SPEAK NO ILL OF THE DEAD: WHEN FREE SPEECH AND HUMAN DIGNITY COLLIDE

I. INTRODUCTION

"God Hates Fags." "Semper Fi Fags." "Thank God for Dead Soldiers." These are just three of the messages displayed on signs at the funeral of Lance Corporal Matthew Snyder on March 10, 2006, by Rev. Fred Phelps and members of the Westboro Baptist Church of Topeka, Kansas.[1] The lawsuit surrounding this funeral protest was not the first time this church has been involved in litigation over its controversial rhetoric and picketing at soldier funerals.[2] Albert Snyder, the father of Matthew, filed a complaint in June 2006, alleging five state law tort claims against Westboro.[3] The Phelps family and other members of Westboro Church defended their protest, saying that their speech was of a religious nature and merited absolute constitutional protection.[4] They further stated that the funeral was both a public matter and involved public individuals because notice of the funeral was put in the local newspaper.[5] Summary judgment was granted on two of the claims and denied on the rest with a trial proceeding on the intrusion upon seclusion, intentional infliction of

1. This is just a sampling of the signs held up that day, the majority of them addressed similar topics such as hatred from God towards soldiers, particularly homosexuals, statements hoping for U.S. defeat in ongoing conflicts, a general desire to see the nation fail, and even attacks on the Catholic Church. Snyder v. Phelps, 580 F.3d 206, 222 (4th Cir. 2009).

2. *See also* Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008); Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008).

3. The following are the claims of the Snyder family at the district court level: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress (IIED), and civil conspiracy. *Snyder*, 580 F.3d at 212.

4. Snyder v. Phelps, 533 F. Supp. 2d 567, 576 (D. Md. 2008), *rev'd* Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009).

5. *Id.* at 577.

emotional distress (IIED), and civil conspiracy claims.[6] On October 31, 2007, the trial jury found for Snyder on the three claims awarding him $2.9 million dollars in compensatory damages and $8 million in punitive damages.[7] The District Court of Maryland agreed with this finding but reduced the damages by almost half.[8] The Defendants appealed, and the Fourth Circuit Court of Appeals unanimously reversed the district court's judgment, holding that the judgment contravened the First Amendment of the Constitution.[9] In March of 2010, the U.S. Supreme Court granted the petition for writ of certiorari.[10] The petitioners in this case submitted three questions for the Court to answer: Whether *Hustler Magazine, Inc. v. Falwell* applies to private persons against other private persons concerning a private matter, whether freedom of speech trumps other First Amendment freedoms such as religion and peaceful assembly, and whether an individual attending a family member's funeral constitutes a captive audience who is entitled to state protection from unwanted communication.[11]

The recent decision of *Snyder v. Phelps* by the Supreme Court should be remembered as a missed opportunity for needed change within defamation law. This Note will argue what changes should have come from the case and why such changes would be an improvement over existing law. First, I will give a brief history of how the Court has treated defamation and speech tort liability and the states' reactions to those decisions. I will then discuss the interests at play and problems with the current Supreme Court approach. This Note will argue that the current jurisprudential framework needs change in order to add clarity and uniformity, while serving the important ends of speech tort liability. Possible suggestions will be entertained and the Note will outline a summary of the desired result in this case. The alternative framework will provide for a constitutional standard that expressly provides for opinion and extends the same constitutional standard of defamation for all types of individuals. I will conclude with a summary and brief analysis of the Court's holding in the case and the reasoning behind the decision.

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6. *Snyder*, 580 F.3d at 213. In granting summary judgment on the defamation claim, the appeals court in this case focused largely on if the statements were defamatory or protected speech and then if a remedy was available. The district and appeals courts looked at the case through entirely different lenses.

7. *Id.* at 215.

8. *Id.* at 216.

9. *Id.* at 211.

10. Grant of Certiorari, Snyder v. Phelps, 130 S. Ct. 1737 (2010).

11. Petition for Writ of Certiorari, *Snyder*, 2009 WL 5115222 (2009) (No. 09-751).

II. DEFAMATION IN THE SUPREME COURT[12]

Supreme Court treatment of defamation law in a constitutional context began in 1964 with the landmark case of *NY Times v. Sullivan*.[13] The Court continued to build on this foundation and added more categories and rules with *NY Times* as the touchstone. Later cases like *Curtis Publishing Co. v. Butts*[14] and *Rosenbloom v. Metromedia, Inc.*[15] extended the constitutional privilege. In the former case, the Court noted some disagreement amongst the states about how to apply the *NY Times* standard, something that appears often in defamation jurisprudence. The plurality based their holding in *Rosenbloom* on the idea that a "public" and "private" distinction made little sense. A different standard based on a public figure voluntarily exposing himself to public scrutiny and the private figure attempting to shroud his life from public view is a legal fiction, which can dampen discussion of important public concerns.[16] An issue of public concern does not become any more or less public and important if brought by a private individual. The plurality opinion concluded that the actual malice standard should be used with any matters of public concern, regardless of what category the plaintiff falls in.[17]

As the law stood in 1971, the Court seemed to be moving toward a cohesive and uniform defamation standard but that movement suffered a major blow in the seminal case of *Gertz v. Welch*.[18] Not only did *Gertz* change the standard for private individuals, abrogating *Rosenbloom*, but the states regained the power to make defamation law with only a single federal limitation. The divided Court held that the categories of private

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12. The Note will largely ignore the common law history of defamation law and early doctrines like fair comment, other than what is mentioned in the cases cited.

13. A unanimous majority in that case held

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering 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.

NY Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

14. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Though Justice Harlan wrote the plurality opinion, a majority of the Court agreed with Justice Warren's concurrence which found, in part, the division between public officials and public figures and the separate standards to have "no basis in law, logic or First Amendment policy" and public figures should be held to the same standard as public officials in *NY Times*. *Id.* at 163.

15. Though later overturned, the Court here continued its march towards finding *NY Times* as a standard for all people in defamation actions. The Court held

> that a libel action by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.

Rosenbloom v. Metromedia, 403 U.S. 29, 51 (1971), *overruled by* Gertz v. Welch, 403 U.S. 29 (1974).

16. *Id.* at 48.

17. *Id.* at 29.

18. *Gertz*, 418 U.S. 323 (1974).

and public persons needed to remain because private individuals are more vulnerable to injury and the state has a greater interest in protecting them.[19] Therefore, the states retained substantial latitude in enforcing defamatory remedies against harm to the reputation of private individuals.[20] The states could define the appropriate standard of liability for defamatory falsehood against an individual, as long as they did so without imposing liability without fault.[21] It is worth noting that the dissenters pointed to some of the growing problems with defamation law. Justice Douglas noted the broader issue of trying to find the proper accommodation between the law of defamation and the freedoms in the First Amendment, calling the struggle a "hopeless" one.[22] Most importantly for my later arguments, Douglas voiced concern about leaving the standards in the hands of the states, possibly eroding the safeguards provided by established constitutional protection for speech.[23]

The prospect of returning to an actual malice standard for any speaker, as stated by the *Rosenbloom* plurality, remained unsatisfied with *Milkovich v. Lorain Journal Co.*[24] The respondents in *Milkovich* sought to have the Court recognize explicit protection for opinion, relying mostly on dictum from *Gertz*.[25] In *Milkovich*, the Court stated explicitly that the dictum in *Gertz* was not intended to create a wholesale defamation exemption for anything that might be labeled opinion.[26] The Court found that the existing constitutional doctrine would provide the "breathing space" which freedom of expression requires without having to create a dichotomy of opinion and fact.[27] The Court also gave a general rule on when statements

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19. *Id.* at 344.
20. *Id.* at 345-46.
21. *Id.* at 347.
22. *Id.* at 356 (Douglas, J., dissenting).
23. The other dissenting opinions vary somewhat. Some opinions argued issues only tangentially discussed in this Note. The thrust of Justice Brennan's opinion, a return to *Rosenbloom*, proved to be the most applicable to my arguments. Justice Brennan stated that the proper balance between censorship and protection of reputation would best be achieved if the States were required to apply a knowing or reckless falsity standard for all matters of public interest. *Gertz*, 418 U.S. at 361 (Brennan, J., dissenting). He held fast to the idea that the category of speaker as public or private should not matter and the same standard should apply, the actual malice standard. Justice Brennan believed that social interaction exposes the speaker to some degree of public view and that such exposure is essential to life in a society that values freedom of speech such as this one. *Id.* at 364. The current court would be well served to return to Brennan's arguments here.
24. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1980).
25. The dictum in *Gertz* stated that

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz, 418 U.S. at 339-40.
26. *Milkovich*, 497 U.S. at 18.
27. *Id.* at 19 (quoting Philadelphia v. Hepps, 475 U.S. 767, 772 (1986)).

are to be protected but stopped short of declaring an opinion privilege.[28] Within its general standard, the *Milkovich* majority authored two types of speech that would be inherently protected. First, the First Amendment protects statements on matters of public concern that fail to contain a "provably false factual connotation."[29] Second, rhetorical statements that employ "loose, figurative, or hyperbolic language" receive protection, in the name of preserving the integrity of public discourse.[30] The usefulness of this two tiered categorical approach remains arguable, though the Fourth Circuit concluded the speech in *Snyder* fell into these categories and gave it protection.[31]

III. STATE LAW IN THE WAKE OF *GERTZ* AND *MILKOVICH*

With the Court's rejection of an outright constitutional protection for opinion and in turn giving the power back to the states to regulate defamation remedies, problems began to be evident. State courts have reached divergent results when deciding whether an opinion should be protected. Deferring to the states might breed problems of uniformity but historically the states controlled the standards of defamation.[32] The varied responses to *Milkovich* have included states inserting an opinion privilege in their constitutions, through case law, or using a different rule based on their state law. The New York Court of Appeals in *Immuno AG. v. Moor-Jankowski* looked to state law and the historical treatment of liberty of the press and declined to follow *Milkovich*.[33] The court decided the case using state law only and stated that any reference to federal cases was for purpose of guidance.[34] Ultimately, the court in *Immuno* adopted a similar but subtly different test.[35] The court believed the standard in *Immuno* better

28. In his dissent, Justice Brennan summarized the Court's holding on fact and opinion stating "full constitutional protection extends to any statement relating to matters of public concern that cannot be reasonably interpreted as stating actual facts about an individual." *Id.* at 24 (Brennan, J., dissenting). Justice Brennan continued and enumerated the factors that the courts should use to determine if actual fact was stated by someone, hereafter referred to as the *Ollman* factors. For a list of the factors and analysis, *see infra*, note 64.

29. *Milkovich*, 497 U.S. at 20.

30. *Id.* at 20-21.

31. *Snyder*, 580 F.3d at 223.

32. American defamation law has roots in English common law. Guided later by the First Restatement in 1938 and common law rules like strict liability, state courts fashioned their own laws until the Supreme Court entered the discussion with *NY Times*. *See* RESTATEMENT (FIRST) OF TORTS § 569 (1938).

33. *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991).

34. *Id.*

35. The *Immuno AG.* majority seemingly adopted a more contextual approach than the court in *Milkovich*:

> [W]e believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose, balances the values at stake rather than an analysis that first examines the challenged statements for express and implied factual assertions, and finds

balanced the values at stake than *Milkovich*. Other states struggled to reconcile the *Milkovich* holding with existing state law. Some granted broader protection than the Supreme Court, some fell in line with federal protection, and some states decided their cases based on pre-*Milkovich* tests.[36]

To the Court, the reasonableness test and two separate categories of *Milkovich* put no more burden than necessary on the exercise of free speech. However, in light of the number of state cases that are declining to follow *Milkovich*, the impact of that case must be called into question. The rules authored by the Court provided little guidance for what statements deserve protection. The first class of speech protected for example, statements of opinion that cannot reasonably be interpreted as stating actual facts, used a difficult to apply standard.[37] There are important fundamental freedoms at stake, and perhaps a clearer constitutional standard that prevents states from fashioning their own rules might be the best way to ensure that all people are protected and freedom of speech is honored.[38]

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them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances.

Immuno AG., 567 N.E.2d at 1281 (internal citations omitted).

36. *See, e.g.*, Beattie v. Fleet Nat. Bank, 746 A.2d 717, 724 (R.I. 2000) (holding under state law that a person does not abuse his or her state constitutional liberty of publishing sentiments on any subject if those sentiments are in the form of an opinion based upon disclosed, nondefamatory facts); Lyon v. Globe Newspaper Co., 612 N.E.2d 1158, 1161 (Mass. 1993) (declining to adopt *Milkovich*, but instead following the Restatement (Second) of Torts as adopted by the Massachusetts Supreme Court before *Milkovich*); Vail v. The Plain Dealer Publishing Co., 649 N.E.2d 182, 185 (Ohio, 1995) (holding that regardless of the outcome in *Milkovich*, the Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press); Scott v. News-Herald, 496 N.E.2d 699, 706 (Ohio 1986) (holding that Ohio law uses the totality of circumstances in determining if a statement is fact or opinion, including examination of factors such as the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared). These four factors, often called the *Ollman* factors were first announced in *Ollman v. Evans* and are the same as stated by Justice Brennan in his dissent in *Milkovich* when discussing the indicia the lower courts have used to differentiate fact from opinion. Ollman v. Evans, 750 F.2d 970 (1984). *See also* Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision about the Sanctity of Opinions under the First Amendment*, 19 TOURO L. REV. 119 (2002).

37. As most lawyers or law students who still have the ability of long-term recall would attest, tests involving whether some action is reasonable became something engrained in the mind of the eager students early in law school. It has been used in first year subjects like torts or criminal law but also extends to more specific issues. Used commonly for cases involving negligence or self-defense to name two examples, a reasonableness analysis remains tough to apply with speech liability. Making a speaker undertake a reasonable person analysis before speaking or being open to liability burdens free speech. Determining whether a speaker's statement reasonably states actual facts places an objective test onto individual speech, communication often based entirely on subjective ideas of fact or opinion. For a great overview of reasonableness in different applications in the law, see Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS AND CLARK L. REV. 1233 (2010).

38. This proposal for a federal standard in a field of law that has historically been controlled by the states brings up interesting Tenth Amendment issues, most of which are beyond the scope of this Note. Often cited as a constitutional truism, the Tenth Amendment states that the powers not delegated to the United States by the Constitution nor prohibited by it, are reserved for the states. The Amendment has been used by the Supreme Court to invalidate actions of Congress in commandeering

IV. ATTEMPTING TO FORMULATE A WORKABLE OPINION DEFINITION

The issue still remains of what is the best way to differentiate between opinion and fact. Courts have come up with various approaches. Justice Brennan in *Milkovich* discussed the context-based approach (guided by the *Ollman* factors) that some states and circuits have adopted, which involves looking at the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.[39] Generally, there are three avenues the Courts of Appeals have followed. Some courts followed *Milkovich* and its test for opinion and the two categories that merit protection. Others have followed a circumstances test, patterned after the *Ollman* factors. Some have taken from both tests, resting largely still on the context of the statement.[40]

A fact-specific, context-based test clearly has some benefits. It provides the flexibility conducive to the varied facts confronting courts and

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state legislatures, in cases involving Congress and their spending power, or limiting Congressional action under the Commerce Clause as being outside their enumerated powers. This is not a case where the desired result involves Congressional action, but the issue remains about what effect the Tenth Amendment would have on such a far reaching judicial decision as the one discussed below. Also, whether this Amendment has any force beyond being a truism has to be doubted after *United States v. Darby Lumber Co.*, where the Court said

> that nothing in the history of the adoption suggests it was more than declaratory of the relationship between the national and state governments as it have been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted.

United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941). This proposed action by the Supreme Court would likely have Tenth Amendment implications, as a state could attempt to challenge the decision as overreaching by the federal government. There has been extensive research on the power of the Tenth Amendment in a constitutional context. Seeing as the Tenth Amendment proved surmountable for the no liability without fault constitutional standard found in *Gertz*, the rules proposed here should pass under similar analysis. *See* Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

39. *Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting).

40. Some courts used *Milkovich* but in conjunction with earlier defamation frameworks, such as the pre-*Ollman* tests like the Second Restatement or a totality of circumstances approach. Regardless of the tests used, courts seemed to place emphasis on context. *See, e.g.*, Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987) (holding that the second *Ollman* factor of verifiability would provide a threshold issue and that if a statement can be verified, then a factfinder would look to see if a reasonable reader would recognize the subjective character of the opinion and disregard it); Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 180 (4th Cir. 1998) (stating that *Milkovich* rejected the *Ollman* factors but still looked to the "context and general tenor of the article" to find the statements in question to be protected subjective views and not verifiable facts); Flam v. Am. Ass'n of Univ. Women, 201 F.3d 144, 147 (2d Cir. 2000) (rejecting any pre-*Mikovich* opinion law, but as with the *Ollman* analysis, focused on the content of the statement); McClure v. Am. Family Mut. Ins. Co., 223 F.3d 845, 853 (8th Cir. 2000) (applying a four factor test articulated in *Janklow v. Newsweek Inc.*, a test that was based on the *Ollman* factors); Lieberman v. Fieger, 338 F.3d 1076, 1079 (9th Cir. 2003) (applying the antecedent to the *Ollman* test, the totality of circumstances test); Gardner v. Martino, 563 F.3d 981, 986 (9th Cir. 2009) (also following the totality of circumstances test which looks to the general tenor of the entire work, whether hyperbolic language was used and whether the statement in question is susceptible of being proven true or false).

allows the states to provide for whatever protection they deem necessary.[41] Part of the issue with this approach, as Justice Douglas stated in *Rosenbloom*, is that the possible infringements on free speech seem more likely without justiciable standards at the federal level. Using a context-based approach will not give a speaker adequate notice of what speech is going to violate a person's name interest and whether they will be exposed to a possible lawsuit. Forcing a speaker to engage in a contextual assessment, which may or may not coincide with the analysis by a factfinder, before speaking or risk being subject to a lawsuit would bring an undesired chilling effect.

The *Milkovich* standard using a reasonable assertion of fact standard is also difficult to apply. Inquiries of reasonableness involve objective examination and that can be difficult to apply to speech that could be subjectively stated as fact or opinion. The issue is not just whether the existing framework will protect the interests at stake, as it often accomplishes that, but whether other parties are granted notice of the standards that might be used against them in a defamation claim. Speech is a high priority for the Court and constitutional standards should do more work to preserve free speech. The law in this field would benefit greatly from less amorphous standards of what qualifies as fact or opinion and then a constitutional mandate to make opinion a defense to a defamation charge. The *Ollman* factors as a guidepost to determining context are the best place to start, but subjective intent of the speaker should not be dismissed as easily as the majority did in *Milkovich.*

V. JUSTIFYING A CONSTITUTIONAL PROTECTION FOR OPINION

While protection of free speech continues to retain a position of high importance, should free speech be considered of high enough importance to remove all restrictions?[42] The First Amendment contains language granting an absolute freedom of speech, but the Court has placed limits on the right.[43] Many rationales have been given by the Supreme Court for

41. The problem with having speech analyzed on a case-by-case basis has already been addressed by the Court to a certain degree. The *Gertz* majority remained concerned about balancing the needs of the press and speech with the individual's claim to compensation. The majority surmised that ad hoc resolutions to dealing with the interests at stake would lead to "unpredictable results and uncertain expectations and it could render our duty to supervise the lower courts unmanageable." *Gertz*, 418 U.S. at 343. Because of this, a constitutional standard came into effect, much like what the Court should have established in *Snyder v. Phelps*.

42. One could argue that opinion should always be a defense. Perhaps the interests of an individual being able to say what they want should reign supreme over everything else all the time. That argument is not going to be made in this article and the law has limitations in place that will likely remain in some form. However, the idea of true free speech as stated in the Bill of Rights is not such an outlandish idea.

43. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that the Constitution provides no protection of fighting words, defined as words which by the very utterance

holding freedom of speech in such a high regard. The search for truth has been a compelling rationale for many Justices, masterfully articulated in the "marketplace of idea" theory by Justice Holmes in *Abrams v. United States,* where he said, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[44] Justice Brandeis embraced this outlook even further, stating that "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[45] While a government or court could censure speech in the name of protecting individuals or a compelling state interest, the marketplace theory provides the best justification for allowing it.

Whether the speech in *Snyder* contributes to any sort of search for truth or enriches the marketplace of discussion cannot easily be determined. That is perhaps a benefit and also a drawback of justifying speech under Holmes's approach, as offensive speech with perhaps just a modicum of usefulness in public discourse would be allowed without restriction. The Fourth Circuit stated that the speech would not be treated as obscenity or fighting words, so it would not fall into any presumptively unprotected speech categories.[46] There are many examples of speech that might be considered offensive or inappropriate which received protection in the past, and the statements by Westboro Baptist Church should receive that same First Amendment protection.[47]

Another important principle in valuing free speech more than the dignity of one's name could be describing the speech as beneficial in enhanc-

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inflict injury or tend to incite an immediate breach of the peace); Miller v. California, 413 U.S. 15, 36 (1973) (reaffirming that obscenity is not protected by the First Amendment and giving a multi-part test of such speech); Cent. Gas & Electric Corp. v. Pub. Serv. Comm'n of NY, 447 U.S. 557, 563 (1980) (holding that commercial speech receives lesser protection than other constitutionally guaranteed expression); New York v. Ferber, 458 U.S. 747, 763 (1982) (holding that child pornography is a presumptively unprotected speech category)

44. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

45. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

46. *Snyder*, 580 F.3d at 221.

47. *See, e.g.,* Virginia v. Black, 538 U.S. 343 (2003) (holding that speech as hateful as cross burning cannot be banned simply because the speech is offensive); Cohen v. California, 403 U.S. 15 (1971) (while overturning the conviction of a Vietnam protestor who entered a courtroom with a jacket stating "Fuck the Draft," the Court noted that the government cannot cleanse public debate just because the manner of speech might offend some individuals); U.S. v. Stevens, 130 S. Ct. 1577, 1592 (2010) (holding that a federal law criminalizing commercial sale, creation, or possession of certain depictions of animal cruelty, largely appealing to persons with a very specific sexual fetish, as overbroad and unconstitutional). Depictions of hurting animals on video in a sexually arousing manner for some people were protected by the Court as free speech, almost unanimously. As an aside, I make no judgment of moral or ethical equivalency between these examples of speech, these cases simply serve as examples of the variety of speech that has found protection. *But see* FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding civil sanctions against a radio station for the broadcast of comedian George Carlin's "Filthy Words"); FCC v. Fox Television Stations, 556 U.S. 502 (2009) (upholding FCC regulations to ban "fleeting expletives" during broadcasts).

ing self-governance and the democratic process. Noted free speech writer and philosopher Alexander Meiklejohn wrote that the principle of free speech "springs from the necessities of the program of self-government."[48] Meiklejohn argued that the First Amendment required not that all opinions be heard, but rather, "that everything worth saying shall be said."[49] Even Meiklejohn realized that not everything that can be said by an individual should be given protection. One could argue the speech at issue in this case probably would not be beneficial to our experiment of democratic self-government, although that is not a foregone conclusion.[50] The signs used by Westboro Church members at the funeral protest, among other things, addressed the issue of homosexuals serving openly in the military.[51] On a more broad scale, the Westboro signs draw attention to the political and moral conduct of citizens that church members deemed to be improper or immoral.[52] The Westboro members complied with the time, place, and manner restrictions put on the speech.[53] A democratic society should tolerate their speech however objectionable some might perceive it to be. Undesirable speech or speech that might offend someone cannot be stifled all of the time. On the other hand, censuring the speech in the name of protecting the dignity of the named person's on the signs provides for a compelling argument. The interest in open and unimpeded public discourse remains compelling, but it must be tempered with the need to protect someone's name and reputation.[54]

VI. PROVIDING THE NEEDED PROTECTION

This Note argues that free speech should enjoy precedence over other interests in this case but what sort of protections, if any, should be put in place for citizens to vindicate their rights? One possible avenue would be

48. Alexander Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

49. *Id.* at 26.

50. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.

51. Since 1993, homosexuals have been prohibited to serve in the military openly pursuant to the policy called "Don't Ask, Don't Tell." 10 U.S.C. § 654 (2006). In 2010, Congress passed the Don't Ask, Don't Tell Repeal Act of 2010, in an effort to lay the groundwork for a repeal of the policy.

52. Defendants testified at the district court level that they did not have democratic motives but simply wanted to publicize their message of God's hatred of America for tolerating homosexuals. *Snyder*, 580 F.3d at 212. While this could be reasonably categorized as a somewhat sadistic motive, the motive for the speech is generally not the determining factor under the case law.

53. *Id.*

54. Mr. Justice Stewart stated that the individual right to protection of a good name "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." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The importance of individual reputation and name recognition cannot be understated; it can be a valuable asset to anyone, public or private.

to simply follow the standards already articulated by the Court but problems with the existing system seem manifest. The extension of *Hustler Magazine v. Falwell* to private individuals would be one way to balance the interests at stake.[55] Reverend Jerry Falwell sued the magazine for a parody depicting him under claims for libel, invasion of privacy, and intentional infliction of emotional distress.[56] In a unanimous opinion, the Court held

> that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication as in this case without showing in addition that the publication contains a false statement of fact which was made with actual malice, *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.[57]

This standard could be applied to defamation law in general, providing the breathing space for free speech to flourish but giving individuals a way to vindicate their dignity rights. To see the extent of the rule, a court would need to define a public figure or official to fully apply the holding.[58] A better course of action would be abrogating that distinction completely and making actual malice a universal standard. Problems with the public and private distinction can be seen with the Snyder family. The family became public figures through no purposeful action of their own. This means that such an individual would receive less constitutional protection than a private individual. It is unfair to treat a person or family as a public entity when they wished to remain private and did nothing to become a public figure other than have a funeral and put a notice in the newspaper.

In the current digital age, the reason for having the different standards is no longer as compelling. With some exceptions, people are able to combat false statements or defamation of their good name with corrective speech through many channels not previously open. With the rise of social media and other public Internet channels, private individuals have the ability to disprove statements of opinion through statements of truth or opinion and can accomplish this rather easily.[59] The overturned plurality

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

56. *Id.* at 48.

57. *Id.* at 56.

58. The Court has defined a public person as one whom by reason of the notoriety of his achievements or vigor and success with which he seeks the public's attention is classed as a public figure. *Gertz* 418 U.S. at 342.

59. The use of cyberspace and Internet forums of communication has been revolutionary in many respects and has intersected with the law in a myriad of ways, defamation being one of them. The Internet allows for unprecedented access to material and the ability to speak one's opinion, with little limitation. *See* Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1158 (1996) (stating that Internet speakers

opinion in *Rosenbloom* questions the nebulous public/private categorical divide quite well.[60] Having a different standard for someone based on something as fleeting as current notoriety at the time a statement is made seems arbitrary, and all individuals should be treated the same. As Justice Brennan said, robust debate on public issues (which *Snyder* concerns) should be honored by extending the constitutional protection of *Rosenbloom* to all matters, regardless of speaker.[61] Extending *Falwell*'s malice standard to all people might make it more difficult for private individuals to bring suit because they would have to meet the higher standard of actual malice. As a trade-off, most of the individuals in this country and worldwide have some recourse through other non-litigious channels, varying from older methods of newspapers to all sorts of Internet communication.

VII. WHAT ABOUT *SNYDER*?

Ideally, the Court should have come up with three changes in defamation jurisprudence in *Snyder v. Phelps*. These changes would be tailored to meet the interests of free speech greater than the current regime, but still provide an avenue for name vindication, albeit not as easily accomplished as before. The first change would be a reexamination in how a court finds speech to be fact or opinion. The context-based approach provides little notice for speakers or guidance for courts. Likewise, the reasonably factual rule in *Milkovich* provides little guidance, making a state-

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have assumed the same risk of defamation as public figures traditionally would have and should be held to the higher standard of proof). The implication of such a view is that people should be held to the same standard regardless of their status, as what made them different in the past, unequal access to such forums of communication, is not nearly as compelling anymore. According to the United Nations, the number of global Internet users reached two billion people by the end of last year. *Number of Internet Users to Surpass 2 Billion by End of Year, Agency Says* (19 October 2010), *available at* http:// www.un.org/ apps/ news/ story.asp?NewsID=36492&Cr=internet&Cr1=. This then means unprecedented amounts of people can have access to channels of communication, something not true when the Court first starting looking at categories with *NY Times* in 1964. The Internet gives these two billion global citizens relatively inexpensive access to a medium of mass communication and therefore transforms every citizen into a potential "publisher" of information for First Amendment purposes. Larissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 49 DUKE L.J. 855, 895 (2000). One need only spend minimal time searching the Internet to find users that have reached thousands with relative ease, being able to put opinions and information out there that could potentially have defamatory purposes or counteract just that. It must be noted that the adequacy of channels to engage in corrective speech or counter defamation with truth might not be equal for speaker or recipient and this is again a regrettable situation. However, the Court should err on the side of allowing more speech, not restricting it.

60. The Court stated 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. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

Rosenbloom, 403 U.S. at 43, *overruled by* Gertz v. Welch, 403 U.S. 29 (1971).

61. *Id.* at 43-44.

ment subject to a judge or jury's perception of what might be reasonably certain.[62] A context-based approach should form the foundation for constitutional defamation law and would require the overturning of *Milkovich* as to the reasonably factual test. Though such an approach contains some flaws, looking at context would be the best method at this point.[63] The touchstone of protection should not consist solely of asking if a person was reasonably asserting something factual. Using the factors, the signs carried by Westboro would be difficult to classify, leaving any court with a complicated decision.[64]

The second change would be to rid defamation law of the public and private category of speakers. As the 2011 Supreme Court decision showed, the public and private distinction remains. However, the continued insistence on this artificial and often useless dichotomy will only succeed in stifling speech, as any speaker could be classified as a public figure even without wanting such status. Such a change in status would greatly affect the ability to sue under current case law. This Note has argued that it should not matter, and the Court should have changed the law. Free speech deserves enough breathing space so to not be saddled with this categorical divide.

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62. A speaker's attempt to state his intention of making an opinion statement by using qualifying language such as "In my opinion" should play an important role in the contextual analysis. A fact-finder would need to assess whether a statement made with that qualification was made in good faith. The Court stated that even if someone puts facts with his opinion and those facts appear erroneous or are mistaken, the statement still may imply a false assertion of fact. *Milkovich*, 497 U.S. at 18-19. The Court approved of a comment by Judge Friendly in saying that "it would be destructive of the law of libel if a writer could escape liability for accusations by using the words 'I think.'" *Id.* While it is true that expressions of opinion may often imply an assertion of objective fact, qualifying a statement with the preface of "In my opinion" should be the most important factor in the contextual analysis. This would involve an examination of the subjective intent of the speaker, an inquiry rejected by the *Milkovich* majority.

63. I use the terms "looking at context" here, but that is shorthand for an adoption of the *Ollman* factors. Before even using the list, considerable weight should be given to the subjective intent of the speaker. These factors include a judge "(1) consider[ing] the author or speaker's choice of words; (2) decid[ing] whether the challenged statement is 'capable of being objectively characterized as true or false'; (3) examin[ing] the context of the challenged statement within the writing or speech as a whole; and (4) consider[ing] 'the broader social context into which the statement fits.'" *Potomac Valve & Fitting, Inc.*, 829 F.2d 1280 at 1287-88 (quoting *Ollman*, 750 F.2d 970 at 979-983). The similarity between this approach and *Milkovich* is clear in at least one regard: both look to the verifiability of a statement. Essentially the second *Ollman* factor is what *Milkovich* would ask. The other factors are useful tools in trying to get at this issue of verifiability. Context in the broadest sense should always be mandated.

64. The Church's choice of words contains few clear hallmarks of fact or opinion so that factor is inconclusive. The statements talking about God's views towards homosexuality or towards soldiers cannot be verified as fact, which tips the scales towards opinion. The broader social context and the context of the signs within the overall protest would likely also be inconclusive. The subjective intent of the protestors complicates the calculus. The members perhaps made those signs fully intending to assert those statements as fact, as statements of their religious belief. Whether a given court would classify the signs as fact or opinion is not nearly as important as the Court failing to mandate the exact process for making that determination in *Snyder v. Phelps*.

The final change would extend the *Falwell* actual malice standard to all people, regardless of category. Such an extension could be seen as favoring free speech to a greater degree that is customary for the Court by making individual claims against other private individuals harder to bring. Extending *Falwell* might have a detrimental impact on the ability to preserve individual reputation but any change in the freedom of one's good name could be countered by the other media channels discussed earlier.[65] Practically, this change would mean that opinions made out of negligence or a non-reckless lack of information would not sustain a defamation suit. As harsh as this might be, this ensures that the only lawsuits that infringe on the exercise of free speech would require knowledge of the falsity of a statement.

VIII. AN OPPORTUNITY MISSED

Snyder v. Phelps was decided in March 2011 with the Court affirming the Fourth Circuit's dismissal of Snyder's lawsuit.[66] Seven Justices voted with Chief Justice Roberts and Justice Breyer filed a separate concurrence. That left one dissenting vote, that of Justice Alito. While affirming the Fourth Circuit was a victory for First Amendment speech advocates and not altogether surprising, the Court failed to remedy some of the problems implicit with defamation rules.

The most puzzling and frustrating part of the opinion is the almost total focus on the public or private speech categories.[67] The Court began by stating that the First Amendment can serve as a defense to tort suits, including this one for intentional infliction of emotional distress.[68] The majority decided the case on the type of the speech, classifying the signs as public speech, without reference to standards in *Milkovich* or whether Snyder was a public or private figure.[69] The majority approach used a test

65. *See supra* text accompanying note 59.

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

67. The Court focused not on the type of speaker but on the nature of the matter the speech concerns. This distinction in the type of speech comes mostly from two cases: *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.* and *Connick v. Myers*. Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Connick v. Myers, 461 U.S. 138 (1983). These two cases received no mention in the *Milkovich v. Lourain Journal Co.* case in 1990 and little attention in the Fourth Circuit's opinion. *Milkovich* controlled the Fourth Circuit's decision with *Dun & Bradstreet* providing little more than the definition of "public speech." I devoted no attention to the cases for that reason. This reinforces the need for a Court directive as to what test or precedent should control in speech tort liability cases. The Court even admitted in *Snyder v. Phelps* that the boundaries of the public concern test are not well defined yet they chose to follow that legal analysis. *Snyder*, 131 S. Ct. at 1216. Freedom of speech deserves better clarification than reliance on a test with undefined boundaries.

68. *Id.* at 1215.

69. Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social or other concern in the community." *Connick*, 461 U.S. at 146. As with other defamation rules, this test seems malleable and undefined, qualities that encumber public discourse by not providing notice of what speech will be protected. The definition does contain very

similar to the *Ollman* factors.[70] The largest problem is the lack of guidance as to what analysis a court should undertake or what tests maintain precedence.[71] The Court opened by saying that whether the First Amendment prohibits holding Westboro liable turns *largely* on whether that speech is of a public or private concern.[72] This would seem to indicate that a *Dun & Bradstreet*-type analysis should be the first question a court looks at with speech tort liability. If the speech concerns a public matter, then it merits First Amendment protection and there is no need to go further. The Court provided no more guidance as to speech that concerns private matters or the relevance of the holding in *Milkovich*.

Perhaps hoping for sweeping change in a realm of tort law that has historically been state law controlled was a misplaced desire. The Court made it clear that *Snyder v. Phelps* was a narrow decision, and the Court was careful not to go beyond the facts in the case.[73] The decision left more questions than it provided answers, as it is still unclear how any court should square defamation actions with the different speech tort liability rules. The majority failed to adequately address questions about how to reconcile claims for intentional infliction of emotional distress and First Amendment protection.[74] It remains to be seen if the lower federal and state courts fall in step with the analysis of this case or if the case law follows the aftermath of *Milkovich*. Speech tort liability cases rarely make it

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broad wording, which allows for more First Amendment speech protection. The biggest issue involves what is meant by community. Does this involve a geographic city limit or a grouping of like-minded speakers or listeners? Just like with the public or private speaker, the definition here makes no room for the subjective intent of the speaker, that is, whether the speaker intends the speech to encompass a public or private concern.

70. The Court stated that deciding whether speech is of public or private concern requires use to examine the "content, form, and context of that speech as revealed in the whole record." *Snyder*, 131 S. Ct. at 1216 (quoting *Dun & Bradstreet*, 472 U.S. at 761). By not overruling any past decisions, the Court seems to indicate that the First Amendment requires a contextual analysis in some form or fashion. This is less than ideal, as the case law contains many different ways to look at context, but no direction as to what elements or methods are preferred or if they are interchangeable. Though lacking precision and much definition, analyzing whether the speech addresses a public or private concern instead of the type of speaker seems to be the lesser of two evils.

71. Another problem with cases of intentional infliction of emotional distress involves a determination of if the statement is outrageous or not, one of the elements of the tort. A finding of outrageousness should not necessarily foreclose First Amendment protection and the Court echoed that idea. The law cannot risk a jury becoming an instrument of suppression for unpleasant or caustic speech. *Id.* at 1219. In the public sphere, the breathing space of the First Amendment requires tolerance of sometimes outrageous or insulting speech. *Id.*

72. *Id.* at 1215.

73. *Id.* at 1220.

74. The dissent by Justice Alito takes up the issue of if the First Amendment could entirely preclude liability for intentional infliction of emotional distress by means of speech. *Id.* at 1223 (Alito, J., dissenting). Regrettably, this remains an unanswered issue by the majority. Justice Alito felt that when grave injury is intentionally inflicted by means of an attack like the one at issue in this case, the First Amendment should not interfere with victim recovery. *Id.* Justice Alito questioned why actionable speech should be immunized simply because it is interspersed with speech that is protected, another argument not addressed by the majority opinion but nonetheless compelling. *Id.* at 1227.

up to the nation's highest Court and this case should be remembered as an opportunity missed.

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