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The First Amendment And Speech-based Torts: Recalibrating The Balance

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NOTES

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INTRODUCTION

Communist, baby killer, faggot, racist, or terrorist: Historically, these are but a few of the odious words that have been peppered throughout America's dialogue.[1] It seems that with each new political

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1. *See generally* Arthur Miller, *McCarthyism*, PBS.com (Aug. 23, 2006), http://www.pbs.

battle, a verbal firestorm is sure to follow. Diverse personalities engage in rhetoric and harsh language as they become entrenched in an intense fight to become a major influence on the nation's opinions and ideals. Daily, Americans are inundated with messages designed to control the tone of the nation's conversation. As divisive issues, such as immigration, racism, and other social topics, are discussed with passion and vigor, public debate continues to grow more hateful and poignant.[2] Inevitably, as with all battles, these heated exchanges typically yield injurious results.

Oftentimes, victims of these verbal battles suffer ruined reputations or emotional harm. An individual may lose his or her job, suffer damage to his or her credibility, or endure severe emotional distress. Accordingly, these victims look to the courts to provide a remedy. Tort suits are filed in attempt to recover damages for the suffering the individual has experienced. All the while, the "culprit"—the speaker of the harsh speech—brandishes the First Amendment as the weapon of choice to defend him or herself from liability. What should be the result when a person is harmed by the words of another? Should freedom of speech be protected at all cost? Or does that approach translate into an individual being left defenseless against the verbal attacks of others?

Throughout the last four decades, the Supreme Court has sought to answer these questions. Struggling to balance the competing concerns of free speech and tort liability, the Court has made several rulings in an attempt to protect individuals from the harms of speech-based torts without trampling First Amendment goals. With a series of landmark decisions such as *New York Times v. Sullivan*[3], *Curtis Publishing v. Butts*,[4] Gertz v. Robert Welch,[5] and others, the Supreme Court thoughtfully

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org/wner/americanmasters/episodes/arthur-miller/mccarthyism/484/; *Rush Limbaugh: Pelosi and Reid 'Are Terrorists,'* HuffingtonPost.com (Dec. 16, 2010, 3:40PM), http://www.huffingtonpost.com/2010/12/16/limbaugh-pelosi-reid-terrorists_n_797675.html; *Fox Host Glen Beck: Obama is a 'Racist,'* HuffingtonPost.com (Aug. 28, 2009 5:12PM), http://www.huffingtonpost.com/2009/07/28/fox-host-glenn-beck-obama_n_246310.html.

2. For instance, in an attempt to influence the 2010 congressional elections, Sarah Palin, former Governor of Alaska and Vice Presidential Candidate, posted a map on her Facebook page that included rifle "crosshairs." Each crosshair represented a senator that Palin wanted to "take out" of the congressional race. Her rhetoric received national attention after Gabrielle Giffords, one of the senators on her list, was critically injured during a shooting massacre, which occurred at a political event. No connection, however, has been found between Sarah Palin's language and the shooting. *See* John Berman, *Sarah Palin's 'Crosshairs' Ad Dominates Gabrielle Giffords Debate*, ABCNEWS.COM (Jan. 9, 2011), http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437.

3. 376 U.S. 254 (1964).

4. 388 U.S. 130 (1967).

5. 418 U.S. 323 (1974).

carved out rules of law that it believed best served the goals of the First Amendment and tort law.

In these decisions, the Court divided the First Amendment landscape into the "public figure" and "private figure" doctrine.[6] Believing that individuals should have the right to freely criticize those who have the power to influence public opinion, the Court restricted "public figures"—persons who have the ability to influence public policy—from recovering damages for speech-based torts unless they can prove that the defendant acted with actual malice.[7] This standard is incredibly hard to meet, making it exceedingly difficult for courts to recompense public figure plaintiffs for the harm they incur from speech-based torts.

The Supreme Court, however, has declined to pronounce a rule of law for suits brought by private figures. Instead, the Court deferred this decision to the states—leaving each state to determine for itself the degree of impact the First Amendment will have on tort liability.[8] Of course, this deference has led to divergent results among the states.[9] Free-speech advocates who are dissatisfied with the Supreme Court's decision contend that all speech, whether spoken about a "public" or

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6. The Supreme Court ruled that regulating speech concerning "public figures" would be synonymous with the criminal punishment of seditious libel. It stated that "requiring one who criticizes the conduct of a public figure to guarantee the truth of all his or her factual assertions could lead to self-censorship." *New York Times*, 376 U.S. at 279. The Court wanted society to be free to criticize those who had the ability to influence public policy and debate. The Court, however, held that "private figure" defendants did not have access to the media or the prominence to influence public policy and therefore speech concerning "private figures" did not warrant the same level of protection as speech concerning "public figures". *See Id.*; *Curtis Publ'g*, 388 U.S. 130 at 164. For more on this discussion see *infra* pp. 15–18.

7. *See Sullivan*, 376 U.S. at 273–74; *Butts*, 388 U.S. at 164.

8. Gertz v. Robert Welch, 418 U.S. 323, 347 (1974). The Court ruled that in cases which involve both a "private figure" and speech involving a public concern, the First Amendment is not violated if individuals are held liable for the harm which results from the words that they speak, as long as the individual is not held liable without some measure of fault. Lower courts have interpreted this to mean that liability cannot be imposed unless at least a simple negligence standard is imposed.

9. *See* Gay v. Williams, 486 F.Supp. 12, 15 (D. Alaska 1979) ("[T]he actual malice standard [should be] applied in a libel action brought by private individuals against a newspaper for defamatory statements regarding the individual's involvement in "an event of public or general concern."); Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 321 N.E. 2d. 580 (Ind. Ct. App. 1974) ("We adopt a standard that requires the private individual who brings a libel action involving an event of public or general interest to prove the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for whether it was false."); Chapadeau v. Utica Observer-Dispatch, 341 N.E. 2d. 569 (N.Y. 1975) ("[W]here the content of the article is arguably within the sphere of legitimate public concern. . . to warrant. . . recovery [the plaintiff] must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."); Peagler v. Phx. Newspapers, Inc., 560 P.2d 1216 (Ariz. 1977) (holding that the negligence standard should be applied to defamatory statements involving private figures and areas of public concern.).

"private" figure, should be fully protected.[10] Others argue that the public figure/private figure doctrine is arbitrary and unnecessary.[11]

Snyder v. Phelps,[12] the controversial case recently decided by the Supreme Court, endeavored to take on this very issue. The case involves a defendant who gains little sympathy even among supporters of his position on free speech. Fred W. Phelps, the pastor of a fundamentalist religious sect called Westboro Baptist Church, chose the most unbefitting time to express his views. While a father was in the midst of grieving the unfortunate death of his son, Phelps used contemptible and offensive speech to express his church's fierce opposition to homosexuality.[13] "Among the church's religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military."[14] To publicize their beliefs, the members of Phelps' church picket at funerals of slain soldiers and established a website—www.godhatesfags.com—where they purport their religious views.[15]

The Phelpses learned of Lance Corporal Matthew Snyder's death and arrived in Westminster, Maryland, to picket his funeral.[16] They carried signs that conveyed hateful messages, such as "God Hates the USA," "Thank God for Dead Soldiers," and "Fag troops."[17] Recognizing that their message could potentially spark outrage within the community, the Phelpses called authorities prior to their arrival and made certain to comply "with local ordinances and police directives with respect to being a certain distance from the church."[18]

Albert Snyder, Matthew's father, did not see the signs until he watched a television program while at his home but maintained that upon seeing the broadcast he was severely distressed by the conduct of

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10. *See* Eugene Volokh, *Funerals, Fire, and Brimstone: Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300 (2010).

11. For criticism of the public figure/private figure doctrine, see Derek Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991); Mark D. Walton, *The Public Figure Doctrine: A Reexamination of* Gertz v. Robert Welch, Inc. *in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U. L. REV. 141 (1995); Patricia N. Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure:" Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982); Michael K. Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL RTS. J. 507 (1995); Harry W. Stonecipher & Don Sneed, *A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 ARK. L. REV. 303 (1993).

12. Snyder v. Phelps, 533 F.Supp. 2d. 567 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *cert granted*, Snyder v. Phelps, 130 S. Ct. 1737 (2010).

13. *Id.* at 571.

14. *Id.*

15. *Id.* at 572.

16. *Id.* at 571.

17. *Id.* at 572.

18. *Id.*

the Phelpses.[19] A few weeks later, Albert Snyder ran a Google search on his son's name and found a horrific "epic poem" written by the Phelpses. The epic described their belief that Snyder and his ex-wife "raised their son for the devil"[20] and "taught Matthew to defy his creator."[21] Snyder stated that, in reaction to the protest at his son's funeral and the "epic" that he found online, he "'threw up' and 'cried for three hours.'"[22]

Outraged at the actions of the Phelpses, Albert Snyder filed a suit against Fred W. Phelps and the Westboro Church. The jury awarded Albert Snyder $10.9 million in damages for his claims of intentional infliction of emotional distress and intrusion of seclusion.[23] On appeal, the Fourth Circuit overturned the lower court's ruling.[24]

Almost forty years after its decision to refrain from announcing a definitive rule in this area of law, the Supreme Court, once again, was asked to determine whether speakers, who harshly criticize private figures, should be given the same protection they would receive if they would speak against a public figure. In an 8-1 decision, the Supreme Court affirmed the Fourth Circuit's ruling.[25] It held that the First Amendment barred recovery for tort liability because Westboro's speech involved a matter of public concern.[26] The Court, however, made clear that its ruling was narrow[27] and stopped short of pronouncing a bright line rule that would apply the public concern standard to all speech, irrespective of a person's status.

This Article contends that the public figure/private figure distinc-

19. *Id.* at 573 ("Snyder testified at length about his emotional and physical reaction not only to the demonstration at his son's funeral but also to the publication of the 'epic' on the Internet. He specifically testified that he 'threw up' and 'cried for about three hours' after viewing the 'epic' approximately four to five weeks after his son's funeral. He also presented expert testimony with respect to the effect that Defendants' actions had and continue to have on him.").

20. *Id.* at 572.

21. *Id.*

22. *Id.*

23. The jury awarded $2.9 million in compensatory damages and $8 million in punitive damages. The court eventually reduced punitive damages to $2.1 million. Accordingly, the total damages awarded to the Mr. Snyder were $5 million. *Id.* at 570–571.

24. The Fourth Circuit stated that the Phelpes' speech was constitutionally protected because the language was rhetorical and a matter of public concern which failed to contain a provably false fact. Snyder v. Phelps, 580 F.3d 206, 220 (2009). The court defined "matters of public concern" as speech which involves "an issue of social, political, or other interest to a community. The interested community need not be especially large nor the relevant concern of paramount importance or national scope." *Id.* Rhetorical statements are fully protected in order to "ensure that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole which has traditionally added much to the discourse of our nation." *Id.* (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)).

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

26. *Id.*

27. *Id.*

tion should be abandoned. Several of the rationales underpinning the doctrine are no longer viable today. In addition, this Article asserts that the Supreme Court should supplant the public figure doctrine with the public concern standard. The public concern test will implicate the First Amendment and apply the actual malice standard to speech concerning all activities that relate to the function of government, such as issues of social, educational, and political importance.[28] Categorizing speech by a person's status does not calibrate the appropriate balance between tort liability and the First Amendment. It leaves some individuals vulnerable to the harms of speech-based torts while leaving some categories of speech unprotected. By focusing on the function of the speech rather than the status of the speaker, the public concern standard will more adequately protect free speech and better effectuate the purposes of the First Amendment.

Part I will discuss the competing goals of the First Amendment and speech-based torts. While speech-based torts are designed to protect an individual from harm, such as injury to one's reputation, emotional well-being, or invasion to one's privacy, the First Amendment is intended to protect the free flow of ideas in society, the ability to access information that will allow society to govern itself, and the ability to express oneself freely. Part I will also examine the purposes of each and determine why it is important to balance the interests of both concepts.

Part II will delineate a historical perspective of the public figure/private figure distinction and analyze the evolution and purpose of the doctrine in First Amendment jurisprudence. Part III will argue that the public concern standard is the best method of protecting free speech and preserving First Amendment principles. It contends that the public figure/private figure distinction should be abandoned because the rationales underpinning the standard—that private figures deserve greater protection because they enjoy less access to the channels of effective communication and that they have not thrust themselves into the limelight in order to influence public debate—are no longer viable today.

Finally, Part IV will present three case studies: a public official wrongfully accused by a blogger of allowing her racial bias to influence her duties as a government agent; a published article falsely alleging that a public figure cheats on his wife; and the *Snyder* case. This Article finds that in all examples the public concern standard produces a better and more equitable outcome than the current controlling standard.

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28. Howard A. Gutman, *The Attempt to Develop an Appropriate Standard of Liability for the Defamation of Public and Private People: The Supreme Court and the Federalization of Libel Law*, 10 N.C. CENT. L. R. 201, 220 (1979).

I. THE COMPETING GOALS OF SPEECH-BASED TORTS AND THE FIRST AMENDMENT

The tension between speech-based torts and the First Amendment derives from the interests that each are meant to protect. While speech-based torts, such as defamation, intentional infliction of emotional distress, and invasion of privacy, are meant to shield individuals from the harm of speech, the First Amendment is designed to preserve an individual's right to speak his or her mind freely. To appreciate fully this tension, it is necessary to understand the purpose behind speech-based torts and the First Amendment.

1. *Goals of Speech-Based Torts*

A. DEFAMATION

The tort of defamation has its origins in early English law.[29] It was established to safeguard the right of a person to protect his own reputation from unjustified invasion and wrongful hurt which is essential to the dignity and worth of every human being.[30] To prevail in a defamation action a plaintiff must prove the following elements: (1) a false and defamatory statement was made against another; (2) an unprivileged publication of the statement was made to a third party; (3) if the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher; and (4) damage to the plaintiff.[31] "The grant of a right of action [is] also recognition that an individual has an interest in his personal honor and that an injury to reputation may have serious material consequences, such as pecuniary loss, impairment of social relationships, physical injury, and mental distress."[32]

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Unlike defamation, the tort of intentional infliction of emotional distress does not have a long-standing history. Historically, courts have been hesitant to recognize intentional infliction of emotional distress (IIED) as an independent tort.[33] IIED is designed to protect an individual's interests in being free from emotional distress or disturbance. As the America Law Reports stated:

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29. *See* Van V. Vedeer, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

30. Gertz v. Robert Welch, 418 U.S. 323, 401 (1974).

31. Aaron Larson, *Defamation, Law, and Slander*, http://www.expertlaw.com/library/personal_injury/defamation.html (last visited Sept. 11, 2010).

32. Harvard Law Review, *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 877 (1956).

33. 38 A.L.R. 998 § 2 (4th ed. 1985).

> With respect to emotional distress caused by intentional conduct, the position of most courts up until the last 40 or 50 years had been that damages for mental anguish were recoverable only as 'parasitic' to a physical injury or a traditional tort—if the alleged conduct resulted in no physical injury, and did not amount to the commission of a traditionally recognized tort, there could be no recovery for any mental injury suffered.[34]

The courts' reluctance to acknowledge IIED stemmed from difficulties, such as proving that an injury actually occurred or appropriately valuing the damages that should arise from such an injury.[35] In addition, the courts feared that recognition of an independent tort would result in fraudulent claims and open the floodgates of litigation.[36]

However, in 1948, the American Law Institute (ALI) in Section 46 of the Restatement (Second) of Torts recognized IIED as an independent tort regardless of the existence of a physical injury.[37] This came after much criticism and pressure by commentators who believed that denying recovery due to a lack of physical impact was hypocritical and trivial, especially in instances where the injury was serious.[38] The Restatement Section 46 provided that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[39]

Recognition of IIED by ALI led to its adoption by the courts[40] and a common framework was developed to establish guidelines for recovery and to alleviate the difficulties presented by the tort. To be successful in an IIED claim, a plaintiff must prove the following elements: (1) that intentional or reckless conduct occurred; (2) that the conduct is extreme and outrageous; (3) that a causal connection exists between the wrongful conduct and the emotional distress; and (4) that the emotional distress is severe.[41] "Liability has been found only where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[42]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* Harris v. Jones, 380 A.2d 611, 614 (Md. 1977).
42. *Id.*

C. PRIVACY

"By definition, invasion of privacy is an intrusion upon, or revelation of, something private.[43] However, invasion of privacy is a "misleading simple label, for it really embraces several causes of action that overlap each other and the tort of defamation."[44] There are four branches of the tort: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public.[45]

These four branches are designed to protect several forms of privacy. The first branch of privacy, intrusion upon seclusion, protects an individual from the "intentional invasion of solitude or seclusion of another through either physical or nonphysical means," such as "eavesdropping, peeping through windows, or surreptitiously opening another's mail."[46] The second branch, appropriation or the right of publicity "lends protection to another's name or likeness."[47] Publication of private facts, the third branch, involves preserving the right of an individual to be free from the publication of true facts that the common law regards as private and, essentially, nobody's business."[48] The last branch of privacy protects an individual from being placed in a "false light in the public eye."[49]

Be it defamation, intentional infliction of emotional distress, or privacy, each tort protects valuable interests that should be safeguarded. Without this protection, individuals may suffer injury and never receive recovery for the effects of the harm.[50] The protections gained by speech-based torts, however, severely limit the right of the speaker and therefore creates tension with the First Amendment.

2. *Goals of the First Amendment*

The First Amendment guarantees freedom of speech.[51] However,

43. Huskey v. Nat'l Broad. Co., Inc., 632 F.Supp. 1282, 1286 (N.D. Ill. 1986).

44. Eleanor L. Grossman, *Privacy*, 3 AM. JURISPRUDENCE § 29 (2d ed. 2010).

45. *Id.*

46. RODNEY A. SMOLLA, 3 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 24:1 (2010).

47. *Id.* at 24-15.

48. *Id.* at 24-16.27.

49. *Id.* at 24-5.

50. For example, a person may play a cruel joke on a pregnant woman, telling her that her husband has died. As a result of her distress she suffers a miscarriage. Without the tort of intentional infliction of emotional distress, the woman would be unable to seek damages for her loss. In the same way, if a student deliberately and falsely accuses a teacher of being a child molester and that teacher loses his or her job, without the tort of defamation, the teacher would not be able to recover for the harm he or she suffered.

51. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an

the original meaning of free speech or how it should be realized in American jurisprudence has been an elusive concept. Many theories have been posited to explain why the First Amendment exists. One's views on the purpose of the First Amendment "tend to influence heavily one's views on what it means and how it should be implemented."[52] There are three classic free-speech theories—"marketplace of ideas," "human dignity and self-fulfillment," and "democratic self-governance."[53]

A. MARKETPLACE-OF-IDEAS THEORY

The marketplace-of-ideas theory "explains the importance of freedom of speech in terms of an open 'marketplace' in which ideas are allowed to compete against one another in an ongoing process of human enlightenment."[54] The reasoning underlining the theory is that through the competition of ideas, citizens will find the ultimate truth. John Milton, one of the pioneers of the theory, wrote, "though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter."[55]

Justice Oliver Wendel Holmes, another chief proponent of the marketplace theory and also credited with ensuring it to be a "central component in American free speech jurisprudence,"[56] wrote in a passage:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out.[57]

The marketplace-of-ideas theory has become an instrumental approach

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establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for redress of grievances.").

52. SMOLLA, *supra* note 46, at 2-3.

53. *Id.* According to Smolla, "all three of the classic theories have much to commend them, and serve as important justifications for heightened protection for freedom of speech and of the press. They should be understood, however, not as mutually exclusive defenses of freedom of speech, but rather as mutually supportive rationales that combine to make an overwhelming case for the elevation of free speech as a transcendent value in an open society." *Id.* at 2-5.

54. *Id.* at 2-4.

55. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644).

56. *Id.* at 2-14.

57. Abrams v. U. S., 250 U.S. 616, 630 (1919).

to the First Amendment and "has won the most favor with the courts."[58]

B. Human Dignity and Self-Fulfillment

Where the marketplace theory focuses on human enlightenment or the quest for truth, the free speech theory of human dignity and self-fulfillment "articulates the value of freedom of speech in terms of its importance to the individual human being, who, without freedom of expression, cannot be fully known."[59] The ability to communicate with others is essential to self-fulfillment and expression. It allows individuals to convey who they truly are while satisfying a desire to be heard.[60] Justice Thurgood Marshall confirmed this theory by stating, "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands a self-expression."[61] This principle is based on the notion of the "autonomy of the individual and [his or] her right to make choices free from coercion."[62]

C. Self-Government

The theory of self-government "addresses freedom of speech primarily in terms of its importance to democracy. Freedom of speech is essential in democratic governments, for it is the vehicle through which citizens debate social policies and elect governments."[63] The crux of this theory is that in a democratic society the polity must have access to vital information to govern themselves properly.[64] In his treatise, *Constitutional Limitations*, Judge Thomas Cooley endorsed this theory by stating:

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for intelligent exercise of their rights as citizens.[65]

D. The Court's Attempt to Balance

The First Amendment was established to grant individuals the

58. Jerome A. Barron & C. Thomas Dienes, The First Amendment Law in a Nutshell 7 (2d. ed. 2000).

59. Smolla, *supra* note 46 at 2-4. ("[T]he marketplace theory justifies free speech as a means to an end: but free speech is also an end to itself, an end intimately intertwined with human autonomy and dignity." *Id.* at 2-22.

60. Wojciech Sadurski, Freedom of Speech and its Limits 17 (1999).

61. Barron & Dienes, *supra* note 58, at 13.

62. *Id.*

63. Smolla, *supra* note 46, at 2-4–5.

64. *Id.* at 2-26.2.

65. Thomas Cooley, 2 Constitutional Limitations 886 (8th ed. 1927).

capacity to discover their own truth, achieve self-fulfillment through freedom of expression, and participate in government through access to all ideas, even unpopular ones, to make unrestrained decisions about how they should be governed. As mentioned above, speech-based torts, which are designed to limit the freedom of the speaker, are directly opposed to the aims of the First Amendment. When the two concepts conflict, courts must endeavor to delicately balance the values of each and draw lines so that one will not infringe upon the other.

One type of line drawn by the court is declaring certain categories of speech unprotected. Selected categories of speech—obscenities, threatening words, fighting words, incitement, fraud, and child porn—are unprotected.[66] These forms of speech are considered of little value and undeserving of First Amendment protection. Consequently, if an individual claims they are harmed by one of these limited classes of speech, the First Amendment will not serve as a means of protection for the speaker.

Another line drawn is to protect speech that may be harmful to others unless made with actual malice.[67] "Protected speech may be subject to government regulation if the state's interest is compelling and the means of regulation narrowly tailored to accomplish a proper state purpose."[68] To ensure that regulation is narrowly tailored, courts implement substantial limits on tort liability, such as the "actual malice standard" mentioned above. These stringent standards are imposed to make certain that speech is not arbitrarily restricted without good cause.

Snyder is a prime example of the difficult task before the courts. On one hand, the Phelpses were exercising their right to free speech. The church employed the "marketplace-of-ideas" theory by spreading its message, convictions, and religious beliefs. It also engaged the "self-government" theory by voicing its disapproval of the government's support of homosexuality. On the other hand, Mr. Snyder was harmed emotionally by the church's distasteful speech and barrage of insults. Which interest should be valued most? Indeed, the First Amendment, being a constitutional principle, should be given the greatest consideration. But what is the best method of protecting individuals from harm derived from speech?

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66. Alan Stephens, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26 § 3 (2009). Speech is also abrogated in other ways such as time, place, and manner restrictions. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

67. The actual malice test is defined as the "intent, without justification or excuse to commit a wrongful act, or the reckless disregard of the law or of a person's legal right." Burke v. City of Honolulu, No. Civ. No. 08-00339 BMK, 2010 WL4811971, at *3 (D. Haw. Nov. 16, 2010).

68. *Alan Stephens*, *supra* note 66, at § 4.

II. EVOLUTION OF THE PUBLIC FIGURE/PRIVATE FIGURE DISTINCTION

Before discussing the solution to this quandary, it is important to first examine the development of the current case law. Prior to the seminal case, *New York Times v. Sullivan*, the First Amendment had no impact on defamation law because it was not constitutionalized.[69] Individuals could recover damages for defamation without constitutional limitation. Also, defamation was a strict-liability tort, which allowed recovery for reporting false statements, even if the error was an innocent mistake.[70] In reaction to the harshness of the strict-liability rule, states began to enact statutes to reduce or eliminate damages if an error was made without fault.[71] Critics of the strict-liability rule argued that the consequences were too great a burden for the media and could result in self-censorship.[72]

Amid this growing opposition to the strict-liability rule, a critical case was making its way to the Supreme Court. The heart of the civil rights movement was the right to communicate to the world the movement's message and to broadcast the unspeakable horrors that were occurring in the South. In *New York Times v. Sullivan,* this right was threatened. A full-page newspaper advertisement titled "Heed Their Rising Voices" was distributed throughout Alabama to commend the efforts of blacks in the South who resisted racism and to admonish Congress to act on their behalf.[73] The ad also solicited funds to defend false charges brought against Dr. Martin Luther King Jr. for his support of the civil rights movement.[74]

The advertisement, however, contained errors that mischaracterized some of the events that occurred at a demonstration in Alabama, as well as other affairs between the police and leaders of the movement.[75]

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69. *See* Carlo A. Pedrioli, *A Key Influence in the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. L. & POL'Y 567, 568 (2004).

70. *See* Ortiz v. Vadescatilla, 102 A.D.2d 513, 516 (N.Y. App. Div. 1984); Herbert v. Lando, 441 U.S. 153, 159 (1979); Donald H. Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727, 756 (1951); Harvard Law Review, *supra* note 32; Peck v. Tribune Co., 214 U.S. 185, 189 (1909); Williard H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORN. L. Q. 581, 583–584 (1964); Margaret E. O'Neil, *Libel and Slander*, 50 AM. JURISPRUDENCE § 31(2d. ed. 2010).

71. Harvard Law Review, *supra* note 32, at 908.

72. *Id.*; *also see* Robert A. Lefair, *Radio and TV Defamation: "Fault" or Strict-liability?*, 15 OHIO ST. L. J. 252, 253 (1954).

73. SMOLLA, *supra* note 46, at 23-2.3.

74. *Id.*; New York Times v. Sullivan, 376 U.S 254, app. at 305 (1964).

75. *New York Times*, 376 U.S. at 258 (Included in the misrepresentations were claims that the students who demonstrated at the capital sang My Country, Tis of Thee instead of the National Anthem and that nine students were expelled from school for leading a demonstration at the capital when they were actually suspended for demanding service at a lunch counter in

Although Sullivan, a public official, was not specifically mentioned in the advertisement, he claimed that some of the statements contained in the ad referred to him in his capacity as police commissioner.[76] He sued the *New York Times* for defamation and was rewarded a half-million dollar judgment.[77]

The Supreme Court overturned the judgment and held that Alabama's law was "constitutionally deficient" to provide the proper safeguards for freedom of speech.[78] It noted that the advertisement was no ordinary commercial ad but it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[79] The Court feared that allowing the judgment to stand would discourage publishers from carrying this type of advertisement.[80]

As the Court considered its ruling, it reasoned that allowing abridgment of speech regarding the conduct of a public official is analogous to the criminal punishment of seditious libel.[81] It pronounced that "a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on the pain of libel judgments virtually unlimited in amounts—leads to a comparable self-censorship."[82] This is so because individuals will be reluctant to speak or publish the speech of others, even if it is the truth, because a misstatement, albeit it innocent, could lead to liability and judgments in vast amounts. To remedy this

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Montgomery. The ad also claimed that the entire student body protested the expulsion by refusing to register when in fact most refused to register on a single day, and all students registered before school began. Lastly, the advertisement inaccurately stated that the dining hall was padlocked, students were barred from eating there, the police were called to the campus on several occasions, and Dr. Martin Luther King was arrested seven times. He was actually arrested four times.) *Id.* at 256–57.

76. *Id.*

77. *Id.*

78. *Id.* at 264.

79. *Id.* at 266.

80. *Id.* (Stating that the effect of such a judgment "would be to shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources.")

81. *Id.* at 274. The Court also stated, "what a State may not constitutionally bring about by means of criminal statute is likewise beyond the reach of its civil law of libel. The fear of damages awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* Those who are prosecuted for seditious libel have the safeguards of the criminal system, such as indictments or a burden of proof beyond a reasonable doubt. *Id.* These safety mechanisms are not available to civil defendants. In addition, double jeopardy is inapplicable in civil law, leaving a news organization open for several judgments from the same publication. *Id.* The court was alarmed at the possibility that a newspaper might not "survive successions of such judgments," which could ultimately stifle the voices of those who might criticize the government. *Id.*

82. *Id.* at 279.

concern, the Court ruled that a public official would not be allowed recovery for defamation, unless he or she could prove that the defendant published the defamatory statement with actual malice.[83]

To meet the "actual malice" standard the plaintiff must prove that the defendant "knowingly published a false statement or acted with reckless disregard for the statement's truth or falsity.[84] The rationale behind this standard is that erroneous statements are inevitable in free debate and thus must be protected to give freedom of speech sufficient breathing space.[85] The First Amendment was designed to preserve "uninhibited, robust, and wide-open"[86] debate, and any standard lower than "actual malice" would be insufficient to protect its ideals. The Court's decision dramatically changed defamation law. For the first time, the First Amendment could be used as a defense in a defamation action.

A few years after *New York Times* was decided, another significant case presented itself before the Supreme Court. In two consolidated cases—*Curtis Publishing v. Butts*[87] and *Associated Press v. Walker*[88]—the Court determined that the "actual malice" standard reached beyond government officials to public figures.[89] In *Butts*, a newspaper published an article accusing Wally Butts, a coach for the University of Georgia, of "fixing" a football game.[90] The article alleged that an insurance salesman overheard Butts in a conversation with the head coach of the University of Alabama, where Butts outlined, in detail, how Georgia would play the game.[91] Butts conceded that the conversation took place but

83. *Id.* It is important to note that the *New York Times* standard does not just apply to the tort of defamation. In Hustler v. Falwell, 485 U.S. 46 (1988), the Supreme Court extended this standard to the tort of intentional infliction of emotional distress as well. *Id.* at 56. In *Hustler*, a magazine published a parody, which stated that the famous and influential pastor, Falwell, was involved in an incestuous relationship with his mother. *Id.* at 48. In turn, Jerry Falwell sued the magazine for defamation, invasion of privacy, and intentional infliction of emotional distress. *Id.* The Court ruled that the elements of intentional infliction of emotional distress were insufficient to protect the values of the First Amendment. *Id.* at 53–54. It noted that the intentional prong of the tort had no bearing because "[i]n a world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Id.* at 53. The Court further reasoned that previous decisions had held that "even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment. *Id.* The outrageous standard of the tort was also deficient because it ran afoul of the Court's longstanding refusal to allow damages to be awarded where the speech in question may have an "adverse emotional impact on the audience." *Id.* at 55.

84. *Sullivan*, 376 U.S at 280.

85. *Id.* at 298 (Goldberg, J., concurring).

86. *Id.* at 271 (majority opinion).

87. 388 U.S. 130 (1967).

88. 389 U.S. 997 (1967).

89. *Butts*, 388 U.S. at 155.

90. *Id.* at 135.

91. *Id.* at 136.

disputed the substance of the conversation.[92] He sued the newspaper for defamation after an investigation had been launched that threatened to ruin his career.

In *Walker*, the Associated Press published dispatch reports of eyewitness accounts of a massive riot as it occurred at the University of Mississippi.[93] The dispatches portrayed Walker as commanding a violent crowd to charge against federal marshals who were present to carry out a court decree allowing an African American to attend the University.[94] Walker argued that the article mischaracterized the time he spoke to the group and whether he commanded the crowd to prevent the marshals from enforcing the court order.[95]

In contemplating whether to extend the *New York Times* standard to public figures, the Court determined that it obviously could not categorize the restriction of speech as seditious liable since neither defendant was a government official.[96] Nonetheless, the Court decided that speech criticizing public figures still warranted First Amendment protection.[97] In essence, the Court used an early form of a "free speech calculus" to balance the value of speech against the harm to the victim. The balancing test weighed the importance of the defendant's speech against "the plaintiff's position to determine whether [the plaintiff] has a legitimate call upon the court for protection in light of his prior activities and means of self-defense."[98] The Court agreed that the First Amendment should protect speech concerning public figures because they have the power to influence public policy and the means to defend themselves against false statements.[99] There was disagreement, however, among the

92. *Id.* at 137.

93. *Id.* at 140. ("A massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in a University").

94. *Id.* Walker was a private citizen at the time of the riot. However, prior to that time, Walker served in the United States Army and pursued a career in politics. In fact, Walker commanded the troops "during the school segregation confrontation at Little Rock, Arkansas, in 1957." *Id.*

95. *Id.* at 141.

96. *Id.* at 154. ("In the cases decided today, none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel.").

97. *Id.* at 155.

98. *Id.*

99. Justice Warren gave three justifications for extending the actual malice standard to public figures: (1) the blending of public figures into the government decision-making process gave public figures the opportunity to shape and influence policy; (2) public figures, just like public officials, have ready access to mass-media of communications to counteract criticism of their views and activities; and (3) unelected public figures are not amenable to the restraints of the political process; therefore, public opinion may be the only instrument by which society can

Justices as to the legal standard that should be applied—the actual malice standard or one less stringent, such as simple negligence.[100] Although the Court was deeply divided, it ultimately extended the actual malice standard to public figures.

In another case, the Court, once again, found itself in disagreement. The issue before the Court was whether the *New York Times* standard should be applied to cases involving private figures. Briefly, in another plurality opinion, the Court ruled that the actual malice standard should not be based on the status of a person but should be applied to all matters involving issues of "public interest."[101]

In *Rosenbloom v. Metromedia*, a distributor of nudist magazines sued a radio broadcaster for describing his magazines as obscene while reporting news of his arrest.[102] In its broadcasts, the radio station failed to use the terms allegedly or reportedly when recounting the arrest and referred to plaintiff as a smut distributor and a girlie book peddler.[103] In deciding *Rosenbloom*, the Court opted to focus on the content of the speech in controversy rather than on the person involved. Justice Brennan reasoned that "if a matter is a subject of public or general interest, it

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attempt to influence their conduct. Warren contended that public figures have the power to influence public policy but are not accountable to the traditional restraints of the political process. The polity cannot vote a public figure out of office if it disagrees with the public figure's views. Indeed, public figures are insulated from accountability and can impose their beliefs upon public matters without restriction. Therefore, public criticism may be the only tool available to influence the conduct of public figures. Although the Court was deeply divided in this plurality opinion, the Court adopted Justice Warren's conclusion of extending the actual malice standard to public figures. *Id.* at 163–64.

100. In a plurality opinion, Justice Harlan concluded that public figures may recover damages for defamatory statements "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. His opinion, however, did not carry the majority. Chief Justice Warren commanded the majority vote which held that the actual malice standard should apply to public figures as well as public officials. *Id.* at 164 (Warren, J., concurring). He wrote that the "*New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest." *Id.* at 165.

101. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (In the plurality opinion, Justice Brennan, joined by the Chief Justice and Justice Blackmun, concluded that the *New York Times* actual malice standard should be applied to all matters of public concern. Justice Black, concurring in the result, argued that the First Amendment is absolute. He believed that, in all cases, plaintiffs should be barred from recovery in speech-based tort suits, whether or not the defendant knew the statements were false when made. *Id.* at 57. (Black, J., concurring in the judgment). Justice White agreed that the First Amendment should be extended to matters of public concern but wanted to confine the holding to the facts of the case. *Id.* at 61. (White, J., concurring in the judgment). He elected against providing recovery to the plaintiff because the media reported on the conduct of public servants—the actions of the police. *Id.* at 61–62. Justice White believed that the holding was too broad and that the Court should not have decided an issue that was not before them. *Id.*), *abrogated by* Gertz v. Robert Welch, 418 U.S. 323 (1974).

102. *Id.* at 34. The distributor was arrested for possessing obscene material but was later acquitted of criminal obscenity charges. *Id.* at 36.

103. *Id.* at 34.

cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not 'voluntarily' choose to become involved."[104]

Brennan continued that "to fulfill its function, freedom of discussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[105] Throughout his opinion Brennan emphasized that it is not the status of the individual that is of importance but rather society's interest in discussing matters that have a profound impact on its governance, education, ideals, and beliefs.

However, Justice Marshall did not share the same views. Marshall believed that extending the *New York Times* standard to all matters of public interest would severely reduce protection of an individual's reputation.[106] In his dissenting opinion, Marshall criticized the public interest standard as "inadequate protection for both of the basic values that [were] at stake."[107] Marshall employed two arguments against the newly announced standard—one of which is particularly unpersuasive.

First, Marshall argued that for the public concern standard to be viable, the courts would have to be put into a position to decide which matters are legitimately interesting to the public or what issues are relevant to self-government.[108] He reasoned that this was precisely the danger that the First Amendment was meant to prohibit. However, as will be discussed below, this argument has little significance in today's First Amendment jurisprudence. Currently, courts routinely make determinations of what constitutes matters of public interest.[109] Next, Marshall contended that the doctrine failed to protect private individuals who did not voluntarily thrust themselves into the public limelight.[110] Justice Harlan also dissented, stating that private individuals "have less likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do public officials."[111]

The dissenting views of Marshall and Harlan—that private figures required greater constitutional protection than public figures—soon pre-

104. *Id.*

105. *Id.* at 41.

106. *Id.* at 79 (Marshall, J., dissenting).

107. *Id.* at 78.

108. *Id.* at 79.

109. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Connick v. Myers, 461 U.S. 138, 146 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Underhill v. Seibert, No. 291639, 2010 WL 2016310 (Mich. Ct. of App. June, 3, 2010); Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 321 N.E.2d 580, 588 (Ind. Ct. App. 1974); DeVittorio v. Hall, 589 F.Supp. 2d 247 (S.D.N.Y. 2008); Partington v. Bugliosi, 825 F.Supp. 906, 916 (D. Haw. 1993).

110. *Rosenbloom*, 403 U.S. at 78.

111. *Id.* at 70 (Marshall, J., dissenting).

vailed. In *Gertz,* [112] the Supreme Court retreated from the public interest standard. In an effort to provide a balance between the state's interest in protecting its citizens from harm and the goals of the First Amendment, the Court, although not expressly, overturned *Rosenbloom* and decided against extending the *New York Times* standard to private individuals.[113] Instead, the Court elected to have each state formulate its own standards of liability as long as each state imposed some level of fault.[114]

Relying on the same arguments as Justice Marshall and Harlan in *Rosenbloom*, Powell's decision hinged on the fact that private individuals (1) enjoy less access to the channels of effective communication to rebut false statements made against them,[115] and (2) have not thrust themselves into the "forefront of public controversies in order to influence the resolution of the issues involved. "[116] Concluding that private individuals are more vulnerable than public figures, Powell ruled that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[117]

The *Gertz* decision fails to effectively balance the interests of the First Amendment and speech-based torts. In many instances public figures are left vulnerable to the harms of speech without the possibility of a remedy. While it is important to give the highest protection for speech concerning public figures in cases where they can use their power to influence public policy, this level of protection is unnecessary when the speech concerns private matters.

Also, speech involving private figures is not sufficiently protected. The public figure/private figure distinction allows speech involving matters central to self-governance or the free flow of ideas to be unprotected solely because a private figure is the subject. The public figure/private figure distinction should be supplanted by the proposed standard. It calibrates the best balance between the First Amendment and speech-based torts because its focus is whether the speaker was endeavoring to purport

112. Gertz v. Robert Welch, 418 U.S. 323 (1974).

113. *Id.* at 347.

114. *Id.*

115. *Id.* at 344.

116. *Id.*

117. *Id.* at 345–346. The new rule crafted by the majority barely prevailed. A one-vote majority turned on Justice Blackmun's desire to end uncertainty in defamation law. Blackman believed that the public concern standard was "logical and inevitable." *Id.* But he was concerned about the effect of the "unsureness engendered by *Rosenbloom's* plurality." *Id.* at 353. (Blackmun, J., concurring). Blackmun stated that by removing the ability of plaintiffs to receive punitive damages without proving actual malice significantly reduced the danger of self-censorship. *Id.* at 354. Thus, he concurred with the majority.

a message that is anchored by free-speech values. In other words, the standard will protect speech which furthers First Amendment goals.

III. RECALIBRATING THE BALANCE: THE PUBLIC FIGURE/PRIVATE FIGURE DISTINCTION SHOULD BE ABANDONED IN FAVOR OF THE PUBLIC CONCERN STANDARD

The arguments used as the basis for the public figure/private figure distinction are tenuous at best and are certainly no longer pragmatic. Indeed, protections for free speech should not be contingent on whether a person desired to be the subject of discussion or, in other words, thrust him or herself into public debate. In addition, a person should not be regarded as having assumed the risk of harm merely because he or she is in a public position. Furthermore, in today's society, modern technology affords media access to all—not just public figures. Moreover, the contention that it is not the job of the courts to discern what events should be deemed as a public concern or that doing so will undermine the First Amendment is not legitimate. Courts regularly engage the public concern analysis in many areas of First Amendment jurisprudence.

In sum, the public figure/private figure distinction should be abandoned because (1) it is both over-inclusive and under-inclusive; (2) the expectation of privacy of private figures and the assumption of risk of public figures are not valid concepts; (3) access to the media is no longer exclusive to public figures; and (4) courts are not unable to discern matters of public concern—in fact, they do so regularly.

1. *The Public Figure/Private Figure Doctrine is Both Under and Over-Inclusive*

The public figure/private figure distinction bears little relationship to the First Amendment. In fact, it is both over-inclusive and under-inclusive and fails to adequately protect its objectives. The *New York Times* standard sought to resolve the issue of self-censorship produced by defamation law prior to *New York Times* by "protecting the marketplace-of-ideas, public discourse, and public debate."[118] However, the distinction between public figures and private figures stifles speech that furthers these goals and protects speech that does not. In *Rosenbloom*, Justice Brennan stated:

> We are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. . . .[S]uch a distinction could easily produce the paradoxical result of dampening discussion of issues of

118. SMOLLA, *supra* note 46, at 23-61.

> public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of public figures that are not in the area of public or general concern.[119]

Private individuals are often subjects of public concern. Suppose an individual or newspaper discusses or reports the following topics: a private hospital which refuses care to patients without insurance, a private school teacher changes athletes grades to allow otherwise ineligible students to play sports, or a private company dumps toxic waste in a school zone. Suppose the individual or newspaper was misinformed about some of the facts or although the overall statements were true, mentions a particular person who was not actually involved in the event.

Under the current law, the individual or newspaper could be held liable for defamation. But why should a person or newspaper incur liability for speaking about these important topics while a newspaper that publishes a cartoon stating that a famous pastor has engaged in an incestuous relationship with his mother will not?[120] It is inevitable that in situations, such as the ones mentioned above, where truth is being concealed, a person investigating the matter may speak erroneously. That, however, does not diminish the fact that speech concerning those matters is of vital importance and absolutely necessary to correct the injustices in society. Allowing recovery on a standard lower than actual malice, such as simple negligence, surely leads to self-censorship, as it has here with speech involving private figures. Individuals may restrict their speech in fear that it could lead to liability.

In addition, the public figure/private figure distinction falls short of protecting public figures from harm incurred by speech-based torts. It leaves them vulnerable to verbal attacks concerning their private affairs. Public figures stand to suffer severe irreparable injury—maybe even more so than a private individual. Contrary to the Court's belief, public figures can be just as defenseless to tort liability as private figures. Public figures frequently complain about the false statements made concerning their private lives.[121] For example, Ashton Kutcher, a famous celebrity, threatened to sue for false statements that claimed that he was unfaithful to his wife.[122] However, even if the false statements caused

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119. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971), *abrogated by* Gertz v. Robert Welch, 418 U.S. 323 (1974).

120. *See supra* note 83 and accompanying text.

121. BW Team, *Beware Gossip-mongers, Celebrities Will Take You to Court*, BOLLYWORLD.COM (Aug. 9, 2009), http://www.bollywoodworld.com/bollywood-news/beware-gossip-mongers-celebrities-will-take-you-to-court-12096.html.

122. Rick Sault, *What is Defamation and Why Didn't Ashton Kutcher Sue?*, THEDISHMASTER.COM (Dec. 18, 2010), http://thedishmaster.com/2010/12/what-is-defamation-why-didnt-ashton-kutcher-sue.html.

him to lose endorsements, movie roles, or even his marriage, he would not be able to recover unless he could prove the speaker of the statement acted with actual malice. Speech concerning the private lives of public figures is constitutionally protected unnecessarily. A public figure should not be vulnerable to false statements about his or her private life without remedy. This over-inclusiveness does not advance the values of the First Amendment and serves no other purpose.

2. *Expectation of Privacy and Assumption of Risk*

A second argument in support of the public figure/private figure distinction is that private figures have a higher expectation of privacy while public figures assume the risk of harm caused by speech-based torts. The exponential growth of Internet access and other technology assists in dispelling the idea that private individuals have "kept their[ ] [lives] carefully shrouded from public view."[123] In particular, social-media networks have caused private individuals to endure increasingly a lower expectation of privacy. Of course, some may argue that the rise in popularity of certain technological advances has no bearing on a person's expectation of privacy. They may further suggest individuals have not relinquished any rights to privacy merely because they access social-media or take advantage of modern technology.

"The emergence of social media, however, combined with mass access to technology—camera-equipped cell phones, pocket-sized video cameras and blogospheric distribution—has enabled an insatiable market for spying and gossip. The result has been a cultural breakdown in decency and a blurring of the boundaries"[124] of privacy. Activities that were deemed private in the past can no longer be characterized as such. For example, an intimate moment between two people can now be quickly uploaded for the world to see.[125]

While some may contend that this should not be true as a normative matter, society seems to be quickly adjusting to—and indeed embracing—the fact that the privacy it enjoyed fifty to sixty years ago no longer exists. As an example, most users of Facebook, a social-media phenomenon, divulge intimate details about their private lives on a daily

123. *Rosenbloom*, U.S. 29, at 48.

124. Kathleen Parker, *Privacy Matter, Public Concern, Rutger's Suicide Illustrates Our Culture of Disrespect*, APP.COM (Oct. 6, 2010), http://www.app.com/article/20101003/OPINION/10030346/1028/OPINION&source=rss.

125. *Id.* ("Tyler Clementi walked onto the George Washington Bridge the night of Sept. 22 [2010] and jumped over the edge. A few days earlier, authorities say, his roommate, Dharun Ravi, and a female friend, Molly Wei, had placed a webcam in the dorm room Clementi and Ravi shared, filmed Clementi in an intimate encounter with another man, and posted it online for all to see.").

basis. One glance at a user's profile can reveal the status of his or her relationship, what the user did the night before, his or her favorite places to visit, and a variety of other intimate details. One woman even posted a picture of her breast after she had a mastectomy.[126] These profiles are available to hundreds and even thousands of viewers. Private individuals have accepted the exposure modern technology has brought to their private lives.

Similarly, "the premise that public figures have voluntarily accepted the risk of defamation, or that it goes with the territory, is [also] nothing more than a handy fiction."[127] Public figures rarely voluntarily expose their entire lives for all to see. This is evident by the countless lawsuits filed by celebrities and other public figures, like Ashton Kutcher, who seek relief to no avail.

In addition, it is particularly difficult to ascertain "at what point an individual's involvement in an issue renders him a public figure for the purposes of that issue."[128] For instance, after Oprah Winfrey made comments about the sex-abuse scandal at her school in Africa, the headmistress sued for defamation.[129] The Court classified the headmistress as a limited purpose public figure because "she assumed a high-level position at a school that was envisioned as being unique and innovative with respect to the educational system in South Africa, and which was associated with an enormously high-profile celebrity figurehead."[130] The court reasoned that by taking on the position she thrust herself into public prominence. This suggests that one can become a public figure simply because someone who is in a prominent position employs him or her. "In short, as one district court judge observed, 'defining public figures is much like trying to nail a jellyfish to the wall.'"[131] Rightly so, the public figure/private figure distinction has been described as a "confused

126. *Facebook Caves, Let's Woman Post Mastectomy Picture*, FOXNEWS.COM (May 29, 2009), http://www.foxnews.com/story/0,2933,522825,00.html.

127. Joseph H. King, *Deus Ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times For All Seasons*, 95 KY. L. J. 649, 698 (2007); *see also* Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 321 NE.2d 580, 588 (Ind. Ct. App. 1974) ("The argument that public officials and public figures assume the risk of defamation by voluntarily placing themselves in the public eye is a misconception of the role which every citizen is expected to play in a system of participatory self-government. Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest. It has long been recognized that '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.'") (quoting Time v. Hill, 385 U.S. 374, 388 (1967).

128. Gutman, *supra* note 28, at 220.

129. Mzamane v. Winfrey, 693 F.Supp. 2d 442, 465 (E.D. Pa., 2010).

130. *Id.* at 502.

131. Gutman, *supra* note 28, at 220 (quoting Rosonova v. Playboy Enters., Inc., 411 F.Supp. 440, 443 (S.D. Ga. 1976)).

meandering state of affairs."[132]

3. *Access to the Media is Not Exclusive to Public Figures*

The notion that private figures deserve a higher degree of protection from tort liability than public figures because they have less access to means of rebutting false claims is also a fallacy. Due to modern technology, public figures do not enjoy exclusive access to the media. The Indiana Court of Appeals made this point in 1974:

> Only rarely will a public official or public figure have attained sufficient prominence to commend media attention which will provide a meaningful chance to rebut and defend against defamatory falsehood. Even in the rare case where an adequate opportunity for reply is afforded, it is unlikely that the rebuttal statements will receive the same degree of public attention as the defamation.[133]

In addition, the Internet has provided private individuals with instant access to mass-media communications in order to counteract criticisms of their views and activities, especially with the use of blogs, social-media networks, and other phenomena.[134] However, critics may argue that these mechanisms do not place private individuals on equal footing with public figures that have major networks at their disposal, such as CNN, NBC, or major newspapers, such as the *New York Times*.

This argument, however, greatly underestimates the influence that the Internet and social-media provide private individuals in our society today. For instance, one man used Twitter, a very popular social-media network, to post criticism about a change that a major sports network, ESPN, made to its social-media policy.[135] The Twitter posting attracted world-wide attention as many also posted their dissatisfaction with the change. Within a few hours, ESPN was forced to address the issue and

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132. *Id.*

133. Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 321 NE.2d 580, 588 (Ind. Ct. App. 1974).

134. Raymond Tray, *Impact of Social Media on Society*, EZINE ARTICLES (Feb. 4, 2011), http://ezinearticles.com/?Impact-of-Social-Media-on-Society&id=5378885 ("Social-media or "social networking" has almost become part of our daily lives and being tossed around over the past few years. It is like any other media such as newspaper, radio and television but it is far more than just about sharing information and ideas. Social networking tools like Twitter, Facebook, Flickr and Blogs have facilitated creation and exchange of ideas so quickly and widely than the conventional media. The power to define and control a brand is shifting from corporations and institutions to individuals and communities. It is no longer on the 5Cs (e.g. condominium, credit cards and car) that Singaporeans once talked about. Today, it is about the brand new Cs: creativity, communication, connection, creation (of new ideas and products), community (of shared interests), collaboration and (changing the game of) competition.").

135. Jennifer VanGrove, *ESPN Responds to Criticism and Publishes Social Media Policy*, MASHABLE.COM (Aug. 4, 2009), http://mashable.com/2009/08/04/espn-social-media/.

clarify its position on social-media.[136] In another example, thousands of Twitter users voiced their displeasure with the amount of news coverage CNN gave to the Iranian elections.[137] Shortly thereafter, CNN increased its coverage of the elections and listed it as one of its top stories. The Internet has afforded many with a platform to voice their concerns to a wide audience. Private individuals employ this mechanism to influence policy decisions and enter into public debate.

4. *Institutional Incompetence*

Finally, the assertion that courts are unable to determine matters of public concern or that doing so undermines the First Amendment is also a false assumption. In First Amendment jurisprudence, there are several areas where courts are required to determine which issues are matters of public concern.[138] Courts can effortlessly import this analysis to all cases involving speech-based torts.

In fact, a version of the public concern test used by the courts traces its origin to the *Gertz* opinion. *Gertz* has been interpreted as stating that a person can be a "limited purpose public figure if he or she voluntarily injects him or herself, or is drawn, into a public controversy."[139] Private individuals can find themselves temporarily converted into a public figure for an unlimited range of issues. The threshold question to determine this is whether the defamatory statement involves a public concern. As mentioned above, the limited purpose public figure test, which has been incorporated into the public/private figure doctrine, can be quite a "confused and meandering state of affairs."[140] Nonetheless, the very Court that declined the public concern standard has authorized its use when determining when an individual becomes a 'limited purpose public figure.'

Underhill v. Seibert[141] is a clear example of this. Several penalties were assessed against Burt Township officials for not forwarding employee-withholding taxes to the IRS for several years.[142] Underhill, an attorney, believed that Siebert, a former treasurer for Burt Township,

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136. *Id.*

137. Pete Cashmore, *#CNNFail: Twitter Blasts CNN Over Iran Election*, MASHABLE.COM (June 14, 2009), http://mashable.com/2009/06/14/cnnfail/.

138. *Aafco*, 321 NE.2d at 588. ("The contention that the judiciary will prove inadequate for such a role would be more persuasive were it not for the sizeable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens.").

139. Partington v. Bugliosi, 825 F.Supp. 906, 916 (1993).

140. Mzamane v. Winfrey, 693 F.Supp. 2d 442, 498 (E.D. Pa., 2010).

141. No. 291639, 2010 WL 2016310 (Mich. Ct. App. June 3, 2010).

142. *Id.* at *1.

was responsible for the matter.[143] Underhill called for an investigation, which revealed no evidence of wrongful activity by Siebert.[144] In response, Siebert sent an email to a newspaper reporter which accused Underhill of conducting a witch hunt, purposefully delaying the results of the investigation, and "feeding the people distorted information and lies to justify [his] existence so he can continue to be in charge."[145] Underhill sued for defamation of character. The court found that since he "voluntarily agreed to investigate allegations of public wrongdoing involving Burt Township, and the defamatory statements related to Underhill's handling of this matter, which was a highly public concern within the township,"[146] he was a limited purpose public figure.[147]

The Supreme Court also used the public concern standard in determining which party should bear the burden of proof in defamation cases. In *Philadelphia Newspapers v. Hepps*,[148] a newspaper published articles stating that Hepps, a principal stockholder of a corporation, and others "had links to organized crime and used those links to influence the State's governmental processes."[149] However, there was no conclusive evidence that the statement was either true or false. Pennsylvania law followed a presumption of falsity, which placed the burden on the newspaper to prove that the statement was true.[150]

To determine whether the common law's presumption of falsity—which placed the burden of proof on the defendant—adequately protected First Amendment goals, the Court relied upon the public concern test. It stated that "one can discern [from the *New York Times* line of cases[151]] that two forces reshape the common-law landscape to conform to the First Amendment.[152] One force is whether the plaintiff is a public figure or private figure and the second is whether the speech is a matter

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at *5.

147. *Id.* ([A] person who project[s] himself into the arena of public policy, public controversy and pressing public concern is a public figure.).

148. 475 U.S. 767 (1986).

149. *Id.* at 775.

150. *Id.*

151. The Court reviewed the *New York Times* line of cases and found that the governing rule is that where the speech involves a public concern and a public official/figure, it deserves the highest protection. Where speech involves a public concern and a private figure, it deserves some constitutional protection; however, the level should be determined by the states. But where the speech involves a private matter and a private figure, "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.* This rule is both over-inclusive and under-inclusive in that public officials/figures receive no protection in matters that concern their private lives while not giving sufficient protection to some matters of public concern. *See supra* pp. 320–322.

152. *Phila Newspapers*, 475 U.S. 767 at 775.

of public concern."[153] The Court reasoned that where the speech involves a public concern and a private figure, "the Constitution still supplants the standards of common law."[154] It went on to rule that where a matter is of public concern, the constitutional rule should, again, supersede the common law standard thereby requiring the plaintiff to "bear the burden of showing falsity."[155]

The test announced in *Pickering v. Board of Education*[156] and *Connick v. Myers*[157] provides yet another example that confirms that the public concern standard is not a foreign concept to the Supreme Court. In adjudicating claims involving the constitutional protection of public employees' speech, the threshold question for the Supreme Court is, once again, whether the speech concerns a matter of public concern. The Court held that it must seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through employees."[158] The Court further stated that public employers should "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" if the employee's speech does pertain to a matter of public concern.[159]

For example, in *Devittorio v. Hall,*[160] police officers alleged that they were retaliated against by the police department for expressing concerns about a camera that was placed in the locker room to reveal alleged departmental corruption.[161] The police officers claimed that the retaliation was in violation of their First Amendment rights because their speech involved a public concern. The court's key inquiry was whether the speech was a matter of private concern—made in the police officers' role as employees—or a matter of public concern—made in their role as

153. *Id.*

154. *Id.*

155. *Id.*

156. 391 U.S. 568 (1968).

157. 461 U.S. 138 (1983).

158. *Pickering*, 391 U.S. at 568. In *Pickering*, a high school teacher was dismissed from his position "for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools." *Id.* at 564.

159. *Connick*, 461 U.S. at 146 (In *Connick*, an employee was fired for distributing a questionnaire that "solicit[ed] the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." The Supreme Court declined to protect the speech, stating "the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs [should not be] confused with the attempt to constitutionalize the employee grievance.").

160. 589 F.Supp. 2d 247 (S.D.N.Y. 2008).

161. *Id.* at 250.

public citizens. The court determined that the police officers were expressing a personal grievance and refused to characterize their statements as protected by the First Amendment.

As exhibited, courts commonly employ the public concern standard in First Amendment jurisprudence. Doing so, as the Supreme Court suggested, has not undermined the First Amendment. On the contrary, the public concern standard has prevented liability in circumstances where individuals have a right to voice their concerns, such as in *Underhill* and *Hepps*. It has also denied recovery where the true content of the speech was couched in a matter that appeared it was of public concern but was not, such as in *Devittorio*. The instances in which the public concern standard was used provided effective protection of First Amendment goals.

5. *The Real Issue: A Lack of a Clearly Defined Standard*

The problem with the standard pronounced by the plurality in *Rosenbloom* is not whether the courts will be put into a position to determine what is relevant to the public interest of self-government, but rather whether the Court is willing to clearly define what constitutes a matter of public concern. Howard Gutman, a proponent of the public concern test, nevertheless criticized the *Rosenbloom* standard as authorizing too much protection.[162] The public interest standard included a vast range of issues, many of which had no connection to the purpose of the First Amendment. Gutman noted that:

> A public concern is differentiated from mere public interest. A public interest test may protect issues of which the public has a curiosity about or a lurid thirst for details, the public concern test protects only those issues of governing importance. So, while a socialites divorce may be a matter of public interest, it is not a matter of public concern.[163]

Essentially, the *Rosenbloom* standard was too broad and the lack of a clearly defined standard was its primary defect. The proper standard should protect robust uninhibited debate as well as preserve speech as the marketplace of ideas. It will not depend upon the status of an indi-

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162. Gutman, *supra* note 28, at 215. ("The difficulty with the new standard is that lower courts have held few topics to be beyond the octopus-like scope of the term 'public interest'. Public interest has been found in subjects ranging from errant golf shots to the behavior of a political candidate's children. One author thought that under the *Rosenbloom* standard, 'the very fact that a news medium reports an event might be said to create a virtually conclusive presumption that the event is of public concern.' Little remains of the interest in good name if the discussion of almost all issues is given the protection of the actual malice standard. The *Rosenbloom* standard protects unimportant information with the cost of giving the citizen little recourse for injury to his reputation.").

163. *Id.* at 224.

vidual but will protect all persons—whether public or private—when speech pertains to issues not involving matters of public concern. Gutman contended that the public concern standard should be defined as applying "to the discussion of all activities relating to the function of self-government."[164] This article, however, argues that the standard should apply to speech made in the furtherance of education or knowledge as well.[165] It should "include[ ] those issues of social, [educational], and political importance for which the public must receive information if it is to sagaciously conduct its decision-making"[166] or enhance its learning.

While the public figure doctrine focuses on the status of the person toward which the speech is directed, the public concern test focuses on the content and function of the speech. Constitutional protection should be granted to any speech which seeks to further the goals of the First Amendment, especially to provide a marketplace for ideas and to promote self-government. As concluded by the *DeVittorio*[167] court, in determining whether speech addresses a matter of public concern the court should take "into account the content, form, and context of a given statement as revealed by the whole record."[168]

Although the *DeVittorio* court applied this analysis to speech involving public employees, it should be exercised in the area of speech-based torts. Speech should not be piecemealed, but rather the Court should examine the overall content and context of the speech. If the court determines that the speech is a matter of public concern, the plaintiff should not recover unless he or she can prove that the defendant acted with actual malice.

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164. *Id.* at 223.

165. While Gutman's definition is certainly on the right track, it is incomplete. Gutman's definition focuses on the theory of self-government while failing to include the theory of the marketplace of ideas. The First Amendment should not only protect individuals who criticize political matters, such as official conduct of public officials or social issues such as abortion or homosexuality, but it should also protect those who criticize matters of educational importance, such as scientific or medical theories.

166. *Id.* Gutman states that "some matters of political importance are discussion of pending legislation, commentary on the functioning of governmental bodies, commentary on institutions, companies, and individuals in their relation to government, plans for reform of government, and speech relating to official conduct of public officials. . ..Matters of social importance are those matters which though not explicitly political, may have a significant effect upon people's lives." *Id.* at 223—224 n.149. Matters of educational importance include any ideas, new concepts, or hypotheses that will enhance the education of society.

167. 589 F.Supp. 2d 247 (S.D.N.Y. 2008).

168. *Id.* at 259.

IV. CASE STUDY ANALYSIS: APPLYING THE PUBLIC CONCERN STANDARD

The three case studies below will apply the public concern standard. One case—the Shirley Sherrod example—will have the same outcome under the public concern standard as it would under the existing law. The other two case studies—the philanthropist and *Snyder v. Phelps*—yield a different result. The emphasis will be on the last two examples and how the public concern standard produces the more equitable result.

1. *Government Official Falsely Accused of Racism*

Shirley Sherrod, a government official at the Department of Agriculture, found herself in the midst of a political controversy. A conservative blogger, Andrew Breitbart, posted online a misleading and "heavily edited" video clip of Sherrod, which portrayed her as a racist and suggested that racism affected her job duties.[169] The edited video depicted Sherrod at an NAACP luncheon "talking about how she did not use the full force of her office to help a white farmer."[170] However, a copy of the full video revealed quite the opposite. Shirley Sherrod was explaining her own struggles with race and how she "realized that the greatest inequality in America today is class."[171] She went on to discuss how she helped the farmer.

Breitbart admitted to strategically posting the video to combat a campaign to "falsely malign opponents of the Democratic Party as racist."[172] His intention was to highlight reverse racism within the Democratic Party.[173] Eventually, Sherrod was forced to resign after a media firestorm ensued.[174] Later, the public was astonished when it was revealed that Sherrod did not allow racial bias to affect her responsibilities after all and that Breitbart had edited the video in an attempt to inaccurately characterize the NAACP and the Democratic Party as racist.[175]

Putting the First Amendment aside, Shirley Sherrod would indeed

169. Brian Stelter, *When Race Is the Issue, Misleading Coverage Sets Off an Uproar*, N.Y. TIMES (July 26, 2010), http://query.nytimes.com/gst/fullpage.html?res=9A0DEEDF1638F935A15754C0A9669D8B63&ref=shirleysherrod.

170. Patrick Johnson, *Shirley Sherrod, Does She Have a Case Against Andrew Breitbart?*, THE CHRISTIAN SCIENCE MONITOR (July 29, 2010), http://www.csmonitor.com/USA/Politics/2010/0729/Shirley-Sherrod-Does-she-have-a-case-against-Andrew-Breitbart.

171. *Id.*

172. Stelter, *supra* note 169.

173. *Id*

174. *Id.*

175. Johnson, *supra* note 170.

have a valid tort claim.[176] She was falsely branded as a racist, as the entire world watched, and lost her job as a result. The current doctrine, however, would make it difficult for Sherrod to win a tort claim. The court would first look at Sherrod's status. Because of her position as a public official, the *New York Times* standard would unquestionably apply and, to recover, Sherrod would have to prove that Breitbart acted with actual malice when he misrepresented her as a racist.

In contrast to focusing on Sherrod's status, the public concern standard would look at the function of the speech. According to Breitbart, his intention was to criticize and charge the Democratic Party as a racist institution. In an attempt to influence the outcome of the upcoming election, he planned to expose the Democratic Party as race baiters.[177] Under the public concern test, the First Amendment would also play a significant role. In criticizing Sherrod's ability to fairly allocate government funds, Breitbart's speech concerned an issue of public importance. Certainly, it is critical for the polity to be informed that a government official engaged in racism. Although some may have disagreed with his approach, the First Amendment guarantees Breitbart the right to question the conduct of a government official. Just as with the public figure doctrine, the public concern standard would require Sherrod to prove that Breitbart acted with actual malice in order to recover damages.

Although the State has a great interest in protecting Shirley Sherrod's reputation from harm, allowing critics to incur liability solely by voicing their concerns about her activities while operating within the scope of her position would lead to grave consequences. As the Supreme Court has stated on numerous occasions, "a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on the pain of libel judgments virtually unlimited in amounts—leads to a comparable self-censorship."[178] Nonetheless, since Breitbart intentionally edited the video to give a false impression of Shirley Sherrod, it is quite possible that she will be able to prove actual malice and win her claim.

2. *The Private Life of a Public Figure*

The next case study involves a fictional example. It illustrates the difference in outcomes between the two standards when a defamatory

176. To satisfy the elements of the tort of defamation, the plaintiff must prove that (1) a false and defamatory statement was made, (2) an unprivileged publication of the statement was made to a third party, and (3) plaintiff incurred damages. Here all elements were met in that Breitbart falsely maligned Shirley as racist, he posted the video online for millions to see, and Sherrod lost her job as a result.

177. *Id.*

178. N.Y. Times v. Sullivan, 376 U.S 254, 274 (1964).

statement concerns the private life of a public figure. Assume that a newspaper article is published about a well-known businessperson and philanthropist that falsely claimed that he repeatedly cheats on his wife. Although the author was negligent in failing to adequately verify his sources, he did not write his article with malicious intent.

Under the current doctrine, once again, the court would be required to look at the status of the philanthropist as a public figure. He would achieve this status because he is in the public limelight and has the power to influence and shape public policy. Due to this status, the philanthropist would be barred from recovery unless he proved that the author acted with actual malice. This would be so, not because his behavior—cheating on his wife—may adversely impact public policy or affect his duties in anyway, but solely because he is in a *position* to influence public affairs. His status as a public figure leaves him open to virtually all kinds of personal attacks without regard for his right to protect his reputation, privacy, and emotional well-being. The public concern standard, however, would have a different result.

Under the public concern standard, the court's primary concern would be to analyze the function of the author's speech. Taking into consideration the speech as a whole, the court would analyze whether the author was trying to serve a broad public purpose in making his statements. It would question whether the article highlighted the philanthropist's conduct to speak out against adultery or whether the author called into question his ability to work on public issues because of his behavior.

Here, however, the author was not critiquing the philanthropist's business or social policies. Rather, he merely reported an interesting story concerning the businessman's private affairs. The issue of whether the philanthropist cheats on his wife or treats her inappropriately is a private matter between husband and wife, not a matter of public concern. As a result, the First Amendment would not be implicated or require the actual malice standard to be met before allowing recovery.

Critics may argue that since the philanthropist is a public figure and has the capacity to influence public policy his character should be regarded as a matter of public concern. While it is true that today's society has an insatiable appetite for the details of the private lives of public figures, it does not have the right to know or discuss the particulars of an individual's marriage. The philanthropist's position as a public figure stems from the contribution of his intellectual capital and business acumen to society.

The public has a right to discuss any issue arising from or affecting his role in making policy decisions, such as fraudulent business prac-

tices, lying about the quality of his education, or taking bribes to advocate for policies that he does not truly support. How he behaves in his private life, however, has no bearing on his ability to make quality business or policy decisions. Speech involving his behavior would not implicate the First Amendment.[179] Not any of the First Amendment goals would be advanced by requiring the actual malice standard in this case. Knowledge of a public figure's affair is not the kind of vital information needed for society to govern itself properly.[180] It does not enhance the process of human enlightenment, nor does it assist in the process of self-fulfillment.

3. Snyder v. Phelps*: A Public Concern and a Private Figure*

Snyder is in complete contrast to the philanthropist case. Although at first glance it appears that the Phelps' speech focused on private affairs, when examined closely it becomes apparent that it concerned a public matter. But first reviewing the case under the public figure doctrine, the key inquiry would be whether Snyder is a public figure. Taking into account that Snyder—whose role in this drama is merely as a father mourning the death of his son—is not in the position to influence public policy and did not thrust himself into the public eye, he would indeed be considered a private figure. Consequently, Snyder would be allowed to recover damages if he is able to meet the fault standard established by his state—in this case, the court did not require fault.[181]

In contrast, under the public concern standard, Snyder would not be able to recover without proof of actual malice because the Phelpses were speaking on a matter of public concern. In picketing the funeral and

179. Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245 (1961) (The First Amendment does not protect a freedom to speak. It protects the freedom of those activities of thought and communication by which we govern. It is concerned, not with a private right but with a public power, a governmental responsibility. . . .These responsibilities mentioned are three kinds. We, those who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness.).

Meiklejohn went on to further explain that the First Amendment forbids the abridgement of speech whenever it is "utilized to govern the nation." *Id.* at 255–256. In other words, the First Amendment is not concerned with speech that has no bearing on how the nation governs itself. How the philanthropist behaves in his private life should not implicate the First Amendment if it has no effect on governance.

180. SMOLLA, *supra* note 43, at 2-26.2.

181. Snyder v. Phelps, 533 F.Supp. 2d 567 (D. Md. 2008) (The court merely instructed the jury on the First Amendment and advised it to balance the defendant's First Amendment rights against Maryland's interest in protecting its citizens from emotional distress. *Id.* at 581. The court stated that because the speech was of private concern, it deserved considerably less protection than speech that is of public concern. *Id.* at 576–77.).

writing the epic, the church's purpose was to criticize the government's support of homosexuality. Matters concerning homosexuality are hotly contested throughout the nation. Pastors and parishioners often express their views on homosexuality in an attempt to influence public opinion.[182] Allowing recovery without actual malice would chill this speech. Individuals would refrain from voicing their views due to a fear of being sued for causing emotional distress to another. Although the language used by the Phelpses was particularly loathsome, the Supreme Court makes clear that speech may not be abridged just because it is offensive.[183]

One argument against denying recovery to Snyder is that although the protestors carried signs with general messages consistent with their views on homosexuality, they also carried signs more personal in nature such as "God hates you" and "you're going to hell" which were targeted specifically toward the Snyder family. The contention is that these signs should certainly expose the Phelpses to liability because it was a personal attack and not a critique of public policy.[184] Again, while these signs are distasteful, considering the content, form, and context of the whole record, the signs purported messages of public concern.

As noted by the Supreme Court, "the content of Westboro's signs plainly relates to broad issues of interest to society at large, rather than

182. *See Pastor John Hagee, Homosexuality and Collective Punishment*, THE ARGENT WALL (March 3, 2008), http://argentwall.blogspot.com/2008/03/pastor-john-hagee-homosexuality-and.html; *Pastor and Gospel Artist, Donnie McClurkin Speaks Out Against Homosexuality; He Admits He Has Homosexual Thoughts*, BCNN1.COM (November 20, 2009, 9:30AM), http://blackchristiannews.com/news/2009/11/pastor-and-gospel-artist-donnie-mcclurkin-speaks-out-against-homosexuality-he-admits-he-has-homosexu.html; Daniel Connolly, *Memphis Pastors, County Commissioner Speak Against Anti-Discrimination Measure*, THE COMMERCIAL APPEAL (May 26, 2009), http://m.commercialappeal.com/news/2009/may/26/memphis-pastors-county-commissioner-speak-against-/.

183. *See* FCC v. Pacifica Found., 438 U.S. 726, 745–746 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace-of-ideas."); Street v. New York, 394 U.S. 576, 592 (1969) ("[I]t is firmly settled that . . . the public expression of ideas may not be prohibited mainly because the ideas are themselves offensive to some of their hearers.").

184. Some might even contend that the speech amounts to fighting words. However, it does not meet the standard. Fighting words are those which "provoke immediate violence." Chaplinsky v. N.H., 315 U.S. 368, 372 (1942). Accusing someone of being a homosexual or claiming that someone is going to hell is not the type of speech that courts consider would provoke someone to immediate violence. Many may simply deny the charge or explain his or her position. In the same way, it does not constitute the unprotected category of incitement. To fall within this category, the Phelpses would have to intend for their speech to produce, and it must also be likely to produce, imminent lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). Here, there is no evidence to support that the Phelpses intended to cause those who heard their message to break the law. Therefore, their speech does not rise to a level of incitement.

matters of purely private concern."[185] The signs that purported "You are going to Hell" are not a personal attack against the Snyders, but a part of the overall discussion that God is displeased with the military's support of homosexuality. The signs support Westboro's view that God will punish those who do not subscribe to their ideology. Even if the signs contained some personalized content, in the Phelps' mind, the function or purpose behind the speech was to prick the moral consciousness of America to cause it to turn away from its support of homosexual conduct. In fact, the Court stated, "even if a few signs. . .were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[186]

In the same way, the First Amendment should also protect the epic written by the Phelpses. Just like the signs, the epic was a medium used to voice the Phelps' opposition of homosexuality. Again, critics may argue that the epic addressed matters of private concern and the actual malice standard should not be applied. While it may be true that a segment of the epic addressed how the Snyders raised their son—namely it suggested that the Snyders "taught Matthew to defy his Creator, to divorce, and commit adultery"[187]—the epic, as a whole, was a matter of public concern because its content explained the Phelpses' grounds in conducting the funeral protest.

The Supreme Court declined to consider the epic in deciding the *Snyder* case,[188] however, the Fourth Circuit explained, "The Epic cannot be divorced from the general context of the funeral protest."[189] The epic contained "nearly two pages of Bible verses,"[190] which links the speaker's purpose for the epic back to the original message that God disapproves of America's political and moral conduct. The epic

185. Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011). In the Fourth Circuit's analysis of whether the signs concerned an issue of public or private concern, the court used as an example "the public firestorm that erupted in 2001 after two prominent religious figures, Jerry Falwell and Pat Robertson, alleged that the September 11 terrorist attacks represented God's punishment for our country's attitudes regarding homosexuality and abortion." Snyder v. Phelps, 580 F.3d 206, 223 (2009). The pastors made these comments within days of the attacks. Just as in *Snyder*, some may have certainly found the speech outrageous and contemptible, especially after the needless death of thousands of Americans. However, does this mean that the pastors should not be allowed to voice their opinion?

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

187. *Snyder*, 580 F.3d at 225.

188. *Snyder*, 131 S.Ct. at 1214, n. 1 ("The epic is not properly before us and does not factor in our analysis. Although, the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari. . . .Given the foregoing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in this case.").

189. *Snyder*, 580 F.3d at 225.

190. *Id.* at 224.

expressly reveals the author's belief that Matthew Snyder's death was God's plan to provide the Westboro Church an opportunity to preach God's message to the U.S. Naval Academy, the Maryland Legislature, and the "whorehouse called the St. John Catholic Church."[191] The function of the Phelps' speech was to publicize their message.[192]

Certainly, the Phelpses have a right to petition the government with its grievance that it should not support or embrace homosexual conduct. They also have a right to criticize the Catholic Church and to persuade society to accept their religious views. This is precisely the type of speech the First Amendment was designed to protect. Indeed, the First Amendment is not needed to protect speech that is agreeable to all. Although the means used to spread their message caused harm to the Snyders, the public concern standard would require that the Phelpses committed the harm knowingly, purposefully, or recklessly.

The personal nature of the signs and the epic may exhibit some ill-will. However, in *Hustler v. Falwell,*[193] the Supreme Court noted that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . Even when a speaker or writer is motivated by hatred or ill-will, his expression was protected by the First Amendment."[194] The question is not whether the personal nature of the speech should remove constitutional protection but rather whether the circumstances involving the event rose to a level of actual malice.

Here, the key word is malicious. The fact that the Phelpses' conduct may have been outrageous to many is insufficient to remove constitutional protection from their speech. The Supreme Court has stated that "[o]utrageousness 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."[195] The Court went on to note that allowing removal of protection would run "afoul of [its] long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."[196]

"Outrageous" is not synonymous with "actual malice." The two terms can be differentiated in that actual malice concentrates on the purpose or intent of the speaker where outrageousness takes into account the manner of the speech or the circumstances surrounding how the

191. *Id.*
192. Snyder v. Phelps, 533 F.Supp. 2d. 567 (2008).
193. Hustler v. Falwell, 485 U.S. 46 (1988).
194. *Id.* at 53.
195. *Id.* at 47.
196. *Id.* at 55.

speech was conveyed. Outrageousness encompasses "conduct [that] is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[197] With regard to speech-based torts, actual malice is defined as a conscious disregard for the legal rights of others.[198]

To demonstrate the actual malice standard, facts that give rise to such a level include the following scenarios: a teacher, upset that his colleague received a promotion over him, falsely tells others that he suspects his colleague of molesting children; an employee, angered that he was fired, submits a false complaint that his former boss, a public official, is embezzling funds; or an individual, upset at the rise in prostitution and other crime in his neighborhood, sends the mother of a murdered prostitute several emails—even after she repeatedly asked to be left alone—stating that her daughter deserved to die because it made the neighborhood safer. All of these examples involve matters of public concern and may also constitute the torts of defamation or intentional infliction of emotional distress with actual malice. Indeed, each speaker either defamed or intentionally engaged in outrageous conduct which could cause severe distress. Yet, his or her speech also rose to a level of actual malice because each speaker *consciously* or *purposefully* disregarded his or her victim's right to be free from reputational or emotional harm.

Opponents may contend that, just as in the examples above, the Phelpses also consciously disregarded the Snyders' right to be free from emotional disturbance. They may point to the choice of picketing at a funeral, the personal nature of the signs, and the callousness of the message delivered during a time of bereavement as facts that support a finding of actual malice.[199] This is arguably a close case. However, the fact

197. G'Sell v. Carven, 724 F.Supp. 2d 101, 109 (D. D.C. 2010).

198. In *Hustler*, the Supreme Court did not define the actual malice standard in the context of the IIED tort. However, at least one court has explained that outside defamation, the actual malice test is defined as the "intent, without justification or excuse to commit a wrongful act, or the reckless disregard of the law or of a person's legal right." Burke v. City of Honolulu, No. Civ. No. 08-00339 BMK, 2010 WL4811971, at *3 (D. Haw. Nov. 16, 2010).

199. In his dissent in *Snyder*, Justice Alito stated, "the Supreme Court suggests that respondents' personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge, but I see no basis for the strange distinction that the Court appears to draw. Respondent's motivation—to increase publicity for its views—did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud, are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention. Snyder v. Phelps, 131 S. Ct. 1207, 1227 (2011).

that Westboro Church engaged in a peaceful protest, Snyder was not even aware of the protest until hours after the funeral had ended, and the church made sure to obey all time, place, and manner restrictions imposed by the state, played a critical role in the Supreme Court's decision to affirm the lower court's ruling to set aside the jury's verdict.[200] In fact, the Court noted, "the record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed rather than any interference with the funeral itself."[201] The public concern standard ensured the Phelps' right to voice their opposition to homosexuality while protecting Snyder from malicious attacks.

The obvious question becomes: Can a person intentionally inflict distress or defame another so long as he or she surrounds the attack with language that touches upon some public matter? The answer is no. The public concern standard interests itself with the content and the function of the speech and whether it serves First Amendment goals. In *Snyder,* the Supreme Court was not concerned that "Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability."[202] It stated that, Westboro has been actively engaged in speaking on the subjects addressed, and there can be no serious claim that Westboro's picketing did not represent its honestly believed views on public issues."[203] The public concern standard will not allow for a superficial analysis of whether the speaker merely touches upon a public matter but must determine if the speech serves a broad public purpose.

V. CONCLUSION

The Supreme Court was correct in providing a First Amendment defense to speech in the area of tort liability. It was also correct in shielding Westboro Church from liability. Yet, in declining to pronounce a definitive rule in this area of law, an opportunity to strike a perfect balance between the First Amendment and speech-based torts has eluded the Court.

The public figure/private figure distinction is arbitrary and insuffi-

200. Snyder v. Phelps, 131 S. Ct. 1207, 1218–19 (2011).

201. *Id.* at 1219 (The Court further noted, "A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.").

202. *Id.* at 1217.

203. *Id.* (The Court also noted, "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.").

cient to preserve the values that the First Amendment and speech-based torts are designed to protect. It allows for the abridgement of speech in instances where speakers have the right to engage in the free flow of ideas or to criticize social or political policies. For instance, do parents not have the right to criticize the policies of a private school principal? Should patients be allowed to criticize the conduct of their doctors or hospital procedures without the fear of being sued? Also, shouldn't protection be afforded to a mayor or governor if he stands to lose his job or credibility because he is wrongfully accused of having an affair or a gambling addiction? The answer to these questions is yes. To remedy these issues, the public concern standard will protect the dissemination of all information vital to self-governance or enhancing human enlightenment without the needless cost of exposing some to harm. The public concern standard calibrates the most effective balance of the First Amendment and speech-based torts.