saw the content of some very large signs along the way to the funeral. In such a scenario, the funeral still would not have been disrupted; it is unlikely that there would have been a delay or that the service would have been in competition with loud protesters. However, the funeral might very well have been disrupted for Albert Snyder, who might have become so disturbed by the signs that his grieving process would have been completely undermined.

In the envisioned scenario, Snyder might have been disturbed that there were signs at his son's funeral at all *and* by the contents of the signs in particular. The *Phelps* Court implicitly rejected that Snyder found the very fact of a demonstration disturbing—the Court hypothesized that “[a] group of parishioners standing at the very spot where Westboro stood, holding signs that said ‘God Bless America’ and ‘God Loves You,’ would not have been subjected to liability,”³⁰⁴ implying that liability would only have been imposed because of disagreement with the message. Yet, suppose instead that there were signs advocating the consumption of a particular cereal for breakfast or supporting a particular candidate. Such signs might be disturbing, even if Snyder liked that cereal or supported that candidate, precisely because those holding the signs were attempting to take advantage of the funeral to get free publicity.³⁰⁵

Certainly, one might point out that advertising a commercial product or promoting someone's candidacy at a funeral might be unwise, because one might thereby promote consumer or elector ill will rather than good will.³⁰⁶ But the same point might have been

303. *Phelps-Roper v. Strickland*, 539 F.3d 356, 370 (6th Cir. 2008) (“[T]he Funeral Protest Provision does not place ‘limitations on the number, size, text, or images’ of placards, and places ‘no limitation on the number of speakers or the noise level, including the use of amplification equipment.’ Thus, it is conceivable that picketers outside of the 300-foot buffer zone can still communicate their message to funeral attendees.”).

304. *Phelps*, 131 S. Ct. at 1219.

305. Zipursky suggests that liability might have been imposed had a publicity seeking group held signs saying: “Love and Hot Sex, Not War!”. See Zipursky, *supra* note 127, at 518. But these signs might also be viewed as political, and one might infer from *Phelps* that the First Amendment would have precluded liability in that case too. The point here is that even those agreeing with a message, whether political or commercial, might nonetheless believe the messages to be inappropriate at a funeral.

306. Cf. Julie Anderson & David Fish, Note, *Sotelo v. Directrevenue, LLC: Paving the Way for a Spyware-Free Internet*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 841, 841 (2006) (discussing a “form of advertising [that] has gained popularity with

made about the wisdom of the Westboro Church funeral-picketing policies and that has not dissuaded them from engaging in that behavior.

It is worth considering how a *Phelps*-like case would be decided if protesters picketed a funeral in violation of local law. One of the ironic aspects of the *Phelps* opinion is that it leaves open whether there would be tort liability in the hypothesized case and even whether a content-neutral law would be more likely to pass muster if it restricted speech at funerals in particular or, instead, was more generally applicable.

While some courts and commentators have suggested that funerals should be treated differently for purposes of the captive audience doctrine,³⁰⁷ the *Phelps* Court did not focus on aspects that were unique to funerals. For example, the Court noted that the protest was orderly and staged where the police had instructed³⁰⁸ and that no evidence was presented to establish that the protest had interrupted the service.³⁰⁹ But if these are the relevant factors, then protesters who interfere with a religious service in violation of law might also be punished, even if that service does not involve a funeral.³¹⁰

The *Pacifica Foundation* nuisance rationale was offered in the

advertisers, but [that] has generated much ill-will with consumers”).

307. See *Strickland*, 539 F.3d at 364–65 (comparing the right of privacy in mourning to the right of privacy of “individuals in their homes or individuals entering a medical facility”); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (“[Funeral] attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person’s interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive.”); see also *Brownstein & Amar*, *supra* note 35, at 373 (“While the issue is certainly not free from doubt and argument, we believe, as we elaborate below, that funerals present a similarly or more compelling case of audience captivity and vulnerability as the circumstances discussed in [other cases where the captive audience doctrine was applied].”); Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381, 406 (2008) (arguing that “funeral attendees are captive in a way that deserves the same recognition afforded the resident in his or her home, or the patient in a medical facility”). But see *Wells*, *supra* note 239, at 231 (cautioning that extending the captive audience doctrine as described in *Frisby* on the grounds that funerals are “particularly unique and deserving of broader privacy protection” would be a “mistake”).

308. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213.

309. *Id.* at 1220.

310. See, e.g., *St. David’s Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821, 830, 834 (Kan. Ct. App. 1996) (affirming an injunctive order on the grounds that “the government has a legitimate interest in protecting the privacy of one’s place of worship”); cf. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215 (9th Cir. 1998) (per curiam) (upholding an ordinance that “prohibits all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed”); *Action v. Gannon*, 450 F.2d 1227, 1232–33 (8th Cir. 1971) (noting that the defendants do not have a right to “disrupt the church services of the plaintiffs”).

context of an individual receiving an unwelcome radio transmission while driving in his car rather than at his house,³¹¹ so the captive audience doctrine might not require that funerals in particular be targeted. Further, the *Phelps* Court did not seem receptive to carving out a special exception for funerals. For example, when Snyder claimed that the funeral setting presented unique circumstances,³¹² the Court noted that “Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder’s funeral to increase publicity for its views,”³¹³ as if the staged protests at each of these locations should be analyzed in the same way and the fact that one of these involved a funeral did not alter the analysis.³¹⁴

That the Court seems to be treating funerals no differently from other kinds of events *might* decrease the likelihood that the Court would recognize a captive audience exception for funerals. Certainly, the *Phelps* Court made clear that it was not addressing the constitutionality of a content-neutral picketing law and suggested that such a law *might* pass muster.³¹⁵ Nonetheless, the Court went out of its way to note that there have been “a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral.”³¹⁶ Such a comment suggests that a content-neutral statute limiting funeral picketing might not pass muster after all because there have been only a few limited situations in which content-neutral statutes limiting targeting picketing have been upheld.³¹⁷

4. *Phelps’s impact on the regulation of funeral picketing*

The *Phelps* Court seems to intentionally provide no direction to lower courts. While the Court made clear that the damage award at issue could not stand, one cannot tell from the opinion whether content-neutral funeral protest restrictions pass muster as a reasonable time, place, manner restriction or, perhaps, on a captive audience rationale. Further, legislators wishing to draft or amend

311. *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978).

312. *Phelps*, 131 S. Ct. at 1217 (“Snyder goes on to argue that Westboro’s speech should be afforded less than full First Amendment protection ‘not only because of the words’ but also because the church members exploited the funeral . . .”).

313. *Id.*

314. *Cf. Wells*, *supra* note 239, at 231 (arguing that funerals should not be singled out for special treatment).

315. *Phelps*, 131 S. Ct. at 1218 (“[Content neutral picketing laws] raise very different questions from the tort verdict at issue in this case.”).

316. *Id.* (emphasis added).

317. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding an ordinance that banned targeting picketing of a home).

legislation in this area might well feel frustrated. One cannot tell whether such legislation would be more likely to pass muster by protecting funerals in particular, because such statutes would be more narrowly tailored,³¹⁸ or whether legislation that protected religious services from interruption as a general matter would be more likely to pass muster because it would be less plausible to believe that the legislation was targeting unpopular speech.³¹⁹

Suppose that a state statute specifically restricting funeral protests is held to pass constitutional muster.³²⁰ A separate question is whether the Court would permit the imposition of damages for intentional infliction of emotional distress under such circumstances.³²¹

Certainly, the picketing at issue would not be protected by the First Amendment in that ex hypothesi the protesters would have violated a constitutionally-valid law. But that would not settle the question at hand. Presumably, when upholding the validity of the content-neutral statute, the Court would say that “an incidental burden on speech is no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”³²² However, the Court would presumably fear that any intentional infliction of damages would turn “on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”³²³ While the Court has not always rejected imposing a penalty on speech that was at least in part motivated by the content of the speech,³²⁴ the Court has struck down a law penalizing speech on the basis of content, even though that speech could have been punished under a content-neutral statute.³²⁵ As the *R.A.V.* Court noted, “the power to proscribe

318. Cf. *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 619 (N.D. Ohio 2007) (“As to the fixed buffer zone, the Court finds that the statute is not substantially broader than necessary to achieve the State of Ohio’s legitimate interest in protecting its citizens from unwanted communications while they attend a funeral or burial service.”)

319. See Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097, 1127 (2007) (claiming that the “purpose and function” of the funeral picketing statutes is “to silence the unpopular viewpoints of a small sect of religious outsiders”).

320. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 358 (6th Cir. 2008) (upholding Ohio Funeral Procession Provision).

321. See Brownstein & Amar, *supra* note 35, at 386–87 (advocating that such damages be potentially awarded when the defendant had violated a constitutionally permissible law prohibiting funeral picketing).

322. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

323. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

324. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) (acknowledging that the Commission’s objections were based, in part, on the content of the broadcast).

325. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance

particular speech on the basis of a noncontent element, like noise, does not entail the power to proscribe the same speech on the basis of a content element.”³²⁶ Thus, merely because funeral protesting might be subject to sanction because violating a content-neutral time, place, or manner statute does not establish that the Court would uphold tort damages for intentional infliction of emotional distress based on the outrageous content of the comments made at the funeral, assuming that the comments involved matters of public concern. This means that even those violating the statute might not be subject to tort liability for the content of their speech.

At least two issues would be implicated in such a case. First, merely because a content-neutral time, place, or manner restriction had been violated would not mean that local law also permitted a tort action to be brought based on that violation. Second, even if local law did permit such an action,³²⁷ it is not clear after *Phelps* whether any tort award based on that violation would be upheld.

The *Phelps* Court emphasized that it “was what Westboro said that exposed it to tort damages,”³²⁸ and that “any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”³²⁹ But even if interference with the funeral was added to the facts of *Phelps*, a potential difficulty would still exist—that damages would have been imposed because the jury disagreed with the speech, not because the jury believed it was outrageous to stage a protest at a funeral. So, too, local law affording a tort remedy under these circumstances might not allay the Court’s worry that an award could be based on the jury’s disagreement with the message rather than on its belief that funerals should not be disturbed.

punishing cross burning because it targeted speech, even though those burning a cross in someone’s yard could have been prosecuted under other ordinances, for example against outdoor fires in city limits. *See id.* at 385.

326. *Id.* at 386 (1992).

327. *See, e.g.,* Chelsea Brown, Student Work, *Not Your Mother’s Remedy: A Civil Action Response to the Westboro Baptist Church’s Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 234 (2009) (“Mississippi enacted legislation, in addition to its criminal penalties, allowing any surviving member of the deceased’s family who is damaged or threatened with loss or injury by reason of a violation to sue for damages, so long as there is credible evidence that a person violated or is likely to violate the state’s prohibition against disruptive protest at a funeral service within one hour before, during, or after the service.”).

328. *Phelps*, 131 S. Ct. at 1219.

329. *Id.*

CONCLUSION

Phelps raises more questions than it answers. The Court explained that tort damages for nondefamatory speech on matters of public concern could not be awarded without offending constitutional guarantees. But the Court did not make clear which, if any, factors were dispositive, so it is difficult to determine whether—or to what extent—the case has import for either tort or First Amendment law.

One understanding of the opinion is that the case is not particularly noteworthy. At issue was quiet and orderly speech on a matter of public concern. The protest, which did not interrupt the funeral, complied with the directions of the police. When characterized this way, the case seems to involve political speech that took place in accord with local law and so should not, of course, be subject to tort damages. Many political statements are taken to heart and may cause real emotional harm,³³⁰ and the Court does not want to permit tort law to chill speech on important matters.

Yet, there are other ways to understand the decision that may make it a watershed opinion. While the *Phelps* Court suggested that its holding was “narrow,”³³¹ the Court did not do a particularly good job in limiting the applicability of the decision. The Court noted, for example, that Snyder did not see the content of the signs on the way to the funeral.³³² But suppose that he had, and the content of the signs was so distracting that Snyder’s mind was reeling both during and after the funeral. Would that be enough to change the holding even though the speech would have occurred in a public place on matters of public concern? After all, as the Court pointed out, speech can “inflict great pain.”³³³ By the same token, it is uncertain whether the Court would uphold content-neutral funeral protest limitations and, even if it did, whether the Court would uphold tort liability for the violation of such a statute by protesters discussing matters of public concern.

An additional question is whether *Phelps* has implications for the intersection of tort and First Amendment law more generally. The *Phelps* Court implied that liability could not be imposed because the

330. See *id.* at 1220 (“Speech 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.”)

331. *Id.*

332. *Id.* at 1213–14.

333. *Id.* at 1220.

speech at issue involved matters of public concern.³³⁴ But if speech on matters of public concern can be immunized in the funeral protest context, then one must wonder whether matters of public concern will now be trumpeted in other contexts as well. For example, this could be a signal that the Court wishes to resurrect *Rosenbloom*, its overruling of the case in *Gertz* notwithstanding,³³⁵ and require actual malice in all defamation cases involving matters of public concern, whether or not the plaintiff is a public figure.

The Court's suggestion that some matters not of public concern were not actionable because "the overall thrust and dominant theme . . . spoke to broader public issues"³³⁶ cannot help but confuse the current jurisprudence. One cannot tell, for example, whether the Court is signaling that speech on a matter of public concern, if predominating, will immunize actionable speech on matters of purely private concern, as long as the former speech is not offered to insulate the latter.³³⁷ This would be a significant change in the current jurisprudence. As Justice Alito suggests, the "First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern."³³⁸ If, indeed, the *Phelps* family's comments on matters of purely private concern would have been actionable but for their comments on matters of public concern, it is not clear jurisprudentially why their comments on matters of public concern should have had an immunizing effect.

One must also wonder whether *Phelps* has implications for the constitutional limitations on awards in non-defamation cases. In the past, the Court has refused to preclude liability merely because the speech at issue involved a matter of public concern.³³⁹ One cannot tell, however, whether the *Phelps* holding has implications for a case like *Zacchini*—perhaps even a case involving unjust enrichment would be barred if it involves a publication on a matter of public concern. Or, perhaps, *Phelps* is not intended to apply to tort damages where defamation is not at issue.³⁴⁰ Indeed, it is not clear whether an unjust

334. *Id.* at 1215.

335. *See supra* Part II.A.2–3.

336. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217.

337. *Cf. id.* ("We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability.").

338. *See id.* at 1227 (Alito, J., dissenting).

339. *See supra* notes 171–76 and accompanying text.

340. Defamation was at issue in *Phelps* at the trial level, where the trial court held that there was no defamation as a matter of law. *See supra* note 27 and accompanying text.

enrichment action against funeral protesters would pass constitutional muster, assuming that the elements of the tort were met under local law.

Some may celebrate the open-ended nature of *Phelps*, because it can be read as either being quite consistent with the pre-existing jurisprudence or as effecting a sea-change in the jurisprudence. But lower courts seeking guidance from the Court cannot help but feel frustrated. Not only has the Court failed to tell them which factors are important in funeral protest cases in particular, but the Court has virtually extended an invitation to lower courts to modify the existing jurisprudence. Consequently, a relatively clear area of the law is likely to become more, rather than less, confused. While the result in *Phelps* may have been correct, the opinion itself has the potential to be a source of much regret.