BALANCING INTERESTS: FREEDOM OF SPEECH v. FREEDOM TO REST IN PEACE

I. INTRODUCTION

Albert Snyder’s ("Snyder") enduring emotional pain began with the loss of his son, Marine Lance Corporal Matthew Snyder, who was killed in Iraq. Then the pain was exacerbated by an obnoxious protest during his son’s funeral. The protest was organized by Westboro Baptist Church ("WBC") to disseminate their message that “God kills U.S. Troops as a punishment for the country’s tolerance of homosexuality . . . .”\(^1\) Outside the funeral, WBC members held inflammatory signs reading “Thank God for Dead Soldiers” and “God Hates You.” Knowing of the protester’s presence and then seeing the signs on television later caused Snyder emotional trauma,\(^2\) which often made him sick to the point of vomiting. After three months of anguish, Snyder sued WBC for intentional infliction of emotional distress (“IIED”) among other things. A jury found in Snyder’s favor, but the 4th Circuit Court of Appeals reversed finding the signs were free speech under the First Amendment. Snyder appealed to the Supreme Court, which will hear oral arguments in October.\(^3\)

This commentary addresses whether the Supreme Court should allow Snyder’s IIED claim in light of WBC’s First Amendment right. Part II provides a background of the Court’s relevant precedent. Then, Part III analyzes Snyder’s IIED claim in light of that precedent. Finally, Part IV concludes that WBC’s deplorable actions should not be immune from suit by invoking the freedom of speech that Matthew Snyder died to protect.

II. BACKGROUND

Freedom of speech is “recognized throughout the world as an essential component of a just society.”\(^4\) In the U.S., the framers enshrined this freedom in the First Amendment to the Constitution, affirming that “Congress shall make no law . . . abridging the freedom of speech.”\(^5\) The question since its ratification has been how far does that freedom extend, especially when others are harmed by the speech.
In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court unanimously ruled that the First Amendment protected a magazine against an IIED claim for an offensive and even repugnant parody of a public figure, Jerry Falwell. The Court found that the nature of public debate will sometimes allow for caustic and even offensive attacks. This is because freedom of expression requires “breathing space.” Accordingly in *Philadelphia Newspapers, Inc. v. Hepps*, the Court even found First Amendment protection for a newspaper against a defamation claim by a private figure to ensure an uninhibited debate on issues of public concern. Thus, public and even private figures can be limited in civil suit to protect a defendant’s freedom of speech.

However, “it is well understood that the right of free speech is not absolute at all times and under all circumstances.” As a result, the Supreme Court has limited the protection of speech in some specific instances. For example, the Court in *Chaplinsky v. New Hampshire* upheld a man’s conviction, in spite of the First Amendment, for calling a city marshal a “God damned racketeer.” This limitation is referred to as “fighting words” because some words “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

### III. Jurisprudence Justifies Snyder’s Claim

The First Amendment jurisprudence presented above can be broken down into two independent methods for analyzing Snyder’s claim. There is the development of heightened burdens to afford more “breathing space” for speech involving public figures or public concerns. Here, Snyder’s claim is distinguished as a private figure suing a non-media defendant for IIED. On the other hand, Snyder’s claim could fall within the “fighting words” precedent. There, the Court limits speech because of personal abuse or inciting a breach of the peace. WBC’s signs and protest fall within those parameters. Thus, under either line of thinking Snyder’s IIED claim should be allowed to proceed against WBC.
A. Private Persons, More Vulnerable, More Deserving of Recovery

"In New York Times v. Sullivan, the Supreme Court expressly held that the First Amendment limits the ability of government to impose tort liability." There, the Court sought to strongly protect political speech by holding that a public official could only recover in defamation by proving "actual malice." Since then, the Court has articulated two different "forces"—whether the plaintiff is a private or public figure and whether the matter is of public concern—that will alter a plaintiff’s burden in order to protect a defendant’s speech. There also seems to be another consideration at play in the background—whether the defendant is part of the media—though the Court has never explicitly invoked that as a "force."

First Amendment protection is at the highest when the speech is of public concern regarding a public official. For example, in Hustler v. Falwell, the Court applied the NY Times standard of proof to IIED. This case is at the "high end" of the scale because a public figure is suing for emotional injury caused by a media defendant’s speech about a public matter. There is no dispute that Hustler, a "publication," is a media defendant or that Falwell is a public figure. Falwell is a minister and active commentator on politics. In other words he has "thrust himself into the vortex of [a] public issue" and has "engage[d] the public’s attention in an attempt to influence its outcome." While Snyder’s claim is also an IIED claim, it does not fall within this precedent. Snyder did not thrust himself into any public issue nor engage the public’s attention; rather, WBC thrust this issue upon Snyder. In other words, Snyder is a private figure and therefore his claim should not be subjected to the heightened Falwell standard.

A different standard applies to private persons because they are “more vulnerable to injury” and “more deserving of recovery.” Private people have not placed themselves in the public eye and they have less access to media to
counteract a defendant’s speech, so states have a strong interest in compensating their citizens for harm by defamation. Therefore, the First Amendment applies, but the constitutional requirements are “less foreboding” than for public figures. Here, the only limit is that there cannot be liability without fault. This precedent so far only exists in defamation cases, but the reasoning is still applicable to an IIED plaintiff who is no less vulnerable. Since an IIED claim requires both intent or recklessness and causation, there will be no liability without fault. Accordingly, Snyder’s IIED claim is in accord with this First Amendment precedent.

The only limit may potentially be for punitive damages. The past precedent, as articulated above, held that a private plaintiff could recover actual damages, but for punitive damages more was required. Punitive damages do require the heightened NY Times standard of actual malice. This is when the cases involved “speech of public concern,” which “is at the core of the First Amendment’s protections.” If the speech is exclusively of private concern, then a private plaintiff has no added constitutional requirement even for punitive damages. Speech of “public concern is something that is a subject of legitimate news interest” or “a subject of general interest and value of concern to the public . . . .” The 4th Circuit found that WBC’s signs are public concern because they involve the issue of homosexuals in the military. While the 4th Circuit finding is debatable, it is not necessary to do so since either way Snyder’s claim should proceed.

Though the private person precedent above poses no limit to Snyder, the 5-4 holding of Philadelphia Newspapers, Inc. v. Hepps did require a private plaintiff to prove the statements at issue were false.” However, this additional requirement should not apply to Snyder’s case. First, Hepps is a defamation claim, not an IIED. Though the Court in Falwell did adopt a defamation standard to an IIED claim, the Court specifically noted that was not a “blind application” and was necessary to give “breathing space” when a
public figure is involved. Thus, a similar careful consideration would not result in a blind application of *Hepps* to Snyder. Further, the holding of *Hepps* specifically applies to a “media defendant.” While the Court has never articulated a distinction between media and nonmedia defendants, it is not likely WBC would be considered a member of the media. In summary, Snyder a “vulnerable” private person should only be limited by proof of fault and in no sense should a *Falwell* “absolute bar” be applied to Snyder’s claim.

**B. First Amendment, Subject to Limitations**

Even when the First Amendment protections are at the highest in *Falwell*, the Court still admits the First Amendment has limits. For example, “vulgar, offensive and shocking [speech] is not entitled to absolute constitutional protection under all circumstances.” It is hard to imagine that signs thanking god for dead soldiers at a funeral could be considered anything but offensive and shocking. However, the First Amendment does not allow censoring speech simply because society may find it offensive or disagreeable. The limit lies in specific precedent like *Chaplinsky v. New Hampshire*.

There, the Court found a limit to the First Amendment for “fighting words.” As said above, these are words that by their very nature inflict injury or threaten a breach of the peace. In *Chaplinsky*, a man was criminally convicted for directly calling a city marshal a “damned racketeer.” The Court held that such “epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.” The WBC’s signs similarly are epithets and personal abuse that should not be protected by the First Amendment. Any reasonable person would understand a grieving military parent would be injured by the very utterance “Thank God for Dead Soldiers” outside the funeral.

Since the decision in *Chaplinsky*, the Court has not again applied the “fighting words” doctrine and a few cases have narrowed the precedent. However, Snyder’s case is distinguishable from each. In *Cohen v. California*,
the Court overturned a man’s conviction for wearing a “Fuck the Draft” shirt in a courtroom on First Amendment grounds. “No individual actually . . . present could reasonably have regarded the words on [Cohen’s] jacket as a direct personal insult.” This four-letter word is definitely offensive and provocative, but the message was only an abstract idea, not directed at any specific person. This is much different from the WBC’s signs. A sign outside a funeral reading “God Hates You” is not an abstract idea, but an epithet directed at Snyder’s son. Further, WBC specifically chose to be outside Matthew Snyder’s funeral, not just an ordinary public place like in Cohen. Thus, Snyder is distinguishable from Cohen because he was actually present and found the signs to be a personal insult.

Another case cited for limiting “fighting words” is Texas v. Johnson. There, a man was convicted under a state law for burning an American flag outside the Republican National Convention to protest President Regan’s policies. The state argued that this conduct incited a breach of the peace, but the Court found it was not directed at any particular person. While indeed many Americans are offended by the burning of an American symbol, no reasonable onlooker would regard Johnson’s dissatisfaction with the Regan administration as “a direct personal insult or invitation to exchange fisticuffs.” However, Snyder did find the hateful WBC signs to be a direct personal insult and reasonable people (i.e. the jury) agree. Further, WBC is not being sued for its “dissatisfaction with the policies of this country,” like Johnson, but rather for its intent to cause Snyder emotional distress. Therefore, Snyder’s case is distinguishable from the cases narrowing Chaplinsky’s “fighting words” doctrine.

Furthermore, the signs not only insult and abuse one direct target, but they could also incite a breach of the peace. Local officials had the police, fire departments, and ambulances on hand for fear that there could be a violent outbreak. Many passer-bys flipped WBC the finger or yelled from
cars.\textsuperscript{49} Luckily violence did not occur, but had the city not prepared in advance these exchanges could have easily resulted in a public disorder. It well may be that the Court has never since applied Chaplinsky, but it has not been overruled\textsuperscript{50} and recent cases like Falwell still cite its principle.\textsuperscript{51} Thus, Snyder’s case might be the very case to renew the “fighting words” jurisprudence.

IV. Conclusion

Although much Supreme Court precedent balances in favor of protecting the First Amendment freedom of speech over tort claims, Snyder’s claim is distinguishable from such precedent. However, the cases most similar to Snyder’s claim like Chaplinsky or the private person precedent are the ones where the balance has shifted in favor of the individual affected by the speech. Thus, the Court should not find WBC immune from an IIED claim for its deplorable conduct, albeit speech, outside Matthew Snyder’s funeral.

Nothing in this commentary is meant suggest that speech should be censored just because it is offensive or harsh. In fact, the author agrees with Justice Black that it cannot “be too often repeated that freedom of speech . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later [it] will be denied to the ideas we cherish.”\textsuperscript{52} WBC should be free to take their message against homosexuals in the military around the country to city halls or even the Department of Defense. However, lines must be drawn because “not all speech is of equal First Amendment importance.”\textsuperscript{53} Speech that directly insults and abuses a private person during a funeral, causing serious emotional trauma is one speech that should not be awarded much importance. If the Supreme Court can uphold restrictions on speech outside abortions clinics,\textsuperscript{54} it should similarly allow a man to bring an IIED suit for preventing his son’s memory from resting in peace.

\textsuperscript{1} Dan Lamothe, Snyder-Phelps Fight Has Many Twists, Turns, \textit{Marine Corps Times}, Apr. 6, 2010,

3 Lamothe, supra note 1.


5 U.S. Const. amend. I.


7 See id. at 51-53.


9 Hepps, 475 U.S. 767.


11 Id. at 569.

12 Id. at 572.

13 Erwin Chemerinsky, Constitutional Law § 11.3.5.1, at 1044 (3d ed. 2006).

14 Id. § 11.3.5.2, at 1045-46.

15 See Hepps, 475 U.S. at 775.

16 See Chemerinsky, supra note 13, § 11.3.5.2, at 1054.


Falwell, 485 U.S. at 56-57.

Id. at 47.

Chemerinsky, supra note 13, § 11.3.5.2, at 1045 (quoting Gertz v. Welch 418 U.S. 323, 352 (1974) (defining a public figure)).


Id. at 773-74 (majority opinion) (citing Gertz v. Welch 418 U.S. 323, 341, 344-45 (1974)).

See Id. at 775 (citing Gertz v. Welch 418 U.S. 323 (1974)).


See Hepps, 475 U.S. at 774 (citing Gertz v. Welch 418 U.S. 323, 348-350 (1974)).

Id. at 778 (1986) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 758-59 (1985)).

Id.

Calvert, supra note 25, at 66.

Lamothe, supra note 1.

Hepps, 475 U.S. 767.


Hepps, 475 U.S. at 777; See also Chemerinsky, supra note 13, § 11.3.5.2, at 1054 (specifying that the holding only applies to media defendants).

Chemerinsky, supra note 13, § 11.3.5.2, at 1054.

Smolla, supra note 18, at 300.
36  **Falwell**, 485 U.S. at 56 (quoting **FCC v. Pacifica Foundation** 438 U.S. 726, 747 (1978)).


39  Id. at 572.


41  **Chemerinsky**, supra note 13, § 11.3.3.2, at 1003 (citing **Cohen v. California**, 403 U.S. 15, 20 (1971)).


44  See **Lamothe**, supra note 1.

45  **Chemerinsky**, supra note 13, § 11.3.3.2, at 1003 (citing **Texas v. Johnson**, 491 U.S. 397 (1989)).


47  Id. at 409.

48  Id. at 411.

49  **Lamothe**, supra note 1.

50  **Chemerinsky**, supra note 13, § 11.3.3.2, at 1002.


52  **Massey**, supra note 40, at 172.

53  **Falwell**, 485 U.S. at 56.

54  **O’Reilly Factor**, supra note 43.