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A New Battleground for Free Speech: The Impact of Snyder v. Phelps

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I. INTRODUCTION

On September 25, 1789, the First Congress of the United States put forth a set of constitutional amendments, ten of which would later become the Bill of Rights.[1] The first of these amendments states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[2] In subsequent caselaw, the U.S. Supreme Court has applied this prohibition to the federal government, as well as state governments through the Fourteenth Amendment.[3] Although this appears to be a simple standard to follow, history has proven otherwise, and the deviations taken have been the subject of much debate.

This historic back-and-forth amongst scholars and legislators alike has led to a new battleground which tests the force behind Edward Beecher's

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1. NAT'L ARCHIVES AND RECORDS ADMIN., THE CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/bill_of_rights.html (last visited Mar. 10, 2009).

2. U.S. CONST. amend. I.

3. *See* Employment Div. v. Smith, 494 U.S. 872, 876–77 (1990) (stating the Free Exercise Clause is applicable to the states).

prescient statement, that "[w]e are more especially called upon to maintain the principles of free discussion in the case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."[4] Recently, a pastor of the Westboro Baptist Church by the name of Frederick Waldron Phelps has pushed the limits of free speech by gathering members of his congregation near military funerals to chant and display slogans that many people would likely find highly offensive.[5]

This note will begin by reviewing the events that led to the filing of *Snyder v. Phelps*[6] and the subsequent jury verdict for the plaintiff, followed by Maryland's law prohibiting funeral protests. Next, it will compare and contrast the current case with previous decisions that have examined how free speech and the free exercise of religion are affected by personal torts and governmental bans on certain types of behavior. The note will conclude by examining whether the jury's decision was appropriate considering both the elements of the tort claims raised, and how the decision could affect the future of First Amendment jurisprudence.

II. A SUMMARY OF *SNYDER V. PHELPS*

On March 10, 2006, plaintiff Albert Snyder and his family assembled at St. John's Catholic Church in Westminster, Maryland to inter Albert's twenty-year-old son Matt, who was killed in the line of duty in Iraq while serving as a Lance Corporal in the Marine Corps.[7]

During the funeral, Phelps and some members of his congregation from the Westboro Baptist Church decided to use the event, as they had done several times previously, to further their anti-homosexual agenda.[8] The Church's rationale for choosing military funerals as a place of protest is perhaps best expressed by its mantra: "They turned America over to fags; they're coming home in body bags."[9] This message is typically conveyed through shouting and hand-held signs; the signs displayed at the Snyder funeral included a variety of statements: "God hates you," "You're going to hell," "Fag troops," and "Thank God for dead soldiers."[10] Along with the protests at the funeral, Phelps added content to his website stating that Matt's parents "raised him for the devil" and supported "satanic Ca-

4. Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201, 210 (D. Mass. 1986).
5. Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 571 (D. Md. 2008).
6. *Id.* at 567.
7. *Id.*
8. *Id.* at 571–72.
9. *Fred Phelps and the Westboro Baptist Church*, ADL.ORG, http://www.adl.org/special_reports/wbc/wbc_on_america.asp (last visited Mar. 10, 2009).
10. *Snyder II*, 533 F. Supp. 2d at 572.

tholicism."[11] The church members, however, "complied with local ordinances and police directions with respect to being a certain distance from the church," and Snyder did not actually see the protests until viewing them on television later that day.[12]

Following the demonstration, Phelps's daughter and follower, Shirley L. Phelps-Roper, published what she described as an "epic," titled "The Burden of Marine Lance Cpl. Matthew Snyder."[13] This was displayed on the Church's website, and later encountered by Snyder following an Internet search.[14] Among other statements, the "epic" claimed that Matthew's parents "taught [him] to defy his creator," and "raised him for the devil."[15]

Less than three months later, Snyder filed a complaint against Phelps and the Westboro Baptist Church—along with his daughters and John and Jane Does representing unknown protestors—in federal court in Maryland.[16] The suit raised several claims: defamation, invasion of privacy based on both intrusion upon seclusion and publicity given to private life, intentional infliction of emotional distress, and civil conspiracy.[17] Snyder claimed that his physical and emotional damages resulted from conduct so outrageous that punitive damages would be appropriate.[18]

Phelps initially countered with a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, based on jurisdictional and service challenges as well as failure to state a claim upon which relief can be granted.[19] Other than the jurisdictional elements, the crux of Phelps's argument was that his behavior was protected by the interpretation of the First Amendment set forth in *Hustler Magazine v. Falwell*.[20] After denying the jurisdictional and service challenges, Judge Bennett pointed out the flaw in Phelps's reliance on *Hustler*, namely that Matt Snyder was not of the required "public figure" status.[21] Therefore the case proceeded on all merits.[22]

11. Complaint at 5, Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567 (D. Md. 2008) (No. 1:06-cv-01389-RDB).
12. *Snyder II*, 533 F. Supp. 2d at 572.
13. *Id.*
14. *Id.*
15. *Id.*
16. Complaint at 2, *Snyder II* (No. 1:06-cv-01389-RDB).
17. *Snyder II*, 533 F. Supp. 2d at 572.
18. Complaint at 9, *Snyder II* (No. 1:06-cv-01389-RDB).
19. Snyder v. Phelps (*Snyder I*), No. 1:06-cv-01389-RDB, 2006 WL 3081106, at *1 (D. Md. Oct. 30, 2006).
20. Defendants' Memorandum of Points and Authorities Supporting Their Motion to Dismiss at 12–13, Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567 (D. Md. 2008) (No. 1:06-cv-01389-RDB); *see* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
21. *Snyder I*, 2006 WL 3081106, at *9.
22. *Id.* at *11.

The court granted the defendants' motion for summary judgment on the defamation and publicity given to private life claims, but the defendants' other summary judgment arguments failed.[23] On October 31, 2007, the jury returned a verdict in favor of Snyder in the amount of $10.9 million, consisting of $2.9 million in compensatory damages, $6 million in punitive damages relating to the invasion of privacy claim, and $2 million in punitive damages relating to the intentional infliction of emotional distress claim.[24]

On February 4, 2008, the U.S. District Court for the District of Maryland issued a memorandum opinion denying the post-trial motions filed by Phelps, the Westboro Baptist Church, and two of Phelps's daughters.[25] However, the punitive damages awarded to Snyder were reduced from $8 million to $2.1 million,[26] due in part to the financial aid that Snyder received for litigation costs[27] and the defendants' apparent inability to pay the punitive damages.[28]

III. MARYLAND STATUTORY LAW PROHIBITING PROTESTS AT FUNERALS

Although Phelps engineered this particular protest to comply with Maryland law regulating protests at funerals,[29] it is enlightening to consider the state's legislative response to this activity, especially when deciding whether the conduct is of such an egregious nature as to fall outside First Amendment protections.

Maryland followed the lead of the federal government[30]—as well as many other states—and enacted, effective October 1, 2006, a statute to

23. Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 572–73 (D. Md. 2008).
24. *Id.* at 573.
25. *Id.* at 570.
26. *Id.* at 595.
27. *Id.* at 593.
28. *Id.* at 595.
29. *Id.* at 572.
30. *See generally* Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006) (codified in scattered sections of 18 U.S.C. and 38 U.S.C.). The provisions of the Respect for America's Fallen Heroes Act provide that any disruptive demonstration within 150 feet of any "road, pathway, or other route of ingress to or egress from" national cemetery property—or within 300 feet of national cemetery property that would "impede the access to" the property—are illegal, unless there is prior approval by "the cemetery superintendent or the director of the property on which the cemetery is located." *Id.* However, this law only applies to demonstrations occurring between the "period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony." *Id.* The act imposes fines and up to one year in prison for violators. *Id.* The general outrage at funeral protesting was reflected in the unanimous vote in both the House of Representatives and the Senate to pass the bill on May 24, 2006, representing a rare bipartisan allegiance against this particular form of expression. Rebecca Bland, Note, *The Respect for America's Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 UMKC L. REV. 523, 530 (2006). The President signed the

prevent the same types of funeral protests that Phelps had notoriously staged across the country.[31] Unlike the federal statute, Maryland chose to direct its prohibition towards "speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace."[32] This provision was modeled very closely to the "fighting words" exception from *Chaplinsky v. New Hampshire*: words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[33]

The statute also implemented a buffer zone applying to areas "within 100 feet of a funeral, burial, memorial service, or funeral procession,"[34] significantly smaller than the 150- to 300-foot zone defined in the Federal Respect for America's Fallen Heroes Act. This 100-foot zone—like the prohibitions enacted in Colorado,[35] New York,[36] and Vermont[37]—represents the minimum buffer zone imposed by states attempting to prevent disruptions at funerals.[38] A more far-reaching version of the ordinance can be observed in Montana, where the prohibition extends to 1,500 feet.[39] Thus, Maryland appears more sensitive to the impact that the statute may have on areas surrounding cemeteries.

Furthermore, the consequences of violating the Maryland statute—imprisonment not exceeding ninety days or a fine not exceeding $1,000 or both—are substantially less than the federal statutory penalties of possible imprisonment of one year or a $100,000 fine.[40]

Although in this case Phelps maintained a distance in excess of one hundred feet from the funeral, questions were raised at trial as to whether he also complied with the regulation against the use of "fighting words."[41] The court also faced the question of whether compliance with the statute automatically insulates a party from liability regardless of its conduct.[42]

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bill into law five days later before giving an emotional Memorial Day speech in support of the sacrifices made by troops overseas. *Id.*

31. MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2008).
32. *Id.* § 10-205(b).
33. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
34. CRIM. LAW § 10-205(c).
35. COLO. REV. STAT. § 18-9-108 (2006).
36. N.Y. PENAL LAW § 240.21 (Gould 2007).
37. VT. STAT. ANN. tit. 13, § 3771 (2006).
38. Robert F. McCarthy, Note, *The Incompatibility of Free Speech and Funerals: A* Grayned*-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L.J. 1469, 1487 (2007).
39. MONT. CODE ANN. § 45-8-116 (2007).
40. CRIM. LAW § 10-205(d).
41. *See* Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 577 (D. Md. 2008).
42. *Id.* at 576.

IV. ANALYSIS OF *SNYDER V. PHELPS*

Phelps and his codefendants based their defense primarily on the idea that their actions were absolutely protected by the First Amendment—both the Free Speech Clause and the Free Exercise Clause.[43] However, over a century of caselaw has made clear that the First Amendment guarantees are far from absolute.[44] This case implicates the question of where the line concerning that protection should be drawn.

A. *The Effect of Statutory Compliance*

1. *Limitations on Free Speech*

Phelps believed that because he informed the police prior to arriving at the funeral and followed the Maryland statute's buffer zone requirements, he was legally entitled to act out his religious beliefs in any fashion he deemed appropriate. However, to carry this conclusion to its logical end, it is possible to see why this cannot be: under his theory, screaming graphic obscenities at the top of their lungs,[45] repeatedly challenging every elderly person present to a fight,[46] and threatening to blow up the attendees' cars as they exited the cemetery[47] would all be valid and legal exercises of free speech, without any recourse available to law enforcement officials or those targeted by the protesters. Compliance with certain statutory provisions ensured that Phelps and his followers would not be criminally charged *under those provisions*, but it did not ensure that he was completely free from *any* kind of liability.

One particularly egregious miscalculation on the part of Phelps's followers was the decision to include signs and chants aimed directly at the family of Matthew Snyder—as opposed to the rest of their material, which was directed towards U.S. government policy and homosexuality in general.[48] By doing this, in light of the circumstances, they opened themselves up to the possibility that their actions would be considered "fighting words" due to their likelihood to "inflict injury or [tendency] to incite an

43. *Id.*

44. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985).

45. *See generally* Roth v. United States, 354 U.S. 476 (1957) (excluding obscenity from First Amendment protection).

46. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568, 568–72 (1942) (prohibiting fighting words from First Amendment protection).

47. *See generally* Schenk v. United States, 249 U.S. 47 (1919) (prohibiting imminent threats from First Amendment protection).

48. *See* Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 572 (D. Md. 2008).

immediate breach of the peace."[49] In fact, this is the precise type of conduct that the Maryland statute is aimed at eliminating,[50] and whether the conduct rose to that level is an issue of fact that should be left to a jury to resolve.

2. *Limitations on Free Exercise*

Phelps argued further, however, that his speech was an expression of his beliefs, and that statutes or other laws prohibiting or interfering with such expression are per se unconstitutional.[51] His argument was based on a misunderstanding of the law. What is prohibited is not the language itself, but the unprotected features of the words. As stated by Justice Scalia:

> [T]he exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech," both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.[52]

Thus if the words of the church members served as a basis for defamation, invasion of privacy, and intentional infliction of emotional distress, no shelter in the form of First Amendment protection can be found for the offensive nonspeech elements.

The same erroneous reasoning on the part of the defendants also led them to the mistaken belief that the Free Exercise Clause provides them with effective immunity from lawsuits.[53] As discussed above, the government may certainly enforce laws for the public good that incidentally prohibit the actions of certain religious groups.[54] This principle has been outlined in *Employment Division v. Smith*:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting con-

49. *Chaplinsky*, 315 U.S. at 572.
50. *See* MD. CODE ANN., CRIM. LAW § 10-205(b) (LexisNexis Supp. 2008).
51. *Snyder II*, 533 F. Supp. 2d at 578.
52. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (internal citation omitted).
53. *See Snyder II*, 533 F. Supp. 2d at 578.
54. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

> duct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter . . . : "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . ."[55]

The Court also recognized the impact this necessarily has on the free exercise of religious beliefs by certain groups; however, it decided that such concerns are clearly outweighed by the need to protect the public at large:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[56]

The practices of Phelps's church would certainly qualify as those "not widely engaged in," and the above-quoted decision makes clear that although his constitutional right to exercise his religious beliefs is significant, it is simply not more important than the protection of the society as a whole.

3. *The Content of Phelps's Speech*

Phelps's main contention regarding the invalidity of the claims against him—as well as the statute itself—rests on the belief that it is the *content* of his speech that is being targeted.[57] However, the court disagreed.[58] Phelps and his congregation describe themselves as Baptists, and their belief system can be summed up in his own words: "our goal is to preach the Word of God to this crooked and perverse generation. By our words, some

55. *Id.* at 878–79 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

56. *Id.* at 890.

57. *Snyder II*, 533 F. Supp. 2d at 576.

58. *Id.* at 576–80.

will repent. By our words, some will be condemned. Whether they hear, or whether they forbear, they will know a prophet has been among them. . . ."[59] Noticeably absent from their stated purpose or the Bible itself is any religious requirement to attend and be active in protests at military funerals. In fact, the church members "essentially acknowledged in their testimony that their choice of military funerals was driven by the publicity the demonstrations generated."[60] Although courts should be hesitant to challenge the sincerity of a religious group's practices, the Westboro Baptist Church has acknowledged that its choice of venue was not driven by religious purposes, but rather by the desire to be noticed. Thus in this case, it is not the *content* of the message that is being targeted, but rather the *means* by which the message is being promulgated.

B. *The Tort of "Intentional Infliction of Emotional Distress"*

1. *The Elements of "Intentional Infliction of Emotional Distress" in Maryland*

Regardless of Phelps's arguments, the "intentional infliction of emotional distress" claim appears to have been correctly balanced against Phelps's First Amendment rights. This action has been recognized as a tort in Maryland as far back as 1977.[61] Since that time, the courts have chosen to expand on the Restatement's definition and follow the standard articulated in *Womack v. Eldridge*, which stated that the following elements must be proven to establish a prima facie case:

(1) The conduct must be intentional or reckless;

(2) The conduct must be extreme and outrageous;

(3) There must be a causal connection between the wrongful conduct and the emotional distress; [and]

(4) The emotional distress must be severe.[62]

There is no specified "time" or "immediacy" element, only the need for a causal connection. Therefore it does not matter whether Snyder witnessed the actions of Phelps and his followers firsthand, as long as those actions caused his emotional injuries. Furthermore, intent is not necessary

59. Lauren M. Miller, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097, 1103 (2007).

60. *Snyder II*, 533 F. Supp. 2d at 578.

61. Jones v. Harris, 371 A.2d 1104, 1107 (Md. Ct. Spec. App. 1977).

62. Harris v. Jones, 380 A.2d 611, 614 (Md. 1977) (summarizing the rule stated in Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974)).

if the conduct is found to be reckless. Thus even if Phelps did not intend for Snyder to be harmed in any way, if the jury found his conduct to be reckless, he could still be found liable.

2. *"Intentional Infliction of Emotional Distress" v. The First Amendment*

The Supreme Court in *Madsen v. Women's Health Center, Inc.*, when faced with an ordinance establishing a buffer zone around an abortion clinic, stated that any burden on free speech must be considered in light of the governmental interest at stake.[63] The government certainly has an interest in protecting its citizens from injury, even if that injury is not physical in nature.[64] In this case, the remaining analysis was appropriate for a jury, since there were several genuine issues of material fact: whether the actions of Phelps's and his followers were intentional or reckless, whether they were extreme and outrageous, whether there was a causal connection between the acts and Snyder's injuries, and whether Snyder's injuries were severe.

Phelps's reliance on *Hustler* for the proposition that Snyder "may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact which was made with 'actual malice'"[65] is misplaced. That case specifically dealt with an undisputed "public figure": Falwell was host of a nationally syndicated television show and was the founder and president of a political organization, as well as the author of several books and publications.[66] *Hustler* applied the approach from the Court's prior decision in *Gertz v. Robert Welch, Inc.*—expanding on the holding of *New York Times v. Sullivan*—which stated that public figures include both persons who have achieved persuasive fame or notoriety and persons who voluntarily inject themselves into a central role in a particular public controversy.[67] Snyder's son, however, was not a public figure until Phelps made him so through his protests. Furthermore, the contention that Snyder's son was a public figure due to publication of his death and funeral information in the obituary section of the newspaper, if sustained, would completely destroy the doctrine of "public figure." Benjamin Franklin once famously stated, "Nothing is

63. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 770 (1994).
64. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 51–52 (1988).
65. *Id.* at 56.
66. *Id.* at 57 n.5.
67. Gertz v. Robert Welch, Inc. 418 U.S. 323, 351 (1974); N.Y. Times v. Sullivan, 376 U.S. 254, 292 (1964).

certain in life except death and taxes"[68]—if the notice of one's death alone makes him a public figure, then everyone in the world could fall into that special category simply by passing away.

C. *The Tort of "Intrusion Upon Seclusion"*

Phelps also contends that since Snyder did not physically see the church members at the funeral—only on the television after the event—and found the "epic" on the internet by happenstance much later on, "the evidence shows there was *no* intrusion into *anything*—not the funeral, not plaintiff's home, not his psyche."[69] This argument raises deeper concerns, specifically regarding the claim of "intrusion upon seclusion," that necessitate a closer analysis of the judge's conclusions.

1. *The Elements of "Intrusion Upon Seclusion" in Maryland*

Since 1962, Maryland has recognized the tort of "invasion of privacy" as a valid basis to grant relief.[70] The "intrusion upon seclusion" cause of action was subsequently recognized in 1969,[71] and followed the definition in the Restatement (Second) of Torts:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[72]

However, by stating that "when Snyder turned on the television . . . he did not 'choose' to see close-ups of the Defendants' signs . . . but rather their actions intruded upon his seclusion,"[73] the judge took a dangerous step in expanding the doctrine. One of the fundamental elements of this cause of action is that the defendant "*intentionally* intrudes, physically or otherwise, upon the solitude or seclusion of another."[74]

68. Adrian Cronauer, *The Twenty-Third Charles L. Decker Lecture in Administrative and Civil Law*, 183 MIL. L. REV. 176, 179 (2005).
69. Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 581 (D. Md. 2008)..
70. Carr v. Watkins, 177 A.2d 841, 845 (Md. 1962).
71. Household Fin. Corp. v. Bridge, 250 A.2d 878, 883 (Md. 1969).
72. RESTATEMENT (SECOND) OF TORTS § 652B (1977).
73. *Snyder II*, 533 F. Supp. 2d at 581.
74. RESTATEMENT (SECOND) OF TORTS § 652B (emphasis added).

2. *How "Intrusion Upon Seclusion" Applies to the Facts of* Snyder v. Phelps

In this case, there is no evidence that Phelps intended to intrude on Snyder's seclusion—rather than just promulgate his message to the public at large—by protesting at the funeral. In fact, Phelps made sure that his congregation followed the statutory directive to stay at least one hundred feet away from the funeral, and Snyder himself testified that he was unaware of the protest until he later saw it on the television.[75] If Phelps's desire was truly to harass Snyder, he could have done so after the funeral in another location where the statute did not apply. It would be difficult to conclude that Phelps protested in the fashion he chose because he intended to intrude on Snyder's seclusion by predicting that Snyder would happen to watch the protests later on the television.

Likewise, the same reasoning the court used to support the finding of intrusion upon seclusion regarding "The Burden of Marine Lance Cpl. Matthew Snyder" is just as troublesome. The judge made clear that in his opinion, "[t]o publish comments on the Internet that a young man, whom Defendants had never met, was raised for the devil and taught to defy God can clearly be found to . . . have invaded [Snyder's] privacy during a time of bereavement."[76] This might be a tenable position if Phelps had sent the publication directly to Snyder, or at least had published it in such a fashion as to make it highly probable that Snyder would come upon it. Instead, Snyder found it only through an Internet search engine, and the publication itself was only posted on Phelps's website. Once again, there is nothing to show that Phelps *intentionally* intruded on Snyder's seclusion. Snyder was not just a passive party who had disparaging material thrust upon him; he actively sought out and found the publication through both a search engine and the act of clicking on the resulting link. In fact, the only way Phelps could have found out that Snyder read the publication is when it was mentioned in the formal complaint filed before the lawsuit.

Maryland caselaw reinforces the concerns previously stated. In *Bailer v. Erie Insurance Exchange*, the Maryland Supreme Court made clear that intent is essential to the claim:

> [W]rongful intrusion into private affairs always involves an intentional act. It is mistaken to conclude . . . that if malice is not an element of invasion of privacy, neither is intent. The tort cannot be committed by unintended conduct amounting merely to lack of

75. *Snyder II*, 533 F. Supp. 2d at 572.
76. *Id.* at 581.

> due care. Intentional conduct is a necessary element of the cause of action.[77]

Besides illuminating this standard, *Bailer* illustrates the type of behavior that satisfies the intentional element of intrusion upon seclusion. The case was based on an action by an insurance policyholder to enjoin the carrier from denying financial indemnity stemming from a successful claim of intrusion upon seclusion against him.[78] The underlying act was the filming of a nanny while she was in the shower[79]—an act that was clearly far more intentional and intrusive that the acts of Phelps.

Though it may seem like an extreme circumstance, the type of intentional intrusion displayed in *Bailer* fairly resembles the typical conditions in which Maryland courts have found the elements of this tort satisfied. In *Mitchell v. Baltimore Sun Co.*, the court found a genuine issue of intrusion upon seclusion where a former congressman brought action against a newspaper and two reporters that interviewed him without permission in an aggravating fashion at a nursing home he resided at.[80] Another case, *Pemberton v. Bethlehem Steel Corp.*, deals with intrusion through investigative surveillance, such as where a "detection device" was placed on the door of a motel room where the appellant was staying, as well as surveillance being maintained from the bottom of a stairwell in that same motel.[81] In another situational variance, the court in *Crosten v. Kamauf* found a genuine issue regarding intrusion upon seclusion where the counseling center at the plaintiff's location of employment allegedly disclosed to the employer that the plaintiff was a psychotherapy patient after she filed a sexual harassment claim.[82]

These cases all involve intrusions that were significant and directed specifically at the plaintiff. Furthermore, the seclusion that was intruded involved either the plaintiff's physical space or personal effects. In fact, in *Doe 2 v. Associated Press*, the Fourth Circuit stated that "[t]o be liable for wrongful intrusion into private affairs, a defendant must have engaged in conduct that resembles 'watching, spying, prying, besetting, [or] overhearing.'"[83] It is quite a departure to extend these developed interpretations to an unintentional intrusion through an electronic medium, where a personal

77. Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1380–81 (Md. 1997) (quoting Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 7 (S.C. Ct. App. 1989)).

78. *Id.* at 1376.

79. *Id.*

80. Mitchell v. Balt. Sun Co., 883 A.2d 1008, 1023 (Md. Ct. Spec. App. 2005).

81. Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Ct. Spec. App. 1986).

82. Crosten v. Kamauf, 932 F. Supp. 676, 685 (D. Md. 1996).

83. Doe 2 v. Associated Press, 331 F.3d 417, 422 (4th Cir. 2003) (quoting Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 6 (S.C. Ct. App. 1989)).

property right does not exist. It is also difficult to discern whether the intrusion was upon Snyder's home or psyche. If it was indeed the psyche that was intruded upon, then serious concerns are raised.

If a valid cause of action arises every time someone sees himself referenced in an opinion expressed on the Internet—where millions of people express their honest opinions of people every day—or on television, and the opinion is non-defamatory, the floodgates of litigation could burst with potential lawsuits. Snyder may have a particularly vulnerable psyche, but the Restatement makes clear that the standard is objective, based only on whether "the intrusion would be highly offensive to a reasonable person."[84] In a world where the Internet and television have become common mediums of expression, and regardless of whether Snyder agreed with the opinions of Phelps's followers, it is alarming to assume that a reasonable person could claim his psyche's seclusion was intruded by actively viewing electronic data that was not thrust upon him.

If it was Snyder's home that allegedly was "intruded," then the concerns are no less serious. It is true that in *Frisby v. Schultz* the Court stated that one's home holds a special status as "the last citadel of the tired, the weary, and the sick."[85] Directly implicit from this statement is the notion that one "important aspect of residential privacy is protection of the unwilling listener."[86] However, that case involved abortion protestors who congregated outside the homes of doctors and directed their opinions toward the doctors and their families.[87] Phelps's followers were not on Snyder's lawn, nor did they in any way aim their feelings directly at him while he was in his home. Just because Snyder happened to be in his home when he viewed the television report of the funeral as well as Phelps's website, does not mean his home was "invaded." With the possibility of viewing electronic information nearly anywhere in the world, there is no way that Phelps could have intentionally planned that Snyder would be at home when he encountered it.

84. RESTATEMENT (SECOND) OF TORTS § 652B.

85. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Gregory v. Chi., 394 U.S. 111, 125 (1969)). The Court went on to state that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Id.* (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

86. *Id.*

87. *Id.* at 476.

3. *The Importance of the "Intent" Element in "Intrusion Upon Seclusion"*

The presence of the term "intentional" in the language relating to an intrusion upon seclusion claim is essential; without it, the law would likely be deemed unconstitutional. This is primarily because removal of the "intent" element would expand the doctrine in such a way that one could never be sure whether or not his actions were somehow intruding upon the seclusion of another. This would be an overbroad hindrance to the free exercise of First Amendment rights.

A regulation is considered overbroad if, in its attempts to proscribe unprotected speech, it sweeps in a substantial amount of protected speech.[88] Overbreadth has been found where, for example, a statute has avoided the allowable restriction on "fighting words" in favor of a restriction on "opprobrious words or abusive language, tending to cause a breach of the peace."[89] Since the broad language covers more than just "fighting words" and "effectively 'licenses the jury to create its own standard in each case,'" a statute containing such language was struck down as overbroad.[90] Furthermore, if a statute is not tailored closely enough to the government interest at issue, it may be found invalid.[91] Thus, for example, where an airport tried to enforce a regulation that stated it was "not open for First Amendment activities by any individual and/or entity" without any reference to those activities which could cause congestion or other problems, the regulation was found invalid as unconstitutional, and would be so even if it were applied to a nonpublic forum.[92]

With the "intent" language removed—imposing personal injury liability for non-intentional conduct that does not result in bodily injury—the intrusion upon seclusion law would fall into the category of "overbroad." The legitimate opinions and beliefs of many could easily become actionable under this tort, even when the speaker in no way desires that the opinion be made known to the subject. One hypothetical scenario related to this case illustrates the problem: Even if Phelps—while in a supermarket—told one of his followers that he believed Snyder's son was going to hell, and one of Snyder's friends overheard this from another aisle and reported it back to Snyder, Snyder would have a valid cause of action. This example is just one of a many possibilities showing how an immeasurable amount protected free speech would effectively be proscribed.

88. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
89. Gooding v. Wilson, 405 U.S. 518, 519 (1972).
90. *Id.* at 528 (quoting Herndon v. Lowry, 301 U.S. 242, 263 (1937)).
91. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 577 (1987).
92. *Id.* at 574–75.

Thus it is easy to see why the "intent" element of the tort is essential to maintain its validity. Since Phelps had no apparent intent to intrude upon Snyder's life—regardless of how Snyder felt—the court took a dangerous step towards expanding the doctrine of intrusion upon seclusion at the price of constitutional rights in Maryland.

V. CONCLUSION

This case does not appear at first glance to be a situation where First Amendment rights have been subjected to judicial depreciation for the sake of impeding a disagreeable message. It is stated simply as the application of established precedents to a set of circumstances where the health and safety of the public has been threatened by unlawful behavior disguised as constitutionally protected expression. Nevertheless, the court has in fact made a wide departure from its own prerequisites concerning "intrusion upon seclusion," and has thus perhaps taken the first step down a dangerous road that could end in extreme limitations placed upon First Amendment rights.

Although it may seem repugnant to some to condition the allowance of certain forms of expression on their effect on members of the community, this condition is vital for the functionality of our democracy. But when the balance is tipped in favor of regulation for reasons that are highly questionable and inarticulate, the result is a great disservice upon society. There was a reasonable basis in *Phelps* for upholding the jury verdict regarding "intentional infliction of emotional distress," and since the defendants did not dispute that there was an agreement to commit the acts at issue,[93] the finding of "civil conspiracy" was also valid. However, by concocting a post hoc analysis to support the verdict in favor of "intrusion upon seclusion" that likely resulted from the jurors' personal distaste of Phelps and his message, the court significantly revised the previously accepted doctrine that was narrowly construed to avoid this type of overbroad enforcement. By supporting a finding of "intentional intrusion" where a purported victim actively sought the offensive information—as opposed to merely being the passive target of an malicious attack—the court has struck an ancillary blow to Phelps's campaign while simultaneously rolling out the welcome mat for a barrage of future litigation.

93. Snyder v. Phelps (*Snyder II*), 533 F. Supp. 2d 567, 581 (D. Md. 2008).