PUBLIC CONCERN AND OUTRAGEOUS SPEECH: TESTING THE INCONSTANT BOUNDARIES OF IIED AND THE FIRST AMENDMENT THREE YEARS AFTER *SNYDER V. PHELPS*

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ABSTRACT

This Article analyzes how the U.S. Supreme Court's decision in the Westboro Baptist Church funeral-protest case of Snyder v. Phelps is now affecting lawsuits brought against media defendants for intentional infliction of emotional distress (IIED). The pro-First Amendment result three years ago in Snyder pivoted largely on the Court's expansive definition of "public concern." Using a quartet of post-Snyder cases as analytical springboards, the article examines how Snyder and the concept of public concern are being deployed by both courts and media defense attorneys in IIED cases premised upon the publication of allegedly outrageous speech. Ultimately, none of the judges in the post-Snyder cases studied here heeded Chief Justice John Roberts' statement that Snyder should be viewed narrowly. Instead, the notion of public concern was broadly stretched far beyond the factual confines of Snyder. In only one case, in fact, did a Snyder-based, public-concern defense not win the day.

INTRODUCTION

This Article examines how the U.S. Supreme Court's 2011 decision in *Snyder v. Phelps*,[1] with its heavy emphasis on safeguarding speech about matters of public concern,[2] is now affecting lawsuits for

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1 131 S. Ct. 1207 (2011).

2 *See id.* at 1215–16 (reasoning that the "case turns largely on whether that speech is of public or private concern," emphasizing that speech about matters of public concern is "'at the heart of the First Amendment's'" guarantee of free expression, noting that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest[,]" and identifying three factors—the content, form, and context of speech—for courts to consider in deciding if speech is about a matter of public or private concern (internal citations omitted)). It has been observed that the *Snyder* court's distinction between matters of public and private concern "proved crucial" in the case. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 495 (2011); *see also* Aaron H. Caplan, *Free*

intentional infliction of emotional distress (IIED)[3] and outrage[4] filed against media defendants. Citing First Amendment[5] concerns about free expression, the Court in *Snyder* appeared to substantially cabin and confine the viability of IIED in private-figure plaintiff cases[6] pivoting on speech addressing matters of public concern.[7] Professor Nat Stern observed, for example, that the Court's conclusion that the speech "amounted to commentary on matters of public concern proved central to its ruling that the speech was protected."[8]

As for the projected impact of *Snyder*'s public-concern-centric focus on the future of the IIED tort, Professor Elizabeth Jaffe asserted, the same year of the decision, that *Snyder* renders IIED "all but obsolete"[9] in such situations.[10] University of Florida Professor Lyrissa Lid-

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Speech and Civil Harassment Orders, 64 HASTINGS L.J. 781, 823 (2013) (noting that the court in *Snyder* "emphasized that Westboro's speech related to topics of public concern").

3 IIED typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000); *see, e.g.*, Harris v. Kreutzer, 624 S.E. 2d 24, 33 (Va. 2006) (noting that, in Virginia, IIED "requires four elements to be proved: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable; (3) there was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress was severe").

4 *See* Ex parte Bole, 103 So. 3d 40, 52 (Ala. 2012) (remarking that "[t]he intentional infliction of emotional distress is also known as the tort of outrage").

5 The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment's Due Process Clause as fundamental liberties, rendering them applicable to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (establishing freedom of speech and freedom of the press as "fundamental personal rights . . . protected by the due process clause of the Fourteenth Amendment from impairment by the States").

6 *See* Michael I. Krauss, *A Marine's Honor: The Supreme Court from* Snyder *to* Alvarez, 20 GEO. MASON L. REV. 1, 13 (2012) (noting that "the plaintiff in *Snyder* was a private citizen"); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1168 (2013) (characterizing *Snyder* as "a case involving a private citizen using private law to seek redress against a group of people who sought to hijack his son's funeral for their own purposes").

7 *See Snyder*, 131 S. Ct. at 1220 (concluding "that the First Amendment bars [plaintiff Albert] Snyder from recovery for intentional infliction of emotional distress").

8 Nat Stern, *Secondary Speech and the Protective Approach to Interpretive Dualities in the Roberts Court*, 22 WM. & MARY BILL RTS. J. 133, 142 (2013).

9 Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of* Snyder v. Phelps, 57 WAYNE L. REV. 473, 475 (2011).

10 Other scholars are in accord with Jaffe's view. *See, e.g.*, Joseph Russomanno, *"Freedom for the Thought that We Hate": Why Westboro Had to Win*, 17 COMM. L. & POL'Y 133, 171 (2012) ("After *Snyder*, intentional infliction of emotional distress is weaker—and perhaps disa-

sky, in turn, predicted one year later that *Snyder* was "likely to be an unmitigated boon to media defendants litigating tort cases in years to come."[11]

Why might such early prognostications ultimately prove to be true? Because, as Professor Mark Tushnet recently wrote, *Snyder* can be interpreted as adopting "a rule that a victim cannot recover for a speaker's intentional infliction of emotional distress if the vehicle for inflicting that distress is a comment on a matter of public concern."[12] He is not the only academic to subscribe to this view. Professor Eugene Volokh concurs, asserting that *Snyder* held that IIED "may not be used to impose liability based on the distress caused by the content of speech on matters of public concern."[13] More generally and broadly, *Snyder* reaffirmed the First Amendment principle, as Dean Erwin Chemerinsky notes, that "speech cannot be punished, or speakers held liable, just because the speech is offensive, even deeply offensive."[14]

Now, three years after *Snyder*, this Article examines how the case is affecting the dialectic in media-defendant cases between, on the one hand, constitutional concerns with protecting speech regarding matters of public concern and, on the other hand, tort interests in compensating individuals for severe emotional distress caused by the "extreme and outrageous"[15] speech upon which the "parasitic tort"[16] of

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bled—in claims stemming from speech. First Amendment protection is now stronger. The circumstances under which an intentional infliction claim could prevail have narrowed.").

11 Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1825 (2012) (citation omitted).

12 Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 109 (2012).

13 Eugene Volokh, *The Trouble With "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 585 (2011).

14 Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011); *see* Lidsky, *supra* note 11, at 1821–22 (observing that *Snyder*, along with the Court's ruling in the images-of-animal-cruelty case of United States v. Stevens, 130 S. Ct. 1577 (2010), "affirm[s] that the government may not suppress distasteful speech, even when most citizens find it morally reprehensible and it offers little social value").

15 *See, e.g.*, Stokes v. Bd. of Educ. of Chi., 599 F.3d 617, 626 (7th Cir. 2010) (noting that, under the first element of IIED, a plaintiff must demonstrate that "the defendant's conduct was truly extreme and outrageous"); Hunt v. Delaware, 69 A.3d 360, 367 (Del. 2013) (noting that a plaintiff must prove that the defendant "engaged in extreme or outrageous conduct"); Phung v. Waste Mgmt., Inc., 644 N.E.2d 286, 289 (Ohio 1994) (noting that a plaintiff suing for IIED must prove "that the defendant's conduct was extreme and outrageous").

16 *See, e.g.*, Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, 82 TEMP. L. REV. 891, 904 (2009) (describing IIED as "a parasitic tort with more academic hullabaloo than real-world success" (quoting Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J.

IIED pivots. Much important scholarly ink has been expended in recent years considering the meaning of public concern and its close cousin, newsworthiness,[17] within the context of privacy and, specifically, the tort of public disclosure of private facts.[18] This Article, instead, starts to break new ground by concentrating on the meaning of public concern within the context of IIED and, in particular, IIED claims based upon the publication of allegedly outrageous speech by media defendants that were resolved after *Snyder*.

Initially, Part I provides a primer on *Snyder*, as well as both the Supreme Court's 1988 ruling in *Hustler Magazine, Inc. v. Falwell*[19] and the critical IIED element demanding proof that a defendant engaged in extreme and outrageous conduct or speech.[20] Part II then analyzes and critiques four post-*Snyder* cases involving IIED claims filed against media defendants and premised upon the publication of allegedly outrageous speech.[21] Specifically, Part II investigates how notions of public concern and/or outrageous speech in this quartet of disputes played out in comparison to, and against the backdrop of, *Snyder*.

Returning to address in greater detail the most recent of the four cases analyzed in Part II—namely, *Rodriguez v. Fox News Network, LLC*,[22] which now is on appeal—the Article in Parts III[23] and IV[24] ex-

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TECH. & INTELL. PROP. 73, 81 (2007))); Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 115–16 (2010) ("In practice, if not in doctrine, IIED continues to be a parasitic tort, one that is pled and alleged in circumstances where other, better-established tort or contract claims could also have been put forward.").

17 *See, e.g.*, Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 580–81 (2007) ("A newsworthiness standard . . . involves essentially the same inquiry as a 'public concern' test. A newsworthiness inquiry is common in the context of privacy tort actions.").

18 *See, e.g.*, Patricia Sanchez Abril, *"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 385–86 (2011) (discussing "the applicability of the public disclosure tort" and appealing "for reinvigorated privacy protection for those who shield their private lives"); Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 172 (2010) (noting scholars generally regard the tort of public disclosure of private facts as dead); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1040 (2009) (noting that "tort law provides remedies against even accurate reporting when it invades personal privacy"); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 781 (2009) (endeavoring to "compare[] and contrast[] the ethical obligations of news reporters under journalism ethics codes with their reporting obligations under state defamation and privacy tort laws").

19 485 U.S. 46 (1988).

20 *See infra* notes 26–76 and accompanying text.

21 *See infra* notes 77–209 and accompanying text.

22 Minute Entry, Rodriguez v. Fox News Network LLC, No. CV2013-008467 (Ariz. Super. Ct. Jan. 30, 2014) [hereinafter *Rodriguez* Minute Entry], *available at* http://www.medialaw.org/images/medialawdaily/rodriguezminute.pdf.

plores how increasing judicial and legislative sensitivity to the emotional impact of images of death on relatives, along with news media awareness that coverage of car chases could very well end with the capture of such death images, might affect IIED cases akin to *Rodriguez* in the future. Finally, this Article concludes by asserting that the cases evaluated here largely demonstrate the elasticity of the public concern concept in IIED cases after *Snyder* and, in turn, lower courts' seeming unwillingness to confine the holding in *Snyder* to its unique set of facts.[25] With the exception of one decision, the cases represent clear First Amendment victories for media defendants, much as many predicted would be the situation after *Snyder*. Importantly, the conclusion of this Article also considers several ways in which *Snyder* might be limited in the future and it rejects one such method as constitutionally unsound.

I. *SNYDER V. PHELPS,* MATTERS OF PUBLIC CONCERN AND EXTREME AND OUTRAGEOUS CONDUCT: A PRIMER

Snyder v. Phelps[26] centered on speech by seven members of the Westboro Baptist Church ("WBC").[27] They were standing on public property about 1,000 feet away from a church where a funeral was being held for Matthew Snyder, a soldier killed in the line of duty in Iraq.[28] Believing "that the United States is overly tolerant of sin and that God kills American soldiers as punishment[,]"[29] the WBC members held signs with messages such as "Thank God for IEDs," "God Hates Fags," and "Pope in Hell[.]"[30] They displayed them "for about 30 minutes before the funeral began and sang hymns and recited Bible verses."[31]

Albert Snyder, the deceased soldier's father, sued for IIED, among other causes of action.[32] When the case reached the U.S. Supreme Court, Chief Justice John Roberts observed for the eight-Justice majority that the Free Speech Clause of the First Amendment "can serve

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23 *See infra* notes 210–38 and accompanying text.
24 *See infra* notes 239–52 and accompanying text.
25 *See infra* notes 253–77 and accompanying text.
26 131 S. Ct. 1207 (2011).
27 *Id.* at 1213.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *See* Snyder v. Phelps, 131 S. Ct. 1207, 1214 (2011) (noting that Albert Snyder "alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.").

as a defense in state tort suits, including suits for intentional infliction of emotional distress."[33] Chief Justice Roberts reasoned that any liability for IIED in *Snyder* hinged "largely on whether [the WBC's] speech is of public or private concern,"[34] with speech regarding matters of public concern being privileged and "at the heart of the First Amendment's protection."[35]

In explicating public concern, the *Snyder* majority focused on three variables—content, context, and form of the speech[36]—and wrote that when considering them, "no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[37] In addition to articulating this trio of variables, the Court broadly defined public concern as expression that might "be fairly considered as relating to any matter of political, social, or other concern to the community"[38] *or* that relates to "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]"[39] This disjunctive, two-part test (the Court used "or"[40] rather than "and" to separate the prongs) has been criticized as "riddled with ambiguities that lower courts must now sort through."[41]

In *Snyder*, however, the majority had little problem in finding the WBC's speech related to matters of public concern. Chief Justice Roberts, for instance, wrote that the signs' content "plainly relates to broad issues of interest to society at large,"[42] namely "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."[43] In terms of the context in which that speech occurred, Chief Justice Roberts found that the "signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society."[44] In particular, the purposeful

33 *Id.* at 1215.

34 *Id.*

35 *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978))).

36 *Id.* at 1216.

37 *Id.*

38 Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

39 *Id.* (quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).

40 *Id.*

41 Clay Calvert, *Defining "Public Concern" After* Snyder v. Phelps*: A Pliable Standard Mingles With News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 70 (2012).

42 *Snyder*, 131 S. Ct. at 1216.

43 *Id.* at 1217.

44 *Id.*

context of protesting at military funerals illustrated the public nature of the speech "because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies."[45]

Although Chief Justice Roberts emphasized that the majority's decision in favor of the WBC was narrow and "limited by the particular facts before us[,]"[46] he closed with a very broad rhetorical flourish[47] about the importance of protecting hateful and hurtful speech:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[48]

Snyder came more than two decades after the Supreme Court's 1988 decision in *Hustler Magazine, Inc. v. Falwell*.[49] *Falwell* first constitutionalized IIED in speech-based cases involving matters of public concern[50] by requiring public officials and public figures to prove, in addition to the common-law IIED elements, "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."[51] In doing so, the Court ruled against public-figure plaintiff Jerry Falwell's efforts to recover for the emotional distress the reverend and Moral Majority leader sustained due to an ad parody in *Hustler* suggesting he engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[52]

In *Snyder*, the Court went beyond the rule it created in *Falwell*. Specifically, the majority suggested that even when an IIED plaintiff is a private figure, as was Albert Snyder,[53] the First Amendment does not permit recovery for IIED damages when the speech involves an opin-

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45 *Id.*

46 *Id.* at 1220.

47 One commentator has dubbed Chief Justice Roberts' concluding words in *Snyder* "a breathtaking piece of rhetoric." Kiel Brennan-Marquez, *Judging Pain*, 31 QUINNIPIAC L. REV. 233, 245 (2013).

48 *Snyder*, 131 S. Ct. at 1220.

49 485 U.S. 46 (1988).

50 The Court emphasized in *Falwell* that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50.

51 *Id.* at 56.

52 *Id.* at 48.

53 *See* Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What is Next After* Phelps*?*, 61 AM. U. L. REV. 279, 299 (2011) (noting that plaintiff Albert Snyder "does not qualify as a public figure" and adding that "*Falwell* is distinguishable from [*Snyder*] in that the former involved a public figure").

ion on a matter of public concern.[54] The *Snyder* Court, as Professor Cristina Carmody Tilley writes, "failed to apply even the minimally tort-protective standard it had announced in *Falwell*, where the actual malice test was imported to IIED claims."[55] In a nutshell, "the Court concluded that the First Amendment trumped the IIED tort claim . . . because Westboro's speech related to matters of import to society at large."[56]

Why did the Court take these First Amendment-protective actions in *Falwell* and *Snyder*? In both cases, it was particularly concerned about providing a constitutional check against the subjectivity of the common-law IIED element that requires a plaintiff to prove a defendant's conduct (or speech, as in the cases here) is extreme and outrageous.[57] In *Falwell*, for instance, the Court reasoned:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[58]

More than twenty years later, in *Snyder*, the Court criticized outrageousness as "a highly malleable standard" that creates "a risk [that] is unacceptable" in terms of speech being punished simply because it is offensive or insulting to the tastes and views of jurors.[59] The Court thus reasoned that the WBC's speech on matters of public concern was "entitled to 'special protection' under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous."[60]

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54 As Professor Frederick Schauer summarizes the Court's holding in *Snyder*,

> the Supreme Court invalidated the $5 million damage award, primarily because the picketing was related to a matter of public concern. Because of this, the Court held, the First Amendment prevented Maryland from applying the common law of intentional infliction of emotional distress to the conduct of Phelps and the Westboro Baptist Church.

Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1888 (2013); *see also* Russomanno, *supra* note 10, at 171 (noting that "*Snyder* expands protection from [IIED] to defendants whose speech is on matters of public concern, regardless of the plaintiffs public/private status").

55 Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 74 (2012).

56 Douglas Behrens, *Balancing Intentional Infliction of Emotional Distress Claims and First Amendment Protections in* Snyder v. Phelps, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 213, 221 (2013).

57 *See supra* note 15 and accompanying text.

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

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

60 *Id.*

How, then, is outrageous conduct defined? The extreme-and-outrageous conduct or speech element of IIED sometimes is described by courts as conduct that is "atrocious and utterly intolerable in a civilized society."[61] It also represents conduct that is "so extreme as to exceed all bounds of decency in a civilized community."[62] As the Supreme Court of Oklahoma neatly summed it up in 2011, this element "requires the existence of conduct so extreme in degree as to go beyond all possible bounds of decency, and which is viewed as atrocious and utterly intolerable in a civilized community"[63] and that, "[i]n general, a defendant's conduct must be such that an average member of the community would exclaim, 'Outrageous!'"[64] Whether or not the conduct in question amounts to such "an extraordinary transgression is a fact-specific inquiry, to be considered on a case-by-case basis, based on the totality of the circumstances."[65]

Conversely, as the Supreme Court of Nebraska recently wrote in paraphrasing the observations of the drafters of the *Restatement (Second) of Torts*,[66] "[m]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct."[67] The Supreme Court of Kentucky added that "[i]t must be more than bad manners[.]"[68] The Supreme Court of Kansas, in turn, concisely synthesized what does and does not amount to extreme and outrageous conduct, writing in 2010,

> [c]onduct that rises to the level of tortious outrage must transcend a certain amount of criticism, rough language, and occasional acts and words that are inconsiderate and unkind. The law will not intervene where someone's feelings merely are hurt. In order to provide a sufficient basis for an action to recover for emotional distress, conduct must be outrageous to the point that it goes beyond the bounds of decency and is utterly intolerable in a civilized society.[69]

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61 S.B. v. St. James Sch., 959 So. 2d 72, 93 (Ala. 2006) (quoting Travelers Indem. Co. of Ill. v. Griner, 809 So. 2d 808, 810 (Ala. 2011)).

62 Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 486 (Cal. Ct. App. 2009).

63 Durham v. McDonald's Rests. of Okla., Inc., 256 P.3d 64, 67 n.1 (Okla. 2011) (citing Kraszewski v. Baptist Med. Ctr. of Okla., Inc., 916 P.2d 241, 248 n.25 (Okla. 1996)).

64 *Id.* (quoting Computer Publ'ns, Inc. v. Welton, 49 P.3d 732, 735 (Okla. 2002).

65 House v. Hicks, 179 P.3d 730, 736 (Or. Ct. App. 2008).

66 *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (1965) ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.").

67 Roth v. Wiese, 716 N.W.2d 419, 432 (Neb. 2006).

68 Childers v. Geile, 367 S.W.3d 576, 581 (Ky. 2012).

69 Valadez v. Emmis Comm., 229 P.3d 389, 394 (Kan. 2010).

Despite such judicial efforts to clarify what constitutes extreme and outrageous conduct, the determination of outrageousness is still subjective. As this Author waggishly asserted elsewhere,

> [i]f Kevin Pollak's character in *A Few Good Men*, Lt. Sam Weinberg, was correct when he said that a fence line is a big wall that separates the good guys from the bad guys, then outrageousness in IIED represents the most shoddy variety of fence line: Its porousness and permeability prevent predicting whether certain speech is actionable.[70]

Procedurally, it is first up to a judge to determine if the conduct or speech in question can possibly be considered extreme and outrageous.[71] If a judge finds that it can be, then it is up to the jury to decide whether, in fact, it is extreme and outrageous.[72]

In summary, after *Snyder*, there is now a direct tension between the constitutional interest in safeguarding expression affecting matters of public concern and the common-law tort interest in protecting citizens against extreme and outrageous behavior. A finding of the former, constitutional element by a court or jury is designed to keep in check a simultaneous finding of the latter, common-law element. Put more bluntly, the strain today is between speech about matters of public concern and speech that is outrageous. How is that friction playing out after *Snyder*? As the four post-*Snyder* cases described in Part II indicate, both concepts—public concern and outrageousness—have so much elasticity that the current state of the law is bound to produce inconsistent results and, in turn, shoddy doctrinal development.

This probably is not surprising. As Professor David Ardia wrote in the aftermath of *Snyder*, "much work remains to be done in formulating a consistent approach to divining this line" between speech about matters of public and private concern.[73] And in reference to the *Snyder* dichotomy between public concern and private matters, Professor Steven Heyman adds that, in some cases, "the use of these abstract categories is simply too crude a tool to allow for a thoughtful consideration of the values at stake."[74]

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70 Clay Calvert, *Tort Transformation in the Cultural Quicksand of Language and Values*, 39 LITIG. 30, 34 (2013).

71 *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 66, at § 46 cmt. h ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery . . . .").

72 *See* Hunt v. Delaware, 69 A.3d 360, 367 (Del. 2013) ("If reasonable minds may differ, the question of whether the conduct is extreme and outrageous is for the jury.").

73 David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 75 (2013).

74 Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 CONN. L. REV. 101, 126 (2012).

Of course, courts today are under no obligation to rip *Snyder* from its rather quirky factual moorings and extend its public concern/private concern dichotomy to other IIED scenarios. That is because, as noted above, the *Snyder* majority wrote that its decision was narrowly confined to the facts of the case.[75] In fact, Professor Deana Pollard Sacks argued in 2012 that *Snyder* is "specifically limited to its extraordinary facts."[76] Additionally, courts could well interpret the concept of public concern narrowly, so as to apply it only to opinions and viewpoints—not to factual assertions—relevant to public debate about issues affecting a democratic society, such as those on gay rights and sexual abuse by the clergy in *Snyder*.

With this in mind, the Article now turns to an analysis of four post-*Snyder*, media-defendant cases that illustrate the continuing elusiveness and ambiguousness of both public concern and outrageous conduct.

II. PUBLIC CONCERN AND OUTRAGEOUS SPEECH: TESTING THE LEGAL BOUNDARIES AFTER *SNYDER* IN A QUARTET OF MEDIA-DEFENDANT IIED CASES

Each of the four cases examined below involves an IIED claim filed against a media defendant and based upon the publication of allegedly outrageous speech, rather than supposedly outrageous newsgathering methods.[77] The cases are analyzed in chronological order, starting with the most recent and proceeding to the oldest. The U.S. Supreme Court's decision in *Snyder v. Phelps* was cited by either the media defendants and/or the courts in all four cases.

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75 *See supra* note 46 and accompanying text.

76 Deana Pollard Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1068 (2012).

77 Intentional infliction of emotional distress claims against news media organizations may be premised upon how the news or information in question was gathered, as compared to how it was reported. *See, e.g.*, Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 383 (S.D.N.Y. 2008) ("[Plaintiff's] principal claims survive, for . . . a reasonable jury could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement. . . . NBC purportedly instigated and then placed itself squarely in the middle of a police operation, pushing the police to engage in tactics that were unnecessary and unwise, solely to generate more dramatic footage for a television show."); KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr. 2d 431, 435 (Cal. Ct. App. 1995) (concluding that a reasonable jury could find that the manner in which a never-broadcast interview was conducted by a television news reporter with three minors, who were home alone, constituted extreme and outrageous conduct). Such claims based upon allegedly outrageous newsgathering methods are beyond the scope of this Article.

The cases were chosen, in part, because they cut across a wide and, arguably, controversial variety of topics that test the boundaries of public concern and outrageousness, namely:

(1) the live television broadcast of a suicide that was later witnessed by the plaintiffs—the decedent's three minor children—on the Internet;[78]

(2) the admittedly false publication by a well-known and gossip-prone tabloid of a trio of stories regarding the death and remains of Natalee Holloway;[79]

(3) the Internet-posting of parts of a hidden-camera sex tape of a well-known professional wrestler, Terry Gene Bollea, better known as Hulk Hogan;[80] and

(4) the broadcast of a woman's arrest and involuntary appearance on a reality television program called *Female Forces*.[81]

A. Rodriguez v. Fox News Network LLC[82]

Fast-forward approximately two-and-a-half years after *Snyder* to August 2013 and the defendant's motion to dismiss (MTD) the IIED claim in *Rodriguez v. Fox News Network LLC*.[83] The commanding rhetorical dicta with which Chief Justice Roberts memorably closed his *Snyder* opinion—the verbiage regarding the power of speech and the need to protect even hurtful expression[84]—finds itself quoted early in the *Rodriguez* MTD.[85] *Snyder*, in fact, is cited at multiple points in the motion for the following propositions, each of which addresses matters of public concern:

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78 *Infra* Part II.A.

79 *Infra* Part II.B.

80 *Infra* Part II.C.

81 *Infra* Part II.D.

82 *Rodriguez* Minute Entry, *supra* note 22.

83 Motion to Dismiss Plaintiff's Complaint, Rodriguez v. News Corp., No. CV2013-008467 (Ariz. Super. Ct. Aug. 30, 2013) [hereinafter *Rodriguez* Motion to Dismiss].

84 This refers to the Court's statement:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

85 *Rodriguez* Motion to Dismiss, *supra* note 83, at 3.

- "statements about *issues of public concern* that do not contain provably false statements of fact – like the ones here – are absolutely privileged under the First Amendment[;]"[86]

- "as a matter of well-settled First Amendment and common law, Fox cannot be held liable for emotional distress caused by news coverage of an *issue of public concern*[;]"[87]

- "a plaintiff cannot recover for emotional distress stemming from statements addressing an *issue of public concern* without demonstrating that the speech is false, or some other form of unprotected expression[;]"[88] and

- "the First Amendment's long-settled protections for speech about public officials and public figures apply with equal force to speech on *issues of public concern* in the context of cases alleging emotional distress."[89]

What then, with this heavy reliance upon *Snyder*, was the alleged issue of public concern in *Rodriguez*? Did it relate to national security, foreign or domestic terrorism, same-sex marriage, credit-card data breaches, the national debt, the Patient Protection and Affordable Care Act, or the job Barack Obama is doing as President? Or did it pertain, as was the scenario in *Snyder*, to issues such as American tolerance of homosexuality and sexual abuse by members of the clergy?

No, it related to none of the above. In fact, the speech that gave rise to the IIED claim in *Rodriguez* was a fleeting, long-distance image that was televised live to a national audience on Fox News Channel's *Studio B with Shepard Smith* on September 28, 2012.[90] It was the picture of JoDon Romero committing suicide in the Arizona desert after a high-speed chase that concluded when Romero pulled off from Interstate 10, abandoned his car and ran from it.[91] All totaled, about

86 *Id.* at 2 (emphasis added).
87 *Id.* at 3 (emphasis added).
88 *Id.* at 5 (emphasis added).
89 *Id.* at 7 (emphasis added).
90 *See* Complaint at 2–4, Rodriguez v. Fox News Network, LLC, No. CV2013-008467, (Ariz. Super. Ct. June 6, 2013) [hereinafter *Rodriguez* Complaint], *available at* http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2013/06/13/Editorial-Opinion/Graphics/fox-car-chase-suicide-complaint.pdf (detailing the facts of the case).
91 *Id.* at 3–4.

1.8 million viewers "witnessed the death from their couches."[92] Only three people, however, who saw it later on the Internet, would provide the impetus for the *Rodriguez* lawsuit.

> *"That didn't belong on TV."*[93]

Shepard Smith, in apologizing with those words to his viewing audience shortly after airing Romero's suicide, may be morally and ethically correct that Romero's death was inappropriate for television. That, however, is a far different matter from whether Fox News should be held legally accountable to Romero's children under the IIED tort.

The *Rodriguez* complaint, which was filed on behalf of the three minor sons of JoDon Romero, contended the trio, who were at school when the death aired live on Fox News Channel, saw it later that day at home after finding "a clip of the Fox News broadcast on YouTube."[94] In a nutshell, the complaint's IIED cause of action asserted that Fox's decision to air the suicide live constituted extreme and outrageous conduct or speech that ultimately caused the minors severe emotional distress.[95]

Fox News, unsurprisingly, framed the issues of public concern in its motion to dismiss as "public safety and law enforcement,"[96] not Romero's on-air suicide. In other words, the defendants focused on the police chase of Romero and the danger it posed to the public, not the suicide that transpired after the vehicular chase ended. Citing *Snyder*, Fox asserted that "a live news program that informed the public about an ongoing police pursuit of an armed and 'extremely dangerous' suspect cannot form the basis of a claim for emotional distress where the Complaint fails to allege the Newscast was false in any way."[97]

On January 30, 2014, Maricopa County Superior Court Judge John Rea, immediately after hearing oral argument, ruled from the bench in favor of Fox News and dismissed the IIED claim.[98] Among

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92 Don Kaplan et al., *Fox News Horror*, DAILY NEWS, Sept. 29, 2012, at 4.

93 Brian Stelter, *Fox Regrets Suicide Shown Live*, N.Y. TIMES, Sept. 29, 2012, at A16 (quoting Shepard Smith's on-air comment after his program aired the suicide of JoDon Romero) (emphasis added).

94 *Rodriguez* Complaint, *supra* note 90, at 4.

95 *Id.* at 6.

96 *Rodriguez* Motion to Dismiss, *supra* note 83, at 6.

97 *Id.* at 8.

98 *See* E-mail from Joel B. Robbins, Esq., Robbins & Curtin, PLLC, to author (Jan. 31, 2014, 11:19 EST) (on file with author) (stating that the judge "ruled from the bench that the

other reasons that can be heard from an audio recording of the hearing, Judge Rea: a) cited First Amendment concerns; b) found the events were newsworthy and did not stop being newsworthy simply because they culminated in a suicide; and c) held that Fox's actions were not extreme and outrageous, as required under the basic elements of IIED.[99]

Fox News's successful and frequent use of *Snyder* in its *Rodriguez* motion to dismiss initially suggests that both Professors Jaffe[100] and Lidsky,[101] who are quoted at the start of this Article, may be correct in predicting the long-term, pro-defendant impact of *Snyder* on IIED claims brought by private figures. The *Rodriguez* IIED claim also was plagued by the question of causation, with Fox News emphasizing in its motion to dismiss that the children did not watch the Fox News broadcast of the suicide but, rather, saw it only later on YouTube.[102] As Fox asserted, "whatever emotional injuries they suffered were not a direct and proximate result of the Newscast. Rather (and rather candidly), they were the result of (a) their father's lawless conduct, and (b) their mother's apparent failure to control their access to the Internet."[103]

Regardless of these seemingly clear flaws with the plaintiffs' IIED case, the underlying facts of *Rodriguez* make it an excellent vehicle for considering the metes and bounds of public concern and outrageousness post *Snyder*. Furthermore, the case is still very much alive, as the plaintiffs' attorney, Joel Robbins, vowed to appeal it, asserting that "[t]he First Amendment has some limitations."[104]

Consider, for example, the factors of "context" and "content" spelled out by the *Snyder* majority in determining whether speech is a matter of public concern.[105] The speech at issue in *Snyder* occurred in

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motion to dismiss was granted for [F]irst [A]mendment reasons, and that [his] IIED failed because it wasn't outrageous").

99 Audio Recording of Motion to Dismiss Hearing, Rodriguez v. Fox News Network, LLC, Jan. 30, 2014 (on file with author).

100 Jaffe, *supra* note 9.

101 Lidsky, *supra* note 11.

102 *See Rodriguez* Motion to Dismiss, *supra* note 83, at 10 ("The Complaint concedes that Plaintiff's children were in school and did not watch the Fox Newscast. Instead, they learned of the incident at school and later that day watched a video clip of the incident on YouTube.").

103 *Id.*

104 Jacques Billeaud, *Arizona Judge Tosses Suit Against Fox News Network*, WASH. TIMES, Feb. 14, 2014, *available at* http://www.washingtontimes.com/news/2014/feb/14/ariz-judge-tosses-suit-against-fox-news-network/ (quoting Robbins).

105 *See supra* notes 36–37 and accompanying text.

the context of what the Court called "public debate,"[106] specifically involving "picketing"[107] and "protest"[108] in the geographical context of a "traditional public forum"[109] and during which the WBC "convey[ed] its views"[110] on content relating "to broad issues of interest to society at large."[111]

Was, one might reasonably wonder, Fox News really engaged in "public debate"[112]—a key phrase used by Chief Justice Roberts in the same *Snyder* dicta quoted approvingly by Fox News in *Rodriguez*—when it aired the suicide? What "public debate," one might query, would be stifled were tort liability to be imposed in *Rodriguez*? Fox News and Shepard Smith were not, in fact, debating the pros and cons of high-speed police car chases on public freeways. Furthermore, they were not debating anything to do with suicide.

Instead, Fox was merely casting a camera on the world to capture facts as they unfolded in unscripted fashion, with Shepard Smith playing the role of narrator. Unlike the members of the WBC, Fox News was not expressing its viewpoints or opinions on any broad issues of interest to society at large, but simply was seizing images of events as they transpired in real-time fashion and merely providing a verbal narration to supplement the transmission of instantaneous images.

Snyder, in brief, dealt with the expression of viewpoints and opinions in the form of words. *Rodriguez* deals largely with the expression of facts in the form of images. Although Judge Rea failed to make this distinction between assertions of opinion (*Snyder*) and assertions of fact (*Rodriguez*), the federal magistrate in *Holloway v. American Media, Inc.*[113] (described in the next Subpart) recognized this fundamental difference in 2013, and it played a pivotal part in the outcome of that case, which allowed an IIED claim to continue in the face of a *Snyder*-based, public-concern defense.[114]

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106 Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

107 *Id.* at 1218.

108 *Id.*

109 *Id.* (citation and internal quotation marks omitted).

110 *Id.* at 1217.

111 *Id.* at 1216.

112 This refers to the Court's statement:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle *public debate*.

Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (emphasis added).

113 947 F. Supp. 2d 1252, 1263 (N.D. Ala. 2013) (recognizing the difference between assertions of opinion and assertions of fact).

114 *See infra* Part II.B.

Furthermore, in *Snyder*, the Supreme Court wrote that "the issues [the WBC members] highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[115] It is a long stretch to claim that a car chase of a lone, previously unknown individual is equivalent to such matters of public import in *Snyder*, let alone whether the image of the suicide of a single individual in the Arizona desert is a matter of public import. What this illustrates, of course, is the vastly expansive and almost unrestrained nature of the concept of public concern upon which the *Snyder* majority rested its decision. Even if one assumes that a car chase is matter of public concern because innocent people might be injured by it and because it illustrates law enforcement officials performing their important and dangerous public duties, one might reasonably wonder whether this matter of public concern terminates when the car chase itself ends and the suspect pulls out a gun to shoot himself.

If *Snyder's* determination that private figures must pay an emotional price for speech about matters of public concern represents, as Professor Ronald Krotoszynski aptly puts it, "a major displacement of traditional state tort law to accommodate . . . debate about public affairs[,]"[116] then *Snyder* does not necessarily extend to a factual situation (as opposed to a situation involving the expression of opinions) where the plaintiffs are minors. This would be a far different scenario from *Snyder's* facts, because *Snyder* involved an adult-father plaintiff. Additionally, in *Rodriguez*, the factual images of the suicide of the children's father did not affect any debate about public affairs.

Is live coverage of car chases by law enforcement personnel truly a matter of public concern? Assuming for the sake of argument that it is a matter of public concern, then is *continuing, post-chase* coverage—after the car chase ends, after the vehicle is no longer on a public road or highway where it might collide with other vehicles and when its driver is no longer near any other members of the public so as to endanger their safety—a matter of public concern? And, going yet another step further, is an image of a desperate man—a man who almost certainly will not escape capture because law enforcement personnel are on the scene—killing himself a matter of public concern akin to the viewpoints that animated *Snyder*?

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115 *Snyder*, 131 S. Ct. at 1217.

116 Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 902 (2013).

All of these are questions that could easily be put to a jury if, in accord with Chief Justice John Roberts' own words in *Snyder*, the Court's opinion in that case is limited by its particular facts.[117] Furthermore, unlike the public-figure plaintiff in *Falwell*, the plaintiffs in *Rodriguez*—three minors—are private figures, rendering a *Falwell*-based defense distinguishable and impossible to raise in *Rodriguez*. The rule from *Falwell* thus does not apply, and all that a court like that in *Rodriguez* then is left with is *Snyder* and the choice of whether to stretch *Snyder* beyond its factual confines to a very different context. Judge Rea chose to extend it, and his decision illustrates the vast elasticity of public concern in IIED cases involving private-figure plaintiffs.

The flipside of the public concern question is whether, under the common-law IIED elements, the conduct of Fox News was extreme and outrageous.[118] The answer likely depends upon how one parses and splices the conduct. Airing a car chase on a newscast is likely not extreme and outrageous conduct; in fact, it seems routine today, rather than beyond the bounds of decency in a civilized society.[119] Conversely, airing a suicide live on national television might well be considered extreme and outrageous conduct today, especially if, as Part III suggests, it is reasonably foreseeable that resulting suicide images will quickly migrate to the Internet where they likely will exist in perpetuity.

Another way to parse the extreme-and-outrageous conduct issue—one that an inventive plaintiff's attorney might assert—is that it was extreme and outrageous for Fox not to properly use a tape-delay mechanism that would have allowed it to stop coverage prior to the suicide. When a human being fails to timely push the button in order to dump out of the live coverage, as apparently happened in *Rodriguez*,[120] and a suicide of no newsworthy value then is shown live, why not impose tort liability to deter it from happening again?[121] If, as

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117 *See supra* note 46 and accompanying text.

118 *See supra* notes 61–70 and accompanying text (describing and defining the concept of extreme and outrageous conduct as that term is used in the IIED tort).

119 *See infra* Part IV.

120 *See* Al Tompkins, *Will TV's Long Love Affair With Car Chases Come to a Screeching Halt as Fox Broadcasts Suicide Live?*, POYNTER (Sept. 30, 2012, 7:46 AM), http://www.poynter.org/latest-news/als-morning-meeting/189989/will-tvs-long-love-affair-with-car-chases-come-to-a-screeching-halt-as-fox-broadcasts-suicide-live ("Executive Vice President for News Michael Clemente tried to explain how it happened. He called it a 'severe human error.' True enough. The network put the live feed on a five-second delay, but even that precaution depends on humans hitting a button to 'dump' out of the broadcast").

121 Professor Andrew Popper writes that:

First Amendment expert Randall P. Bezanson asserts, "a central purpose of tort law is to deter and shape harmful behavior,"[122] then imposing monetary damages for such shoddy conduct would likely lead in the future to better training among employees about how to properly operate a tape-delay mechanism, so as not to allow it to happen again. A little legal deterrent—or, when parsed more dangerously from the typical media defendant's parade-of-horribles perspective, a little chilling effect—might not always be such a bad thing, especially if it improves the skills of those tasked with television news coverage. Al Tompkins of the Poynter Institute writes that Fox News also had other options: "Not to air the chase at all. Or Fox could have recorded the footage and waited until the chase ended to air portions of it."[123]

Ultimately, Fox News Channel's heavy reliance in its MTD on *Snyder* and its focus on matters of public concern[124] seemed to pay off handsomely before Judge Rea, who dismissed the case immediately after hearing oral argument.[125] Whether this holds up on the now-pending appeal in *Rodriguez* remains to be seen.

B. Holloway v. American Media, Inc.[126]

In May 2013, a federal district court in Alabama refused to dismiss an IIED claim filed against the publisher of the *National Enquirer* by Elizabeth Ann Holloway, mother of Natalee Holloway, who disappeared in 2005 in Aruba.[127] Natalee Holloway's disappearance penetrated deep into popular culture and public consciousness, even spawning a highly watched made-for-television movie on the Lifetime Channel and causing Nancy Grace's TV career to soar.[128] But it was

> the tort system is fully defensible as a primary deterrent mechanism. It is not a perfect system. Not every case deters. In the aggregate, however, the civil justice system provides a powerful and continuous messaging device that positively affects the safety and efficiency of goods and services.

Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 185 (2011/12).

122 Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 892 (2005).

123 Tompkins, *supra* note 120.

124 *See supra* notes 86–89 and accompanying text (describing the portions of the *Rodriguez* Motion To Dismiss that reference the concept of public concern and *Snyder*).

125 *See supra* note 98 and accompanying text (discussing the dismissal of the case).

126 947 F. Supp. 2d 1252 (N.D. Ala. 2013).

127 *See id.* at 1271 ("The motion to dismiss and for partial summary judgment is due to be DENIED as to the plaintiff's claim of intentional infliction of emotional distress.").

128 *See* Jonathan Storm, *Holloway Movie and Mother's Show are Inexcusable*, PHILA. INQUIRER, May 7, 2011, at D1 (criticizing the treatment of the Natalee Holloway disappearance by the Lifetime movie and noting that Nancy Grace's "career soared on the wings of Natalee's disappearance"); *see also* Tom Jicha, *Grace Before Dinner*, SUN SENTINEL, Sept. 12, 2010,

the *National Enquirer's* publication of at least three articles that spawned an IIED claim by Natalee's mother, who alleged the stories were knowingly false and intended to cause her to suffer severe emotional distress.[129] Specifically, and as explained by the court, the offending articles

> described a map that purported to show where Natalee's body was located, a "secret graveyard" where Natalee had been "buried alive," and other details about her "murder" and the treatment of her "corpse," including that it had been secreted temporarily in a coffin with another corpse before being moved to a final location.[130]

Elizabeth Ann Holloway, represented by high-profile, plaintiff-defamation attorney L. Lin Wood,[131] claimed "the stories, headlines, and photographs published in those three articles caused her to suffer severe emotional stress."[132] The *National Enquirer* and its owner, American Media, countered, among other things, that they were "not liable to plaintiff on her tort claims because the published materials *are 'of public concern'* and thus are protected by the First Amendment"[133] and because "the conduct at issue is *not sufficiently 'outrageous'* to support a claim for intentional infliction of emotional distress under Alabama law."[134]

Both concepts at the center of this Article—the First Amendment interest in protecting speech about matters of public concern and the common law IIED requirement of proving outrageousness—thus were squarely before the court in *Holloway*. The *National Enquirer* and American Media, represented by the prominent media-defense firm of Levine Sullivan Koch & Schulz,[135] cited *Snyder*. Specifically, they

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available at http://articles.sun-sentinel.com/2010-09-12/entertainment/fl-arts-nancy-grace-091210-20100912_1_nancy-grace-cnn-headline-news-casey-anthony (asserting that Nancy Grace "almost single-handedly made Casey Anthony and Natalee Holloway into national cause celebres").

129 *Holloway*, 947 F. Supp. 2d at 1254.

130 *Id.*

131 Wood was "lead civil attorney for the late Richard Jewell in matters arising out of reporting about Mr. Jewell in connection with the 1996 bombing of Centennial Olympic Park in Atlanta[,]" "attorney for Dr. Phil McGraw in connection with false and defamatory articles published by *Newsweek*, the *Daily Beast* and the *National Enquirer*[,]" and "lead civil attorney for Howard K. Stern in the prosecution and defense of defamation claims arising out of the death of Anna Nicole Smith." *L. Lin Wood*, WOOD, HERNACKI & EVANS, LLC, http://www.whetriallaw.com/Attorneys/L-Lin-Wood.aspx (last visited Oct. 6, 2014).

132 *Holloway*, 947 F. Supp. 2d at 1254.

133 *Id.* (emphasis added).

134 *Id.* (emphasis added).

135 The firm's "attorneys have been involved in most of the leading media cases in the past two decades involving defamation, product disparagement, invasion of privacy, and rights of publicity," and Levine Sullivan Koch & Schulz "has been engaged at one time or another by virtually every major media company and has been appointed by the leading

argued that the presence of the former concept (public concern) would trump the existence of the latter (outrageousness). They asserted in sweeping fashion that, "*regardless of the falsity or outrageousness* of speech, it is protected by the First Amendment if it involves a matter 'of public concern.'"[136] The *National Enquirer* went so far as to concede falsity for purposes of its motion to dismiss the IIED cause of action, thus arguably pushing *Snyder* to its outer limits.[137] The next two Subparts separately analyze how the court in *Holloway* addressed the *Snyder*/public-concern argument and the question of outrageousness.

1. Snyder *and Matters of Public Concern in* Holloway

Rebuffing the media defendants on their *Snyder*-based defense, U.S. Magistrate T. Michael Putnam decisively put the brakes on an expansive interpretation of *Snyder*, while nonetheless acknowledging the *National Enquirer's* underlying speech about Natalee Holloway's disappearance was of public concern.[138] Putnam initially reined in *Snyder* by suggesting that *Snyder's* holding is limited to cases involving *opinions*, not *factual assertions*, on matters of public concern. He wrote that

> like the "ad parody" in *Falwell*, the speech at issue in *Snyder* did not involve asserted "facts," at least in the sense that a reasonable person could understand the offending speech to assert ascertainably "false" statements. The expressions "God Hates Fags" and "You're Going to Hell" and "Thank God for IEDS" are, at best, opinions, *not* factual statements.[139]

In stark contrast, in *Holloway* it was "undisputed that the articles at issue purported to describe facts concerning Natalee Holloway's disappearance."[140]

Second, Magistrate Putnam seized on[141] Chief Justice Roberts' observation in *Snyder* that the WBC members honestly believed their

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media insurance companies to defend scores of smaller media businesses around the country in libel, privacy, and publicity cases." *Defamation, Privacy & Publicity, Practice Areas*, LEVINE SULLIVAN KOCH & SCHULZ, LLP, http://www.lskslaw.com/practice-areas/defamation-privacy-publicity (last visited Oct. 6, 2014).

136 *Holloway*, 947 F. Supp. 2d at 1261 (emphasis added).

137 *Id.* at 1262 ("Defendants have definitively stated that, for purposes of their motion, they accept the plaintiff's allegations that the articles were false.").

138 Magistrate Putnam opined that "[t]here is little question that the disappearance of Natalee Holloway, which dominated news coverage for many weeks, if not years, and which involved the safety of travel abroad and called up the worst fears of parents, was a matter of 'concern to the community.'" *Id.* at 1261 n.10.

139 *Id.* at 1261 n.11 (emphasis added).

140 *Id.* at 1261 n.9.

viewpoints. "Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its 'honestly believed' views on public issues[,]" wrote Roberts.[142] Magistrate Putnam interpreted this to stand for the proposition that "the First Amendment protection described in *Snyder* does not extend to speech that is not 'honestly' believed."[143]

Third, Magistrate Putnam opined that *Snyder's* First Amendment shield does not apply, even when the underlying topic is about a matter of public concern, if the speech "is used as a weapon simply to mount a personal attack against someone over a private matter."[144] Putnam drew support for this conclusion from Roberts' twin observations in *Snyder* that:

- "We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability."[145]

- "There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter."[146]

Using these statements in *Snyder* to distinguish it from the case before him, Magistrate Putnam noted that Elizabeth Ann Holloway, "unlike [the plaintiff in] *Snyder*, ha[d] alleged that she had a pre-existing relationship with the defendants and that the newspaper articles at issue were 'intended' to cause her distress."[147] Ultimately, Magistrate Putnam concluded that "*Snyder* does *not* definitively extend First Amendment protection to the speech at issue, because plaintiff has alleged that the statements made were not 'honestly believed,' and were motivated by some desire to attack her or cause her pain."[148] In his view, "*Snyder* implies that knowingly false speech motivated by a specific intent to cause emotional harm to a particular per-

141 *See id.* at 1261 ("The Court in *Snyder* noted, however, that there was no allegation that the church members were not representing their 'honestly believed' views on public issues.").
142 Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011).
143 *Holloway*, 947 F. Supp. 2d at 1262.
144 *Id.*
145 *Snyder*, 131 S. Ct. at 1217.
146 *Id.*
147 *Holloway*, 947 F. Supp. 2d at 1262.
148 *Id.* at 1262 (emphasis added).

son may also fall outside First Amendment protection."[149] Magistrate Putnam concluded that the First Amendment did not bar Holloway's "claim that publication of knowingly false information about her daughter's disappearance constituted outrageous conduct where it was published with the intent and expectation that it would cause severe emotional distress to her."[150]

In a nutshell, *Holloway* indicates that even if the underlying subject matter is about a matter of public concern,[151] *Snyder* will not apply if 1) the speech involves factual assertions, rather than expressions of opinions and viewpoints; 2) the factual assertions are false and the defendant does not honestly believe them to be true; and 3) the publication of the false factual assertions is motivated by a desire and intent to attack or cause pain to the plaintiff. This interpretation, of course, represents the view of only one federal jurist thus far.

Magistrate Putnam clearly rejected the defendants' *Snyder*-based and extremely sweeping contention that they were "not liable to plaintiff on her tort claims because the published materials are 'of public concern' and thus are protected by the First Amendment[.]"[152] The defendants essentially swung hard and deep for a legal home run when "they accept[ed] the plaintiff's allegations that the articles were false"[153] and then cited *Snyder* as supporting the bright-line proposition "that the Free Speech Clause of the First Amendment provides a bar to state-law tort claims that arise from speech on matters 'of public concern.'"[154] In the end, however, they struck out.

Magistrate Putnam's decision is perhaps better understood through the lens of *Falwell*. That initially is the case because both *Falwell* and *Holloway* involved IIED claims filed by public-figure plaintiffs.[155] Second, *Falwell* held that such plaintiffs must prove, in addition to the basic common-law IIED elements, "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

149 *Id.* at 1263.

150 *Id.* at 1264–65.

151 In *Holloway*, the underlying subject matter was "the disappearance of Natalee Holloway, which dominated news coverage for many weeks, if not years, and which involved the safety of travel abroad and called up the worst fears of parents." *Id.* at 1261 n.10.

152 *Id.* at 1254.

153 Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1262 (N.D. Ala. 2013).

154 *Id.* at 1261.

155 *See id.* at 1261 n.8 (observing that "the parties in this case do not dispute that Elizabeth Holloway, who sought publicity about the disappearance of her daughter and appeared frequently on television after Natalee disappeared . . . is a public figure"). *See supra* notes 49–52 (noting that Falwell was a public figure).

as to whether or not it was true."[156] In *Holloway*, it was undisputed that the offending articles involved facts[157] that were false.[158] Magistrate Putnam's interpretation of *Snyder* then takes Elizabeth Holloway's case home through the final step of *Falwell*, as he wrote that "*Snyder* implies that *knowingly false speech motivated by a specific intent to cause emotional harm* to a particular person may also fall outside First Amendment protection."[159]

2. Outrageousness in Holloway

The *National Enquirer* and its owner asserted that the conduct of publishing the articles was not extreme and outrageous and, thus, Elizabeth Ann Holloway's IIED claim failed a basic element of the tort.[160] Magistrate Putnam observed that under Alabama law, the extreme-and-outrageous element requires atrocious and utterly intolerable conduct that goes beyond the bounds of decency in a civilized society such that IIED is available as a remedy "only under the most egregious circumstances."[161]

Importantly, Putnam acknowledged the case was one of first impression in the Yellowhammer State, writing that "[t]here are no reported Alabama cases where the underlying conduct allegedly causing the extreme emotional distress was a mere publication of information."[162] Yet, despite this precedential uncertainty, he also was "unwilling to find that published words alone can never be the basis for an outrage claim."[163]

In particular, he framed Elizabeth Ann Holloway's IIED claim as arising "from graphic descriptions of the treatment of her daughter's corpse."[164] Thus, while the *Rodriguez* case described in Part II.A deals with visual images of death captured at the moment it happens, *Holloway* pivots on word-based descriptions of the remains of a presumptively already-dead individual. Magistrate Putnam reasoned that

> [b]ecause "family burials" is one of the limited types of cases in which [IIED] has been applied, this court is unwilling to state as a matter of law

156 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (emphasis added).

157 *Holloway*, 947 F. Supp. 2d at 1261 n.9 ("It is also undisputed that the articles at issue purported to describe facts[.]").

158 *See id.* at 1262 (noting that the "[d]efendants . . . definitively stated that, for purposes of their motion, they accept[ed] the plaintiff's allegations that the articles were false").

159 *Id.* at 1263 (emphasis added).

160 *See id.* at 1265–67 (outlining the defendants' arguments).

161 *Id.* at 1266.

162 *Id.*

163 Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1267 (N.D. Ala. 2013).

164 *Id.*

> that falsely reporting gruesome details of a daughter's death, coupled with the intent to cause emotional distress, could never support a claim for outrage.[165]

Ultimately, *Holloway* settled in 2013 before it could reach the U.S. Court of Appeals for the Eleventh Circuit.[166] The negative precedent for media defendants established by Magistrate Putnam in IIED cases, including his narrow reading of *Snyder*, thus is confined to the Northern District of Alabama. Regardless of the amount of money forked out in the confidential settlement, the media defendants were able to control the precedential damage in *Holloway* by settling.

Whether other courts adopt or distinguish Magistrate Putnam's reasoning on *Snyder* and its impact on IIED claims remains to be seen.

C. Bollea v. Gawker Media, Inc.[167]

Terry Gene Bollea, better known as Hulk Hogan, filed a complaint in federal court in 2012 against the operators of the Gawker website for, among other theories, IIED.[168] As part of that lawsuit, Bollea sought a preliminary injunction ordering Gawker to take down "excerpts from the Hulk Hogan sex tape that were posted on the *www.Gawker.com* website on or about October 4, 2012 and to enjoin Defendants from posting, publishing or releasing any portions or content of the sex tape to the public, including that or any other website."[169] According to Bollea, the tape was made without his knowledge about a half-dozen years earlier when he had sex with a woman who was not his wife.[170]

In deciding whether to grant the injunction, U.S. District Judge James D. Whittemore quoted *Snyder's* proclamation, which itself was drawn from the libel case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[171] that "speech on matters of public concern . . . is at the heart of the First Amendment's protection."[172] Judge Whittemore

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165 *Id.*

166 *See* E-mail from L. Lin Wood, Esq., Wood, Hernacki & Evans, LLC, to author (Jan. 30, 2014, 15:54 EST) (on file with author) ("The case settled shortly after the motion to dismiss was denied.").

167 No. 8:12–CV–02348–T–27TBM, 2012 U.S. Dist. LEXIS 162711 (M.D. Fla. Nov. 14, 2012).

168 *Id.* at *5.

169 *Id.* at *2 (citation and internal quotation marks omitted).

170 *Id.* at *4.

171 472 U.S. 749, 758–59 (1985) (internal quotation marks omitted).

172 *Bollea*, 2012 U.S. Dist. LEXIS 162711, at *6 (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011)).

furthermore quoted[173] *Snyder*'s disjunctive, two-part definition of public concern,[174] under which such speech is anything fairly considered to relate to any matter of political, social or other concern to the community or that relates to a subject of legitimate news interest.[175]

Applying *Snyder*'s definition of public concern to the facts of the case, Judge Whittemore reasoned,

> [the] [p]laintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.[176]

Judge Whittemore thus concluded that, at least at the preliminary injunction stage, the decision regarding whether to post excerpts from the sex tape "is appropriately left to [the] editorial discretion"[177] of Gawker. Because he was only considering whether an injunction should be issued, Judge Whittemore did not address the substantive elements of IIED and, in particular, the question of whether posting parts of the video constituted extreme and outrageous conduct.

Nonetheless, *Bollea* indicates that *Snyder's* definition of public concern can be stretched quite far beyond the narrow context of hoisting printed signs—ones emblazoned with written words of both political and religious protest regarding American tolerance of homosexuality and sexual abuse by the clergy—to the salacious and sordid visual-imagery world of fading-glory celebrity sex tapes.

Significantly, Judge Whittemore's opinion did not end the tale of the titillating tape. In January 2014, a Florida appellate court in *Gawker Media, LLC v. Bollea*[178]—Bollea dropped his federal claim after losing before Judge Whittemore and then chose to test his luck in the Florida state court system—held that injunctive relief stopping Gawker from posting excerpts of the video and a narrative of it amounted to an unconstitutional prior restraint.[179] In doing so, the Florida appellate court quoted *Snyder* for the proposition that speech about

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173 *Id.* at *7 ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011)).

174 *See supra* notes 38–39 and accompanying text (setting forth the two-part test).

175 Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (providing the two-part test).

176 *Bollea*, 2012 U.S. Dist. LEXIS 162711, at *8.

177 *Id.* at *9.

178 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014).

179 *Id.* at 1198.

matters of public concern lies at the heart of the First Amendment.[180] It then had little trouble holding that it was "clear that as a result of the public controversy surrounding the affair and the Sex Tape, exacerbated in part by Mr. Bollea himself, the report and the related video excerpts address matters of public concern."[181] The unanimous three-judge panel added that the fact that the tape dealt with sexual content did not, in and of itself, remove it from the realm of public concern.[182] The only limitation noted by the Florida appellate court was that "[d]espite Mr. Bollea's public persona, we do not suggest that every aspect of his private life is a subject of public concern."[183] Ultimately, in ruling in favor of Gawker, the court reasoned that,

> the written report and video excerpts are linked to a matter of public concern—Mr. Bollea's extramarital affair and the video evidence of such—as there was ongoing public discussion about the affair and the Sex Tape, including by Mr. Bollea himself. Therefore, Mr. Bollea failed to meet the heavy burden to overcome the presumption that the temporary injunction is invalid as an unconstitutional prior restraint under the First Amendment.[184]

The bottom line is that while the U.S. Supreme Court in *Snyder* embraced the concept of public concern as a touchstone in an IIED case involving weighty, gravitas-laden issues such as government policies tolerating homosexuality and sexual abuse by the clergy, *Rodriguez* stretched it to include televised car chases, and both *Bollea* cases found that it encompassed celebrity sex tapes and the sexual affairs of celebrities. Neither *Rodriguez* nor *Bollea* did anything to suggest that public concern constitutes a narrow category of expression; rather, it is vast and sweeping. *Bollea* thus clearly falls in line with the prediction of Professor Lidsky that *Snyder* would prove a boon for media defendants when litigating tort cases.[185]

D. Best v. Berard[186]

Of the four post-*Snyder* and media-defendant IIED cases addressed in this Part, *Best* represents what is arguably the most obvious, clear-cut case of the speech in question being about a matter of public

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180 *Id.* at 1200.

181 *Id.* at 1201 (footnote omitted).

182 *Id.* ("[T]he mere fact that the publication contains arguably inappropriate and otherwise sexually explicit content does not remove it from the realm of legitimate public interest.").

183 *Id.*

184 Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1202 (Fla. Dist. Ct. App. 2014).

185 *See supra* note 11 and accompanying text.

186 776 F. Supp. 2d 752 (N.D. Ill. 2011).

concern and the defendants' conduct, in turn, not being extreme and outrageous. This comes despite the fact that *Best* involves content that some people might classify as "infotainment."[187]

The case centered on plaintiff Eran Best's claim that her involuntary depiction on the reality television show *Female Forces*[188]—a depiction that showed her, among other things, taking a field sobriety test, being arrested for driving on a suspended license and talking about how she "likes Coach purses, bags, and shoes"[189]—"caused her severe emotional distress."[190] The episode featuring Best's arrest, which occurred in Naperville, Illinois, also included a police officer stating, "Do I feel sorry for [Best]? No. Pretty little blond girl, 25 years old, driving a Jaguar-yeah, that's Naperville."[191] Additionally, the segment included footage, taken inside the police car where Best was held, that focused "on a dashboard computer, on which information about Best—including her date of birth, height, weight, driver's license number, and brief descriptions of previous arrests and traffic stops—[was] displayed."[192] The segment ran more than two dozen times on the Biography Channel.[193]

Although the case was decided on March 3, 2011[194]—just one day after the Supreme Court decided *Snyder*—U.S. District Judge Matthew F. Kennelly nonetheless cited both *Snyder's* observation that the contours of public concern "are not well defined"[195] and its disjunctive definition of public concern, namely:

> [S]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, *or* when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.[196]

In determining whether the *Female Forces* segment featuring Eran Best's arrest fell within this definition, Judge Kennelly initially ob-

187 *See* Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 797 (2009) (discussing "infotainment" and defining it as "[t]he entertainment format of news reporting").

188 The show "is an unscripted 'reality' television series that follows female police officers as they perform their duties and interact with members of the public." *Best*, 776 F. Supp. 2d at 754.

189 *Id.* at 755.

190 *Id.* at 753.

191 *Id.* at 755 (internal quotation marks omitted).

192 *Id.*

193 *See* Best v. Berard, 776 F. Supp. 2d 752, 755 (N.D. Ill. 2011) ("[The episode] has been rebroadcast thirty times on that channel since December 14, 2008.").

194 *See id.* at 752 (noting the case was both decided and filed on March 3, 2011).

195 *Id.* at 757 (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (additional citations and internal quotation marks omitted)).

196 *Id.* (quoting *Snyder*, 131 S. Ct. at, 1216) (emphasis added).

served that "courts have repeatedly held that information about arrests rises to the level of public concern."[197] Finding "no contrary authority"[198] to this classification of arrests as matters of public concern, the judge concluded that the defendants' "depiction of Best's arrest and its surrounding circumstances—including the computer screen shots giving information about prior arrests or citations—conveyed truthful information on matters of public concern protected by the First Amendment."[199]

The fact that some people might consider *Female Forces* to be more entertainment than news, Judge Kennelly wrote, "does not alter the First Amendment analysis."[200] He cited favorably here[201] the U.S. Supreme Court's 1948 ruling in *Winters v. New York*.[202] There, the Court reasoned that "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[203]

Furthermore, the fact that the underlying alleged criminal activity leading to Best's arrest was merely driving with a suspended license rather than something more serious, such as murder or assault, made no difference to Judge Kennelly.[204] He observed that newspapers routinely print information about many types of arrests in their blotters,[205] and he found "no authority to support drawing this sort of distinction in determining the First Amendment's application"[206] between serious and minor criminal offenses. He thus concluded that *Female Forces* "depicted, in Best's case, an arrest on criminal charges and facts concerning prior arrests or citations. These are legitimate matters of public concern, even if Best's encounters with the police involved conduct that was arguably toward the lower end of

197 *Id.*

198 *Id.* at 758.

199 *See* Best v. Berard, 776 F. Supp. 2d 752, 758 (N.D. Ill. 2011)

200 *Id.*

201 *Id.* ("'[T]he line between the informing and the entertaining is too elusive for the protection of th[e] basic right' of a free press." (quoting Winters v. New York, 333 U.S. 507, 510 (1948))).

202 333 U.S. 507 (1948).

203 *Id.* at 510. The final sentence in this quotation foreshadows the Supreme Court's dicta more than two decades later that "one man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25 (1971).

204 *See Best*, 776 F. Supp. 2d at 758 ("[Best's actions] are legitimate matters of public concern, even if Best's encounters with the police involved conduct that was arguably toward the lower end of the spectrum of criminality.").

205 *See id.* ("The Court notes that it is relatively commonplace for newspapers to reprint 'police blotter'-type information involving arrests.")

206 *Id.*

the spectrum of criminality."[207] Judge Kennelly therefore found that the First Amendment precluded Best's IIED theory.[208] The judge never addressed whether the actions in question were extreme and outrageous within the meaning of IIED.

In summary, the concept of public concern post-*Snyder* was sufficiently expansive in *Rodriguez*, *Bollea* and *Best* to shield the media defendants from liability for IIED based upon the publication of allegedly outrageous speech by members of the media. On the other hand, in *Holloway*, the court readily acknowledged that the disappearance of Natalee Holloway was also a matter of public concern,[209] but Magistrate Putnam nonetheless refused to stretch *Snyder*'s holding to protect the *National Enquirer*.

The next two Parts circle back to *Rodriguez* to consider aspects of the IIED claim therein that reach beyond the confines of the public concern issue—namely, increasing legal worry about the publication of images of death in the Internet era and the reality that televised car chases are, in fact, well known to end in the broadcast of such images.

III. GROWING CONCERNS OVER IMAGES OF DEATH: THE INTERNET AS A GAME CHANGER AND HOW IT COULD AFFECT IIED CASES LIKE *RODRIGUEZ* IN THE FUTURE

This Part, as well as Part IV, returns to explore in greater detail aspects of the case of *Rodriguez v. Fox News Network, LLC* that went unaddressed in Part II.A above. Specifically, this Part illustrates how growing legal squeamishness toward death-scene images, at least in the realms of public records laws and privacy rights, might—if not in *Rodriguez*—eventually spill over into the realm of IIED. Part IV then returns to media coverage of car chases, but this time focusing on the reasonable foreseeability of televised death as one result of such reportage.

Rodriguez arose at a time when both lawmakers and courts across the country seemed particularly concerned about the emotional harm that might be caused to family members by viewing graphic im-

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207 *Id.*

208 While Judge Kennelly's analysis of the public concern issue came within the context of considering an Illinois statutory theory—dubbed "Count 2"—alleging that the use of Best's identity for commercial purposes without her written consent violated her rights, he nonetheless wrote that "[t]he First Amendment analysis that the Court has applied to Count 2 likewise warrants a similar outcome for Best's claims for invasion of privacy (count 3) and intentional infliction of emotional distress (count 4)." *Id.* at 759.

209 *Supra* note 138 and accompanying text.

ages of the death or dead bodies of their relatives. In the wake of the killings at Sandy Hook Elementary School, for instance, Connecticut in 2013 amended its public records law to exempt from disclosure any record "consisting of a photograph, film, video or digital or other visual image depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members."[210] A dozen years earlier, following the death of NASCAR driver Dale Earnhardt, Florida carved out from its public records law an exemption for "[a] photograph or video or audio recording of an autopsy held by a medical examiner."[211] Additionally, Georgia recently created a crime-scene exemption in its open records laws for images depicting a "deceased person in a state of dismemberment, decapitation, or similar mutilation . . . ."[212] The exemption was adopted after the murder of Meredith Emerson, who was killed in 2008 while hiking in the Georgia mountains.[213]

The worry about the release of images in these and other instances seems largely driven by the fact that the death images might, precisely as they did in *Rodriguez*, end up on the Internet. As one commentator notes, "family members are left devastated by the unwarranted invasion to privacy that occurs when the intimate visual depictions of a loved one's death are published to the Internet, and made available for mass viewing."[214]

The worry today has moved beyond the realm of open records laws described above[215] and into the terrain of constitutional law. In *Marsh v. County of San Diego*,[216] the U.S. Court of Appeals for the Ninth Circuit in 2012 recognized "[t]he long-standing tradition of respect-

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210 CONN. GEN. STAT. § 1-210(b)(27) (2013).

211 FLA. STAT. § 406.135(2) (2012).

212 The provision provides, in relevant part, that:

> Crime scene photographs and video recordings, including photographs and video recordings created or produced by a state or local agency or by a perpetrator or suspect at a crime scene, which depict or describe a deceased person in a state of dismemberment, decapitation, or similar mutilation including, without limitation, where the deceased person's genitalia are exposed, shall not be subject to disclosure . . . .

GA. CODE ANN. § 45-16-27(e)(1) (2014).

213 *See* Brenda Goodman, *Killing of a Young Hiker Puts North Georgia on Edge*, N.Y. TIMES, Jan. 14, 2008, at A12 (discussing Meredith Emerson's death and the impact of her death on her community).

214 Christine M. Emery, Note, *Relational Privacy—A Right to Grieve in the Information Age: Halting the Digital Dissemination of Death-Scene Images*, 42 RUTGERS L.J. 765, 771 (2011).

215 *See supra* text accompanying notes 210–13.

216 680 F.3d 1148 (9th Cir. 2012).

ing family members' privacy in death images."[217] Alex Kozinski, Chief Judge of the Ninth Circuit, wrote for a unanimous three-judge panel in *Marsh*:

> Few things are more personal than the graphic details of a close family member's tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent's suffering during his final moments—all matters of private grief not generally shared with the world at large.[218]

In *Marsh*, the Ninth Circuit became the first federal appellate court to recognize a substantive due process familial privacy right to control public dissemination of a family member's death images.[219] Chief Judge Kozinski wrote that "the Constitution protects a parent's right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government."[220]

The plaintiff-mother in *Marsh* was concerned that graphic autopsy images of her son that were leaked to the news media by a former government employee might end up on the Internet.[221] Chief Judge Kozinski wrote that her "fear [was] not unreasonable given the viral nature of the Internet, where she might easily stumble upon photographs of her dead son on news websites, blogs or social media websites."[222]

In *Rodriguez*, the images of death also ended up on the Internet, where they were viewed by the deceased's sons.[223] The major difference, of course, is that *Rodriguez* is not a 42 U.S.C. § 1983 action, but rather a civil tort action not involving a government agency or official. Yet courts have recognized that the public dissemination of either death images or remains of loved ones may constitute valid claims for IIED by their relatives in extreme circumstances.[224]

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217 *Id.* at 1154.

218 *Id.*

219 *See id.* ("So far as we are aware, then, this is the first case to consider whether the common law right to non-interference with a family's remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected [by substantive due process].").

220 *Id.*

221 *See id.* at 1155 (noting that Marsh claimed to have suffered severe emotional distress due to the fear that she would come across her son's autopsy photos displayed on the Internet).

222 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1155 (9th Cir. 2012).

223 *Rodriguez* Complaint, *supra* note 90, at 4.

224 *See, e.g.*, Catsouras v. Dep't of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 366–67 (Cal. Ct. App. 2010), *modified and reh'g denied*, No. 07CC07817, 2010 Cal. App. LEXIS 253 (Cal. Ct. App. 2010) (centering on the public distribution, by members of the California Highway Patrol, of images of a nearly decapitated young woman who was killed in a car accident); Armstrong v. H & C Comm., Inc., 575 So. 2d 280 (Fla. Dist. Ct. App. 1991) (centering on

In recognizing a constitutional right of familial control over images of death, the Ninth Circuit in *Marsh* cited and built upon the U.S. Supreme Court's 2004 opinion in *National Archives & Records Administration v. Favish*.[225] In *Favish*, the Court recognized a familial privacy right over death-scene images within the context of Exemption 7(C) of the federal Freedom of Information Act ("FOIA").[226] But Justice Anthony Kennedy, in writing for the Court, went beyond FOIA and found that the "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law."[227] Kennedy added that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[228]

This Author calls *Favish* the "key decision in the area of familial privacy rights over death-scene images."[229] Professors Samuel Terilli and Sigman Splichal argue that *Favish* is but one example of increasingly "deep societal concerns regarding the privacy rights and feelings of family members—concerns heightened by technology (the Internet and digital reproduction, for example)."[230]

Some of those concerns are embodied in state statutes restricting public access to autopsy images. As Professor Jeffrey R. Boles wrote in 2012, "[l]egislatures and courts have accorded greater privacy protection to autopsy and death scene photographs than to any other type of death record. Numerous state statutes explicitly render these photographs inaccessible to the public."[231] Professor Boles, in accord with

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the broadcast, by a television station during a newscast, of the image of the skull of a young girl, and allowing a claim for the tort of outrage to proceed where the television station both staged a close-up shot of the girl's skull and then aired footage the same day of a memorial service being held for her).

225 541 U.S. 157 (2004) (holding that families have a statutory right to privacy regarding the public release of information about a loved one's death).

226 *Id.* at 171 (opining that "the personal privacy protected by Exemption 7(C) extends to family members who object to the disclosure of graphic details surrounding their relative's death . . . .").

227 *Id.* at 168.

228 *Id.*

229 Clay Calvert, *Dying for Privacy: Pitting Public Access Against Familial Interests in the Era of the Internet*, 105 NW. U. L. REV. COLLOQUY 18, 22–23 (2010).

230 Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 341 (2005).

231 Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J.L. & PUB. POL'Y 237, 285 (2012).

the reasoning of Professors Terilli and Splichal, asserts that "[t]he special danger inherent in a photograph's release is its unseemly, sensationalistic mass reproduction, particularly through the Internet."[232] Professors Boles, Terilli, and Splichal are not alone in recognizing the emotionally destructive power of the Internet when it comes to the posting of images of death.[233]

How might this legal trend of increasing concern about the emotional harm caused by images of death in the Internet era be of importance in *Rodriguez* and other IIED cases based upon the media's publication of death images? Rather than granting a motion to dismiss, some courts might allow cases filed by relatives of the deceased to proceed to a jury on the question of whether or not airing a live suicide constitutes extreme and outrageous conduct on the part of the news media, in a decade where it is clearly foreseeable that such images might go viral on the Internet.

Arizona Revised Statute § 12-752, for instance, governs motions to dismiss in the Grand Canyon State, and it applied in *Rodriguez*.[234] As interpreted by the Arizona Supreme Court in 2012, dismissal under this section is appropriate "only if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'"[235] Furthermore, at the MTD stage, "courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts . . . ."[236] The court, at the MTD stage, "does not resolve factual disputes between the parties on an undeveloped record."[237]

Although Judge Rea dismissed *Rodriguez*, there may come a point when other judges, perhaps disillusioned with the voyeuristic and sensational tendencies of today's news media, finally decide to let the public—namely, juries—sort out whether live coverage of death and images of the dead is extreme and outrageous conduct. Judicial concern about relational privacy rights in cases like *Marsh* and *Favish*

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232 *Id.* at 286.

233 *See, e.g.*, Catherine Leibowitz, Note, *"A Right to be Spared Unhappiness": Images of Death and The Expansion of the Relational Right of Privacy*, 32 CARDOZO ARTS & ENT. L.J. 347, 375 (2013) ("While the Internet has greatly fostered the public's ability to communicate, it has also, unfortunately, proven how people can abuse the Internet for depraved reasons[,]" and arguing that "[i]n order to deter private individuals from disseminating images of death at the expense of the deceased's relatives, state courts should allow damage actions against private individuals.")

234 ARIZ. REV. STAT. ANN. § 12-752 (2007).

235 Coleman v. City of Mesa, 284 P.3d 863, 867 (Ariz. 2012) (quoting Fid. Sec. Life Ins. Co. v. State Dep't of Ins., 954 P.2d 580, 582 (Ariz. 1998)).

236 *Id.*

237 *Id.* at 874.

might flow over into the realm of IIED. For now, however, *Marsh* and *Favish* remain confined as cases about restricting access to images of death possessed by government officials and agencies, rather than extending tort liability to the publication of such images. Perhaps a little bit more caution and care by the likes of Fox News Channel the next time it airs a car chase—from the effective use of tape-delay mechanisms to not even showing a chase until immediately after it ends, so that any images of death can be edited out[238]—will prevent legal concerns about access to death images from migrating to IIED claims like *Rodriguez*.

IV. THE FORESEEABLE SPECTACLE OF TELEVISED DEATH: ROLLING THE LEGAL DICE WITH LIFE AND DEATH

In its motion to dismiss in *Rodriguez*, Fox News asserted that its coverage of the car chase of JoDon Romero "ended in an act of violence that could not have been foreseen."[239] It added that "[l]ive television coverage of newsworthy events is inherently fast-paced and often unpredictable[.]"[240]

In fact, however, television news organizations are arguably well aware that such broadcasts might end in a violent death. More than a dozen years ago—back in January 2000—*Broadcasting and Cable* magazine began a story with these two paragraphs:

> The unpredictability of a police car chase has again been demonstrated for viewers, as a Phoenix audience several days ago watched as police shot a suspect to death after a wild pursuit, leaving pundits and public questioning the propriety of the chase-in-progress' emergence in an increasingly infotainment medium.
>
> With at least one earlier suicide and another fatal shooting by police broadcast live from TV helicopters—both in Southern California, where the car chase has become a television staple—*death cannot be denied as a possible outcome.*[241]

In 1998, MSNBC aired live the suicide of Daniel Jones on a Los Angeles freeway after he "unfurled a banner protesting health maintenance organizations. . . ."[242] CNN, in contrast, anticipated the possible violent death and did not air it.[243] Was it foreseeable that

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238 *See supra* note 120 and accompanying text (describing such options).

239 *Rodriguez* Motion to Dismiss, *supra* note 83, at 2.

240 *Id.* at 10.

241 Dan Trigoboff, *Shooting Raises Coverage Issues*, BROAD. & CABLE, Jan. 31, 2000, at 13 (emphasis added).

242 Peter Johnson, *MSNBC to Add Delay After Showing Suicide*, USA TODAY, May 4, 1998, at 3D.

243 *Id.* (stating that CNN, though monitoring Jones' actions, chose not to air the live footage).

Jones' death might be aired live? "It was bound to happen. . . . Any time you cover something live and un-edited you're taking a risk[,]" stated Warren Cereghino, an executive producer for the owner of TV station KCOP, which aired live the suicide.[244] More succinctly, *Los Angeles Times* television critic Howard Rosenberg wrote in the aftermath of the Jones suicide: "Live coverage of a volatile situation is the equivalent of playing Russian roulette."[245]

In 1999, Southern California TV viewers watched a man named Michael Thayer get shot to death after he "came out of his car and was killed in a hail of police bullets . . . ."[246] Indeed, as journalist Eric Nusbaum wrote in the aftermath of the events giving rise to the complaint in *Rodriguez*, "the promise of a grisly or dramatic ending is what gives the police pursuit its power."[247] Televised death on the news continues today, with KTLA-TV Channel 5 in Los Angeles showing live in December 2013 Brian Newt Beaird being shot to death by members of the Los Angeles Police Department after a pursuit when he crashed his car and tried to stagger away.[248]

Why is all of this relevant for the IIED tort in cases like *Rodriguez*? Because it illustrates that news organizations such as the Fox News Channel clearly should be aware of the chance that live coverage of a car chase like that involving JoDon Romero will end in a violent death. Under the elements of IIED, it is not a requirement that the defendant must intend to cause the plaintiff to suffer emotional distress. Rather, as the U.S. Court of Appeals for the Ninth Circuit wrote in 2013, it is sufficient that the defendant acted with a "*reckless disregard of the probability of causing, emotional distress*[.]"[249] This has been interpreted broadly to mean giving little or no thought to the potential consequences of one's actions.[250] As Professor John Kircher

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244 Patrick Rogers, *L.A.'s TV News: Pulling Away from Live Shots?*, AM. JOURNALISM REV., June 1998, *available at* http://ajrarchive.org/article.asp?*id*=2318 (internal quotation marks omitted).

245 Howard Rosenberg, *The Russian Roulette of Live News Coverage*, L.A. TIMES, May 2, 1998, http://articles.latimes.com/1998/may/02/entertainment/ca-45412.

246 Dan Trigoboff, *Another California Highway Shootout*, BROAD. & CABLE, Dec. 6, 1999, at 56.

247 Eric Nusbaum, *'Horribly Wrong'—Fox's Live Suicide and the Thrill of the Police Chase*, DAILY BEAST, Sept. 30, 2012, http://www.thedailybeast.com/articles/2012/09/30/horribly-wrong-fox-s-live-suicide-and-the-thrill-of-the-police-chase.html.

248 *See* Kate Mather & Richard Winton, *LAPD Chief: 'Very Thorough' Inquiry into Fatal Shooting Underway*, L.A. TIMES, Dec. 17, 2013, http://www.latimes.com/local/lanow/la-me-in-lapd-inquiry-fatal-shooting-20131217-story.html (describing the event).

249 Lawler v. Montblanc N. Am., LLC, 704 F.3d 1235, 1245 (9th Cir. 2013) (emphasis added) (internal citation and quotation marks omitted).

250 *See* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 682 (Cal. Ct. App. 1986) (interpreting the meaning of "reckless disregard").

notes, "[r]ecklessness could be characterized as engaging in conduct with conscious disregard of its consequences."[251] The comments to the *Restatement (Second) of Torts* suggest that reckless disregard means conduct engaged in with "deliberate disregard of a high degree of probability that the emotional distress will follow."[252]

As *Rodriguez* now works its way through the appellate court process in Arizona, it will be interesting to see if such points about the foreseeability and probability of death following car chases are raised by the attorney for the plaintiffs and, in turn, if they carry the day with the appellate court.

CONCLUSION

Writing in 2012, Professor Mark Strasser fittingly characterized the U.S. Supreme Court's definition of public concern in *Snyder v. Phelps* as "a very forgiving standard"[253] that "would include a whole host of subjects . . . ."[254] The post-*Snyder* IIED cases of *Rodriguez*, *Bollea* and *Best* examined in this Article clearly prove Professor Strasser's point, as well as the predictions of First Amendment scholars such as Joseph Russomanno, who speculated that "[a]fter *Snyder*, intentional infliction of emotional distress is weaker—and perhaps disabled—in claims stemming from speech. First Amendment protection is now stronger. The circumstances under which an intentional infliction claim could prevail have narrowed."[255]

From a live-televised car chase and suicide involving a previously unknown individual to an old hidden-camera sex tape of a well-known celebrity posted on the Internet to a reality television show depicting the arrest of a heretofore private individual for a minor crime, all three IIED cases were held to involve matters of public concern. These subjects are all far, far removed from the underlying facts of *Snyder*. The decisions in *Rodriguez*, *Bollea* and *Best* thus are clear First Amendment victories for media defendants in IIED cases involving both private (*Rodriguez* and *Best*) and public (*Bollea*) figures.

Although Chief Justice John Roberts wrote in *Snyder* that the majority's holding was both "narrow"[256] and "limited by the particular

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251 John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 799 (2007).

252 RESTATEMENT (SECOND) OF TORTS, *supra* note 66, at § 46 cmt. i.

253 Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083, 1117 (2012).

254 *Id.* at 1118.

255 Russomanno, *supra* note 10, at 171.

256 Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

facts before us[,]"[257] not one of the courts in *Rodriguez*, *Bollea* or *Best* cited that language or otherwise felt constrained by it. All three courts, instead, metaphorically waved it off and extended *Snyder's* public-concern focus to very different facts. *Snyder* emphasized that the content, context, and form of speech were three factors to be weighed in the public concern determination.[258] The courts in *Rodriguez*, *Bollea* and *Best* had no trouble finding public concern when the speech in question was very different from *Snyder* across all three variables.

All five cases examined here, including *Snyder*, were determined by courts to involve matters of public concern. Yet, as the table immediately below illustrates, they factually cut across the trio of public-concern variables—content, context and form—in very different ways.

	CONTENT	CONTEXT	FORM
Snyder	Political opinions on national issues	Picketing in a public forum	In-person, written words on hand-made signs
Rodriguez	Truthful, factual report of car chase & suicide	TV newscast	Live images and live spoken words (narration of events)
Holloway	False factual reports of a girl's disappearance	Print tabloid paper	Printed articles
Bollea	Sexual conduct of a celebrity	Internet website	Recorded video images & written word descriptions of them
Best	Arrest of woman for driving with a suspended license	Reality TV show	Recorded video images & spoken words

While *Snyder* did not involve a media defendant, the cases of *Rodriguez*, *Bollea* and *Best* all did. Why is this important? Because judicial deployment of a very soft and nebulous concept like public concern in IIED-based, media-defendant cases carries the very real possibility of the constitutional public-concern defense from *Snyder* eventually swallowing the IIED tort. In particular, when a media defendant is involved, additional First Amendment concerns about

257 *Id.*
258 *Id.* at 1216.

freedom of the press—not simply freedom of speech—come into play that were not present in *Snyder*. Those concerns arguably may lead to even greater judicial deference[259] paid toward IIED media defendants when interpreting the meaning of the already vague notion of public concern. This is consistent with how courts often are similarly concerned with providing deference to media defendants when considering newsworthiness and matters of public concern in the public disclosure of private facts tort.[260] In brief, judicial deference, when coupled with the squishy concept of public concern, constitutes a highly favorable formula for media defendants in IIED cases after *Snyder*.

Although *Holloway* also involved a matter of public concern—the disappearance of, and search for, Natalee Holloway[261]—Magistrate Putnam's decision is the only one of the four cases examined here to draw a line on the scope of *Snyder*. As noted earlier, Magistrate Putnam held that *Snyder* will not protect the news media, even when a matter of public concern clearly is involved, if the speech consists of false factual assertions that are published with the motivation, desire, and intent to attack or cause pain to an IIED plaintiff.[262]

While public concern in *Snyder* represents a constitutional requirement grafted onto the common law IIED tort to provide a check on the subjective and equally pliable element of extreme and outrageous conduct, it may well be that the two concepts are simply inversely correlated. Specifically, the more the speech in question is about a matter of public concern, the less likely it is for publication of that speech to be deemed extreme and outrageous. For instance, if one considers car chases by law enforcement officials to be matters of public concern, then it is much harder to argue that the news media's decision to air them live—from high-speed start through suicid-

259 *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 943 (1999) (stating that deference amounts to "a type of judicial self-restraint").

260 *See* Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 485 (Cal. 1998) ("An analysis measuring newsworthiness of facts about an otherwise private person involuntarily involved in an event of public interest by their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press . . . ."); *see also* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1829 (2010) ("Free speech concerns impact the efficacy of privacy torts as well. Courts dismiss public disclosure claims where information addresses a newsworthy matter, in other words, one of public concern. They often defer to the media's judgment, all but guaranteeing the demise of plaintiffs' claims.") (citations omitted).

261 *See* Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1261 n.10 (N.D. Ala. 2013).

262 *Id.* at 1254, 1261–62.

al finish—is outrageous. Similarly, if one considers the sex lives of celebrities to be matters of public concern, then it is difficult to simultaneously find that the publication of excerpts of videotapes depicting those same celebrities having sex is extreme and outrageous. In this sense, then, initial judicial resolution of the constitutional public-concern question largely dictates how courts will later resolve the common law question of whether publication of the speech was extreme and outrageous.

How might future courts—perhaps plaintiff-sympathetic ones concerned with the possibility that *Snyder's* emphasis on speech about matters of public concern might eventually swallow up most of the IIED tort in speech-publication cases—attempt to limit *Snyder's* reach? The starting point, of course, would be to seize on Chief Justice Roberts' unambiguous statement that "the reach of our opinion here is limited by the particular facts before us."[263]

From there, a court might do as Magistrate Putnam did in *Holloway* and suggest that *Snyder* is simply a case about protecting *opinions and viewpoints* on matters of public concern, not about protecting *factual assertions*.[264] In this perspective, *Snyder* was concerned only with shielding speakers from tort liability for expressing outrageously offensive ideas and viewpoints in the context of public debate. Thus, the *Snyder* Court found it important to quote[265] the late Justice William Brennan's statement in the flag-burning case of *Texas v. Johnson*[266] that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of *an idea* simply because society finds the idea itself offensive or disagreeable."[267]

Had Judge Rea embraced this narrow view in *Rodriguez*, it would have gutted the *Snyder*-grounded public concern defense since *Rodriguez* dealt with facts, not viewpoints. *Falwell*, in turn, would not have helped Fox News because the *Rodriguez* plaintiffs are private individuals, namely minors. Without *Snyder* and *Falwell*, then, *Rodriguez* would need to be decided simply upon the four basic common law elements of IIED. Setting aside the plaintiffs' major problem with proving causation of harm described in the case earlier,[268] the malleable element of extreme-and-outrageous conduct would likely have played a pivotal

263 *Snyder*, 131 S. Ct. at 1220.
264 *Holloway*, 947 F. Supp. 2d at 1261 & nn.9 & 11.
265 *Snyder*, 131 S. Ct. at 1219.
266 491 U.S. 397 (1989).
267 *Id.* at 414 (emphasis added).
268 *See supra* notes 102–103.

role in the outcome of *Rodriguez*. The doctrinal issue, then, is whether it is better to counter a malleable common law element (outrageous speech/conduct) with an equally pliable constitutional one (public concern). As this Article has demonstrated, public concern is an immensely expansive concept, but one that stretches in favor of First Amendment interests.

Conversely, it should be noted that even if the federal and state courts in *Bollea* had applied this narrow "viewpoints-only, not-facts" interpretation of *Snyder* to the substance of the IIED claim in that case, Gawker still would have prevailed under a relatively straightforward application of *Falwell*. Under *Falwell*, the public-figure plaintiff, Terry Gene Bollea, would have needed to prove that Gawker conveyed a false factual assertion with actual malice.[269] The videotape at issue, and accompanying narrative of it, were true factual assertions—thus ending the IIED inquiry and protecting Gawker's First Amendment rights of free speech and press. Parsed differently, the court's focus in *Bollea* on *Snyder's* emphasis on matters of public concern may have been relevant at the preliminary injunction stage, but it would have been irrelevant for the motion to dismiss the IIED claim because *Falwell* already provides sufficient protection.

Such a *Falwell*-based successful outcome for the media defendant in *Bollea* actually raises another related point. Given *Snyder's* unique facts and Chief Justice Roberts' statements about the narrowness of its holding, media defense attorneys might be wise not to trot it out too often and, instead, only use it when *Falwell* will not protect them. In other words, there may be a breaking point where defendants essentially overuse and abuse *Snyder* by trying to factually analogize the matters of public concern within it to those in every case that comes down the pike. Eventually, the factual analogies may become too farfetched that a judge simply does not buy them and refuses to find a matter of public concern at stake.

A second and much more controversial way to limit *Snyder's* reach would be to factually confine it to cases involving non-media defendants, as was the scenario with the members of the Westboro Baptist Church. This solution seems particularly untenable, however, in light of decisions such as the U.S. Court of Appeals for the Ninth Circuit's January 2014 ruling in *Obsidian Finance Group v. Cox*.[270] There, the

269 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice[.]'").

270 740 F.3d 1284 (9th Cir. 2014).

Ninth Circuit held, in the context of a defamation case and considering whether to apply constitutional fault-based protections to a blogger, that "a First Amendment distinction between the institutional press and other speakers is unworkable[.]"[271]

This comports directly with the U.S. Supreme Court's refusal in *Citizens United v. Federal Election Comm'n* to delineate between corporate and non-corporate speakers.[272] Justice Anthony Kennedy opined for the majority in *Citizens United* that the First Amendment forbids "restrictions distinguishing among different speakers, allowing speech by some but not others"[273] and that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[274] Justice Kennedy added that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each."[275] Considered in the aggregate, these statements embrace the proposition that speaker equality is a key First Amendment value. Any court that would attempt to limit *Snyder* to non-media defendant cases thus would be cutting decidedly against the grain of constitutional precedent.

The bottom line, of course, is that only three years have elapsed since *Snyder*, and it will take many more IIED cases to fully sort out the metes and bounds of *Snyder* and its lasting impact on the tort. But as the majority of the cases examined here indicates, *Snyder* is—at least for now and at least for media defendants—proving to be, much like the Court's defamation decision in *New York Times Co. v. Sullivan*,[276] another occasion for dancing in the streets.[277] The dancing only stops —and then only thus far in one federal jurisdiction in Alabama—when defendants, as they did in *Holloway*, sweepingly claim that *Snyder* protects even knowingly false factual assertions on public issues made with the intent to harm the plaintiff.

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271 *Id.* at 1291.

272 130 S. Ct. 876 (2010).

273 *Id.* at 898.

274 *Id.* at 899.

275 *Id.*

276 376 U.S. 254 (1964).

277 *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125 (1964) (noting that philosopher-educator Alexander Meiklejohn hailed *Sullivan* as "an occasion for dancing in the streets.") (internal quotation marks omitted).