

DEFINING “PUBLIC CONCERN” AFTER *SNYDER V. PHELPS*:  
A PLIABLE STANDARD MINGLES WITH  
NEWS MEDIA COMPLICITY

BY CLAY CALVERT\*

ABSTRACT

This article analyzes and critiques the efforts of the U.S. Supreme Court in *Snyder v. Phelps* in March 2011 to fashion a workable definition of, and test for, the critical concept of “public concern” in First Amendment jurisprudence. The article raises many questions left unresolved by the two-part, disjunctive test framed by Chief Justice John Roberts on the part of the *Snyder* majority. It also examines Justice Samuel Alito’s solo *Snyder* dissent in which, contrary to the result reached by the majority, he concluded that the speech of the Westboro Baptist Church (WBC) near the funeral for Matthew Snyder was a personal attack rather than a matter of public concern. Finally, the article addresses the news media’s own complicity in helping to bolster the WBC’s contention that its messages are of public concern.

I. INTRODUCTION

When the United States Supreme Court issued its March 2011 decision in *Snyder v. Phelps*<sup>1</sup> protecting the First Amendment speech rights of members of the Westboro Baptist Church (WBC) near the funeral held for Matthew Snyder, a soldier killed in Iraq, it fashioned a framework for determining when speech involves a matter of public concern.<sup>2</sup> Resolving the issue of whether speech regards a

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\* Professor & Brechner Eminent Scholar in Mass Communication and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Mirelis Torres, Justin Hayes and Rebekah Rich of the University of Florida for their suggestions and editing of a draft of this article.

1. 131 S. Ct. 1207 (2011).

2. U.S. CONST. amend. I. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” *Id.* The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that speech and press freedoms are protected by Fourteenth Amendment

matter of public concern, rather than a private one, is crucial in First Amendment jurisprudence.<sup>3</sup> As Chief Justice John Roberts explained for the *Snyder* majority, “restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”<sup>4</sup>

In brief, the nation’s high court draws a distinction between the public and private realms when it comes to the nature of the content or subject matter of expression targeted for either suppression or punishment.<sup>5</sup> The trouble, however, is that the line delineating the public and private provinces is anything but bright, and, as this article illustrates, the battle to clarify it remains largely unabated, even after *Snyder*.<sup>6</sup>

This is extremely problematic, not only because law largely “is about drawing lines,”—hopefully, clear ones at that—but because the public concern question is pivotal in at least five different areas of modern communications law.<sup>7</sup> For instance, it is of paramount importance to the privacy tort of public disclosure of private facts, under which a plaintiff must prove that the matter revealed was *not* of public concern—was not, in other words, newsworthy—in order to prevail.<sup>8</sup> As Professor Danielle Keats Citron recently wrote,

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from “impairment by the States”). See *Snyder*, 131 S. Ct. at 1215-17 (discussing generally “public concern” jurisprudence and fashioning current framework). In particular, seven members of the WBC stood about 1,000 feet away from the funeral on public land where they had been instructed to stand by police, displaying “their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.” *Id.* at 1213.

3. See *infra* notes 8-32 and accompanying text (providing examples of different areas in communications law where public-concern determination plays important role).

4. *Snyder*, 131 S. Ct. at 1215.

5. See *id.* (presenting briefly public/private distinction).

6. See *infra* notes 74-99 and accompanying text (critiquing *Snyder* Court’s test for public opinion).

7. Douglas K. Newell, *Will Kindness Kill Contract?*, 24 HOFSTRA L. REV. 455, 471 (1995). See Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN’S L.J. 1, 10 (1992) (asserting that law “is all about drawing lines, contrasting behaviors and making classifications – to an incredibly detailed degree”). See Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 89 (2010) (noting that in addition to libel, U.S. Supreme Court “continues to weigh whether speech is a matter of public concern in its current doctrinal formulations in related First Amendment areas such as public employee speech and the unwanted publication of truthful information”).

8. See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *PRIVACY AND THE MEDIA* 124 (2008) (observing that “the newsworthiness test is an element of the tort of public disclosure”). Public disclosure of private facts is “a civil cause of action redressing the widespread dissemination of truthful, but shameful, personal information.” Patricia Sánchez Abril, “A Simple, Human Measure of Privacy”: *Public Disclosure of Pri-*

“Courts dismiss public disclosure claims where information addresses a newsworthy matter, in other words, one of public concern.”<sup>9</sup> The question of newsworthiness is a troublesome one for this tort today, with Professor Patricia Sánchez Abril observing in 2010 that “the public disclosure tort has been encumbered by the newsworthiness test, a chicken-and-egg analysis that often results in courts deferring to the market-driven judgment of publishers.”<sup>10</sup> The public concern determination in the public disclosure tort—an analysis that moves federal constitutional considerations of free expression into the domain of state tort law—thus boils down to a highly fact-specific, case-by-case inquiry.<sup>11</sup>

Whether speech is a matter of public concern is also highly significant in libel law as to the standard of fault that applies in any given case.<sup>12</sup> Indeed, in 2011 the U.S. Court of Appeals for the Second Circuit emphasized that “Beginning with *New York Times Co. v. Sullivan* . . . the Supreme Court ruled that the First Amendment of the United States Constitution limits the reach of state defamation laws insofar as they are applied to *speech on matters of public concern*.”<sup>13</sup> For example, the U.S. Supreme Court held in 1985 in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>14</sup> that “permitting recovery of presumed and punitive damages in defamation cases absent a

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*vate Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 385 (2011). The four basic elements of this tort include: (1) the public disclosure (2) of a private fact (3) that is offensive and objectionable to a reasonable person and (4) that is not of legitimate public concern. *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 361 (Ct. App. 2010) (citing *Shulman v. Group W Prods.*, 955 P.2d 469, 478 (Cal. 1999)).

9. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1829 (2010).

10. Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689, 697 (2010).

11. See 62A AM. JUR. 2D *Privacy* § 187 (2011) (noting that “[t]he determination of whether a matter is one of legitimate public concern, precluding recovery for the tort of invasion of privacy, must be made on a case-by-case basis, considering the nature of the information and the public’s legitimate interest in its disclosure”); see also *Shulman v. Group W Prods.*, 955 P.2d 469, 478 (Cal. 1999) (concluding “that the analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution”).

12. See, e.g., *Moats v. Republican Party of Neb.*, 796 N.W.2d 584, 593-94 (Neb. 2011) (observing that “with respect to fault, when the plaintiff in a libel action is a public figure and *the speech is a matter of public concern*, the plaintiff must demonstrate ‘actual malice,’ which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence”) (emphasis added); see generally ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS* (4th ed. 2011) (providing comprehensive and current review of libel law).

13. *Chandok v. Klessig*, 632 F.3d 803, 813 (2d Cir. 2011) (emphasis added).

14. 472 U.S. 749 (1985).

showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements *do not involve matters of public concern.*<sup>15</sup> One year later, the high court in *Philadelphia Newspapers, Inc. v. Hepps*<sup>16</sup> held that “at least where a newspaper publishes speech of *public concern*, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”<sup>17</sup> It later reiterated this proposition from *Hepps* in *Milkovich v. Lorain Journal Co.*,<sup>18</sup> remarking that a “statement *on matters of public concern* must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.”<sup>19</sup>

The fact that speech involves a matter of public concern also can help to provide a privilege for journalists in defamation actions.<sup>20</sup> For instance, Texas affords a statutory privilege for fair, true and impartial accounts of “the proceedings of a public meeting dealing with a public purpose, including statements and discussion at the meeting or other *matters of public concern* occurring at the meeting . . . .”<sup>21</sup>

In addition, public concern plays a key role today in the anti-SLAPP statutes of several states.<sup>22</sup> For instance, in adopting its anti-SLAPP statute, the legislature of Rhode Island found that:

15. *Id.* at 763 (emphasis added).

16. 475 U.S. 767 (1986).

17. *Id.* at 768–69 (emphasis added). See 58 AM. JUR. 2D *Newspapers, Periodicals & Press Ass’ns* § 9 (2011) (observing that “[w]here recovery is sought against news media defendants for injuries to reputation and emotional distress arising out of publication on matter of public concern, ordinary negligence is a constitutionally insufficient basis upon which to impose liability”).

18. 497 U.S. 1 (1990).

19. *Id.* at 19-20 (emphasis added).

20. One leading legal treatise observes that the basic rule of the fair report privilege is that “the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.” 50 AM. JUR. 2D *Libel & Slander* § 298 (2011).

21. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 (West 2010) (emphasis added).

22. JOHN D. ZELEDNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 163 (6th ed. 2011). SLAPP is an acronym for strategic lawsuits against public participation. See *id.* Anti-SLAPP statutes, in turn, “are designed to allow the early dismissal of meritless lawsuits aimed at chilling expression through costly, time-consuming litigation.” *Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009). Indeed, one federal judge observed in 2011 that “[t]he purpose behind an anti-SLAPP law is to encourage the exercise of free speech . . . .” *Chi v. Loyola Univ. Med. Ctr.*, 2011 U.S. Dist. LEXIS 55743, at \*9 (N.D. Ill. May 24, 2011). See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2011) (providing defendants in SLAPP suits with immunity from liability if defendants are exercising their

[F]ull participation by persons and organizations and robust discussion of *issues of public concern* before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in *matters of public concern*.<sup>23</sup>

In addition to privacy, libel, privileges and anti-SLAPP statute scenarios, the question of whether speech is a matter of public concern is also a decisive issue in government-employee speech cases.<sup>24</sup> For instance, the high court opined in 2006 in *Garcetti v. Ceballos*<sup>25</sup> that “[t]he Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”<sup>26</sup> Writing for the *Garcetti* majority, Justice Anthony Kennedy added that “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to

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speech rights “under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body or any issue of public concern”) (emphasis added); WASH. REV. CODE § 4.24.525 (2011) (extending immunity to defendants in SLAPP suits if their speech occurs “in a place open to the public or a public forum in connection with an issue of public concern” or for “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition”) (emphasis added).

23. R.I. GEN. LAWS § 9-33-1 (2011) (emphasis added); *see also id.* § 9-33-2 (providing, in relevant part, that “a party’s exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims”) (emphasis added).

24. As one leading legal treatise observes:

Public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern. Matters of public concern that may form the basis for the protected speech of a public employee under the First Amendment are those that can be fairly considered as relating to any matter of political, social, or other concern to the community.

328 AM. JUR. 2D *Constitutional Law* § 492 (2011).

25. 547 U.S. 410 (2006).

26. *Id.* at 417.

operate efficiently and effectively.”<sup>27</sup> In brief, two conditions must be satisfied for a public employee’s speech to receive First Amendment protection: (1) he or she must be speaking in the capacity of a private citizen; and (2) must be speaking on a matter of public concern.<sup>28</sup>

Despite the clear importance of the public-concern concept in multiple areas of free-speech jurisprudence, Chief Justice Roberts’ laudable effort to provide a tidy definition and corresponding set of factors to determine what constitutes a matter of public concern in *Snyder* failed to even produce agreement among all of the justices on whether the speech of the WBC addressed a subject of public or private concern.<sup>29</sup> In particular, Justice Samuel A. Alito, Jr. authored a lone, stinging dissent, just as he had done the previous year in another free speech case, contending that the WBC’s “attack was *not speech on a matter of public concern*. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.”<sup>30</sup> That view contrasted sharply with the majority’s determination that the WBC “conducted its picketing peacefully on matters of public concern.”<sup>31</sup> Furthermore, the majority opinion dodged the, perhaps, more difficult question of whether an Internet-posted writing – a so-called epic – by the WBC members constituted speech of public or private concern.<sup>32</sup>

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27. *Id.* at 419.

28. *See* *Nichols v. Schilling*, No. 10-64, 2011 U.S. Dist. LEXIS 46709, at \*58 (E.D. Wisc. Apr. 29, 2011) (discussing requirements to receive First Amendment protection).

29. *See infra* notes 74-99 and accompanying text (describing definition of public concern and related factors created by Chief Justice Roberts in *Snyder*). In addition to the areas of law described thus far in this article, public concern is important in copyright law. *See* *Nat’l Rifle Ass’n Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (observing that “[t]he scope of the fair use doctrine is wider when the use relates to issues of *public concern*”) (emphasis added).

30. *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting) (emphasis added); *see also* *United States v. Stevens*, 130 S. Ct. 1577, 1592–602 (2010) (Alito, J., dissenting). Justice Alito’s dissent in *Snyder* was described in the news media as “blistering.” Robert Knight, *High Cost of Free Speech*, WASH. TIMES, Mar. 7, 2011, at B1. It was also dubbed “passionate.” Peter St. Onge, *Court Protects Right to Remain Hateful*, CHARLOTTE OBSERVER, Mar. 6, 2011, at B1. Finally, it has been characterized as “muscular.” Robert Barnes, *Alito Stands Alone on Supreme Court First Amendment Cases*, WASH. POST, Mar. 4, 2011, at A2. In brief, Justice Alito did not go down meekly to Chief Justice Roberts and the majority.

31. *Snyder*, 131 S. Ct. at 1218.

32. *See id.* at 1214 n.1 (explaining that “[a]lthough the epic was submitted to the jury and discussed in the courts below, [plaintiff] Snyder never mentioned it in his petition for certiorari,” and finding that “Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic. Given the forego-

The *Snyder* ruling is very important because lower courts are already citing and deploying it to determine if speech involves a matter of public concern.<sup>33</sup> For example, U.S. District Judge Kenneth M. Hoyt quoted *Snyder* in a July 2011 opinion when defining what constitutes a matter of public concern, as did U.S. District Judge J. Curtis Joyner in a June 2011 First Amendment-retaliation lawsuit.<sup>34</sup> In brief, *Snyder* is quickly becoming the go-to citation and source for lower courts seeking guidance on what constitutes a matter of public concern.<sup>35</sup> That is because, as the U.S. Court of Appeals for the Eighth Circuit wrote in April 2011, the Supreme Court's decision in *Snyder* "to overturn the verdict against defendants hinged largely on the fact that the speech defendants were held liable for was speech about matters of public concern, which the Court noted is the 'essence of self-government.'"<sup>36</sup>

This article analyzes and critiques the efforts of the *Snyder* majority to articulate a workable and effective framework for future courts to fathom which issues are and are not of public concern. Part II provides a brief overview of the debate about when speech constitutes a matter of public concern and, *a priori*, why such speech merits heightened constitutional protection.<sup>37</sup> Part III then centers on Chief Justice Roberts's explication of the public-concern concept in *Snyder*, as well his application of it to the facts of the case.<sup>38</sup> Part III also raises multiple questions that courts now must address that were left unanswered by Chief Justice Roberts's formulation. In addition, Part III examines Justice Alito's dissent in *Snyder* as it relates to the public-concern question and, in particular, his rhetorical strategies for dubbing the WBC's speech a personal attack. Next, Part IV explores the news media's role in transforming the

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ing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case").

33. See, e.g., *Hoyt v. City of Oakland*, No. 09-16753, 2011 U.S. App. LEXIS 15541, at \*43 n.14 (9th Cir. July 28, 2011) (citing *Snyder* on issue of matters of public concern); *Conklin v. City of Reno*, No. 10-15482 2011 U.S. App. LEXIS 9763, at \*2 (9th Cir. May 12, 2011) (citing and quoting *Snyder* on issue of matters of public concern); *Leverington v. City of Colorado Springs*, 643 F.3d 719 (10th Cir. 2011) (noting "that the Supreme Court in its recent *Phelps [Snyder]* decision underscored the importance of the public-concern inquiry in determining how much protection is afforded to speech" and proceeding to quote from *Snyder*).

34. *Dowdy v. College of Mainland*, No. G-09-13, 2011 U.S. Dist. LEXIS 82850, at \*13 (S.D. Tex. July 28, 2011). *Garcia v. Newtown Township*, No. 09-CV-3809, 2011 U.S. Dist. LEXIS 62202, at \*6 n.11 (E.D. Pa. June 10, 2011).

35. See, e.g., *Tennessee v. Mitchell*, 339 S.W.3d 629, 642 n.6 (Tenn. 2011) (applying *Snyder* to facts of case).

36. *281 Care Comm. v. Arneson*, 638 F.3d 621, 635 n.3 (8th Cir. 2011).

37. See *infra* notes 42-64 and accompanying text.

38. See *infra* notes 65-137 and accompanying text.

speech of the WBC into a matter of public concern, something to which Justice Alito called particular attention.<sup>39</sup> Finally, Part V concludes the article by noting possible future implications of *Snyder's* public-concern test in the news media.<sup>40</sup>

## II. LEGAL CONCERN FOR PUBLIC CONCERN: AN OVERVIEW OF A CRITICAL, YET AMBIGUOUS, CONCEPT

*“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”*<sup>41</sup>

So wrote the late Chief Justice William Rehnquist nearly twenty-five years ago in protecting the parodic speech of adult-magazine publisher Larry Flynt in *Hustler Magazine v. Falwell*<sup>42</sup>—speech which suggested that a well-known reverend and political figure, Jerry Falwell, experienced his first sexual encounter in a fly-infested, fecal-filled, and goat-eradicated outhouse with his mother and that he preached while intoxicated.<sup>43</sup> But long before the Court in *Falwell* embraced protection of parody and farcical opinions on matters of public concern, it adopted a similar stance regarding truthful assertions on such matters. “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment,” wrote Justice Frank Murphy in 1940 in *Thornhill v. Alabama*.<sup>44</sup>

What comprises a matter of public concern and what constitutes news often overlap. Indeed, Professor Mary-Rose Papandrea observes that a newsworthiness standard “involves essentially the

39. See *infra* notes 138–156 and accompanying text.

40. See *infra* notes 157–163 and accompanying text.

41. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (emphasis added).

42. *Id.*

43. See generally Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159 (2001) (providing background on Flynt, as well as his views and opinions on multiple free-speech issues). See *Falwell*, 485 U.S. at 47–48 (describing protagonists in case, as well as content of ad parody that lead to lawsuit between them). The ad parody, which provides in pertinent part that Jerry Falwell “kicked the goat out” of an outhouse in order to have sex with his mother and that the outhouse was filled with “shit” and “flies,” can be found online today. See e.g., *Jerry Falwell Talks About His First Time*, BOING BOING (May 15, 2011, 11:50PM), <http://boingboing.net/2007/05/15/jerry-falwell-talks.html>.

44. 310 U.S. 88, 101-02 (1940) (emphasis added).



same inquiry as a ‘public concern’ test.”<sup>45</sup> For instance, a Florida statute that provides professional journalists with a qualified privilege not to disclose information, including the identity of any source, obtained while actively gathering news actually defines news in terms of public concern: “‘*News*’ means information of *public concern* relating to local, statewide, national, or worldwide issues or events.”<sup>46</sup>

In the American legal system, newsworthiness is, as Professor Paul Schwartz recently observed, “a wide-reaching concept.”<sup>47</sup> There is, in fact, “no universally accepted test to determine whether a particular fact or incident is newsworthy and therefore constitutionally protected . . . .”<sup>48</sup> Similarly, Professor Robert E. Drechsel observed two decades ago that “[o]n several occasions members of the [Supreme] Court have disagreed about the meaning of ‘public concern.’”<sup>49</sup>

Although there is disagreement on how to define newsworthiness and public concern, the very idea that some information is, in fact, newsworthy means that other information must be non-newsworthy, just as the inextricably intertwined concept of public concern suggests the flipside that some information must be of private concern.<sup>50</sup>

Many law review articles in the past five years have been filled with discussions about the twin topics of newsworthiness and public

45. Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 580 (2007).

46. FLA. STAT. § 90.5015 (2011) (emphasis added).

47. See Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV. 1925, 1971 (2010) (examining broad approach to newsworthiness).

48. 62A AM. JUR. 2D *Privacy* § 191 (2011).

49. Robert E. Drechsel, *Defining “Public Concern” in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1, 6 (1990) (citing *Connick v. Myers* 461 U.S. 138 (1983)).

50. Public concern, indeed, might just be the legal equivalent of a newsworthiness doppelganger. See Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 824 (2009) (writing that “whether something is of a legitimate public concern turns on a determination of newsworthiness”); see also Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1336 (2009). Lauren Gelman, former executive director of Stanford Law School’s Center for Internet and Society, observes:

The very notion of newsworthiness inheres a balancing that some content is not newsworthy: that there exists limitations on what news institutions will publish and delegate to a category they choose, based on institutional capacity, not to publish. It is clear that the choice is binary: either publish information and make it part of the public record, or do not publish and keep the information private.

*Id.*

concern and, in turn, what constitutes such matters.<sup>51</sup> In some instances, however, deciding that speech involves a matter of public concern involves very little debate. For instance, in addressing the contents of a civil-rights movement advertisement that alleged abuses of power by Southern government officials and that triggered the defamation lawsuit in *New York Times Co. v. Sullivan*,<sup>52</sup> Justice William Brennan simply reasoned that the ad “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*.”<sup>53</sup>

Determining if speech involves a matter of public concern is of particular importance in cases like *Snyder* because, as Professor Christina Wells recently observed, “speech on matters of public concern retains its value even when delivered in an offensive manner.”<sup>54</sup> There certainly was no disagreement in *Snyder* among the members of the high court that the WBC’s speech was offensive, thus meaning that, as Chief Justice Roberts wrote, “[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern . . . .”<sup>55</sup>

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51. See, e.g., Clay Calvert, *Every Picture Tells a Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349 (2010) (addressing concept of newsworthiness and criticizing U.S. Court of Appeals for Eleventh Circuit’s understanding and application of it in *Toffoloni v. LFP Publ'g Grp.*, 572 F.3d 1201 (11th Cir. 2009)); David A. Elder, *A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges*, 11 VAND. J. ENT. & TECH. L. 99 (2008) (addressing newsworthiness and public concern within context of news media coverage of unfounded rape allegations against several members of Duke University’s men’s lacrosse team); Christina M. Gagnier, *On Privacy: Liberty in the Digital Revolution*, 11 J. HIGH TECH. L. 229 (2011) (addressing concept of newsworthiness within context of privacy and social networks); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1104 (2009) (arguing that “the emerging trend is towards a narrower and less predictable judicial conception of the news”); Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589 (2010) (examining concept of newsworthiness within privacy tort of public disclosure of private facts).

52. 376 U.S. 254 (1964).

53. *Id.* at 266 (emphasis added) (recognizing that “any other conclusion would discourage newspapers from carrying ‘editorial advertisements’ . . . and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities”).

54. Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 75 (2010).

55. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). Chief Justice Roberts acknowledged, for instance, that the WBC’s speech near the funeral for Matthew Snyder was “particularly hurtful to many.” *Id.* at 1217. He added that “Westboro’s

Perhaps the foundational question—the query that precedes the one of how to define public concern—is: Why does public concern matter so much in the first place? In a recent law journal article, Professor Lyrissa Barnett Lidsky asserts that:

[P]olitical speech and speech dealing with issues of public concern . . . lies at the core of the First Amendment because political speech in a democracy is essential to democratic self-governance; without this information, citizens cannot play their assigned roles in choosing and instructing their representatives and in participating in the formation of public policy.<sup>56</sup>

Professor Lidsky’s statement makes it clear that speech regarding matters of public concern must be protected because of its collective-level benefit—its benefit to the development of informed public opinion and policy in a democratic society. Professor Robert Post recently observed, for instance, that “the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance,” adding that many, like the late Alexander Meiklejohn, who support this view “believe that the value of democratic self-governance lies in informed democratic decision making.<sup>57</sup> They therefore believe that the value attaches to the audience of speech rather than to speakers.”<sup>58</sup>

For Meiklejohn, the goal of free expression was “the voting of wise decisions.”<sup>59</sup> He believed that “the principle of the freedom of speech springs from the necessities of the program of self-government.”<sup>60</sup> Wise decisions about public policy issues require, in Meiklejohn’s view, that “all facts and interests relevant . . . shall be fully and fairly presented.”<sup>61</sup>

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funeral picketing is certainly hurtful.” *Id.* at 1220. Justice Alito, writing in dissent, even more bluntly characterized the speech of the WBC as a “vicious verbal assault.” *Id.* at 1222 (Alito, J., dissenting).

56. Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810 (2010).

57. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011). See generally Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2009 SUP. CT. REV. 293, 310-315 (providing overview of Meiklejohn’s beliefs about freedom of expression).

58. Post, *supra* note 57, at 482.

59. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1948).

60. *Id.* at 27 (explaining that freedom of speech “is a deduction from the basic American agreement that public issues shall be decided by universal suffrage”).

61. *Id.* at 26 (commenting that aim of free speech is to make voters as wise as possible before voting on issue).

Significantly for purposes of this article, Professor Post cites *Snyder*, along with other cases such as *Hustler v. Falwell*,<sup>62</sup> as forming part of “a common structure in First Amendment jurisprudence” in which results are based “on whether the speech act in question should or should not be regarded as part of the formation of democratic public opinion. Speakers participating in public discourse are constitutionally presumed to be engaged in the formation of public opinion, to the end of making government responsive to their views.”<sup>63</sup>

In brief, to the extent that speech involves a matter of public concern, it must be protected to inform an audience comprised of the citizenry—Meiklejohn “valued listener interests above speaker interests”—because such information may affect policy and the voting of wise decisions.<sup>64</sup>

### III. SNYDER AND THE MEANING OF PUBLIC CONCERN: CRITIQUING A PLIABLE FRAMEWORK

This part features four sections, the first of which provides a brief description of the speech at issue in *Snyder*.<sup>65</sup> The second section then sets forth and critiques the public-concern test fashioned by Chief Justice John Roberts in the majority opinion, raising, in the process, more than a half-dozen different and difficult questions left unresolved by the case.<sup>66</sup> Next, the third section analyzes the majority’s application of its public-concern test to the specific facts of *Snyder*.<sup>67</sup> Finally, the fourth section focuses on Justice Samuel Alito’s dissent and, more specifically, the apparent reasons why he reached the opposite conclusion on the public concern issue from that of the majority.<sup>68</sup>

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62. 485 U.S. 46 (1988).

63. Post, *supra* note 57, at 484. *Id.* (noting this policy “reflects the political equality that all citizens enjoy within a democracy”).

64. See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 377 (2008) (arguing Free Speech Clause protects political speech in particular).

65. See *infra* notes 69–73 and accompanying text (describing speech issue in *Snyder*).

66. See *infra* notes 74–99 and accompanying text (critiquing public-concern test).

67. See *infra* notes 100–121 and accompanying text (examining how majority specifically applied public concern test to *Snyder*).

68. See *infra* notes 122–137 and accompanying text (discussing Justice Alito’s argument that commitment to free speech does not allow for such vicious verbal assault).

### A. The Speech at Issue in *Snyder*: Public Concern or Personal Attack?

The expression at the center of *Snyder* involved multiple hand-held signs, each emblazoned with an anti-gay, anti-military and/or anti-family message, that were hoisted by seven members of the WBC.<sup>69</sup> Importantly, the Court did not consider the contents of Internet-posted screed referred to as the epic and, instead, addressed only the signs held by the WBC members while standing “approximately 1,000 feet from the church where the funeral was held.”<sup>70</sup>

The sign-emblazoned messages, Chief Justice John Roberts wrote for the majority, “reflected the church’s view that the United States is overly tolerant of sin and that God kills American soldiers as punishment.”<sup>71</sup> Margie J. Phelps, a member of the WBC who represented the organization before the Supreme Court, explained in more detail, in the WBC’s initial brief filed with the high court in July 2010, that the speech:

[W]as about publicly-funded funerals of publicly-funded soldiers dying in an extremely public war, because (in WBC’s opinion) of very-public policies of sin, including homosexuality, divorce, remarriage, and Roman Catholic priests molesting children. The content of the speech is religious commentary on current events of significant import, with numerous statements (on signs and by epic) about God, his wrath and other attributes, this nation’s sins, and its consequences (including on the battlefield).<sup>72</sup>

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69. See *id.* at 1216-17 (describing content of placards). As Chief Justice Roberts wrote:

The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.”

*Id.*; see also *id.* at 1213 (describing that, in addition to Rev. Fred Phelps, founder of WBC, six other members of WBC present at funeral in Westminster, Maryland included “two of his daughters and four of his grandchildren”).

70. See *id.* at 1213-14 (describing content court considered in its analysis: that “[t]he epic is not properly before us and does not factor in our analysis,” and adding that “we decline to consider the epic in deciding this case”).

71. See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (citing Chief Justice Roberts’s conclusion in *Snyder* that signs were WBC’s expressive speech).

72. See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (Brief for Respondents No. 09-751 at 29-30.), 2010 U.S. S. Ct. Briefs LEXIS 679, at \*46, available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_751\\_Respondent.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_751_Respondent.authcheckdam.pdf) (quoting Mary Phelps’s

In contrast, appellant-petitioner Albert Snyder, the father of the deceased soldier whose funeral the WBC members picketed, asserted in his opening brief to the Supreme Court that the signs “were *not* about the purported matters of public concern,” but were, instead, “intentionally harmful epithets hurled at Mr. Snyder and his family.”<sup>73</sup> In brief, the case featured dueling and diametrically opposed views of the nature of the speech.

#### B. Public Concern: The Majority’s Two-Part Test and the Questions It Raises for Future Courts to Resolve

To determine if the WBC’s speech was about a matter of public or private concern, Chief Justice Roberts made it clear that the inquiry must be highly fact specific, taking into account “all the circumstances of the case,” with the lone exception of whether the speech is inappropriate or controversial in character.<sup>74</sup> He then framed a disjunctive test – one under which a matter of public concern exists if either one of two different conditions is satisfied: (1) Community Concern: the speech can be “fairly considered as relating to any matter of political, social, or other concern to the community” or (2) News Interest: the speech centers on “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”<sup>75</sup>

The first part of this test was borrowed directly from the public-employee speech case of *Connick v. Myers*,<sup>76</sup> while the second component was drawn from another, but much more recent, employee-speech case, *City of San Diego v. Roe*.<sup>77</sup> This is significant because *Snyder* clearly was *not* a government-employee speech case. Instead, it involved the speech of a religious group and it sounded in traditional tort principles of intentional infliction of emotional distress (“IIED”) and intrusion into seclusion.<sup>78</sup> As Chief Justice Roberts

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argument, on behalf of WBC, that speech was public concern in that it was religious commentary on significant current events).

73. See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (Brief for Petitioner No. 09-751, at 36), 2010 U.S. S. Ct. Briefs LEXIS 505, at \*54 (detailing Mr. Snyder’s argument that picketing signs were not about purported matters of public concern, but were instead, intentionally harmful epithets hurled at Mr. Snyder’s family).

74. See *id.* (providing that “[t]he arguably ‘inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern’” (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987))).

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

76. 461 U.S. 138 (1983).

77. 543 U.S. 77 (2004).

78. See Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000) (explaining that Intentional infliction of emotional distress (IIED) typically “consists of

posed the issue in the opening paragraph of the Opinion of the Court, “[t]he question presented is whether the First Amendment shields the [WBC] members from tort liability for their speech in this case.”<sup>79</sup>

The Court’s deployment in the tort case of *Snyder* of two different facets of the public-concern concept drawn from a very different legal context—namely, government-employee speech cases—is indicative of the fact that “public concern” is a concept that defies and transcends any silo of communications law, such as libel, privacy or IIED. Instead, public concern permeates First Amendment jurisprudence.<sup>80</sup> Indeed, in explicating public concern and explaining why matters affecting it merit heightened constitutional protection, Chief Justice Roberts cited cases from the domains of libel, intentional infliction of emotional distress, and government-employee speech.<sup>81</sup> This, in turn, suggests the potential lasting significance of *Snyder’s* definition of public concern—that it likely will be applied to a myriad of different factual situations and legal theories when the right to engage in controversial public speech is at

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four elements: (1) defendant’s conduct must be intentional or reckless, (2) conduct must be outrageous and intolerable, (3) defendant’s conduct must cause the plaintiff emotional distress and (4) distress must be severe.” Under Maryland law of IIED that was applicable in *Snyder*, “a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.”); see also Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CALIF. L. REV. CIRCUIT 71, 83 (2010) (contending that “[o]utrageous action is the core element of” this tort”). See generally Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300 (2010) (discussing intentional infliction of emotional distress tort within context of facts in *Snyder*). See also *Snyder*, 131 S. Ct. at 1214 (observing that “[a] jury found for [Albert] Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages”) (emphasis added); see also RESTATEMENT (SECOND) OF TORTS § 652B (1977) (citing to Section of Restatement providing that, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”).

79. *Snyder*, 131 S. Ct. at 1213.

80. See *supra* notes 8-32 and accompanying text (describing multiple areas of communication law in which concept of public concern plays important role).

81. See *Snyder*, 131 S. Ct. at 1215 (citing libel cases including *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) and *Garrison v. Louisiana*, 379 U.S. 64 (1964)); see also *id.* (citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), for intentional infliction of emotional distress case); *id.* at 1215-16 (citing *Connick v. Myers*, 461 U.S. 138 (1983) and *City of San Diego v. Roe*, 543 U.S. 77 (2004)) (describing Roberts’s use of Supreme Court jurisprudence).

stake. It thus is imperative to unpack the two-part test set forth above that Chief Justice Roberts fashioned.<sup>82</sup>

Chief Justice Roberts specifically framed the two-part public concern test as a disjunctive one, by using the word “or,” rather than “and,” which would have rendered it a conjunctive test.<sup>83</sup> Disjunctive tests, which require only one of two items to be present, are not unusual to determine critical concepts in First Amendment jurisprudence. For instance, actual malice is an example of a disjunctive test—it requires proving either knowledge of falsity *or* a reckless disregard for the truth.<sup>84</sup> In addition, the Supreme Court’s original framing of the fighting words doctrine is disjunctive.<sup>85</sup>

The fact that the Chief Justice used the term “or” to create a disjunctive test for determining what constitutes a matter of public concern surely indicates that there is a calculated difference between the two prongs.<sup>86</sup> Unfortunately, Chief Justice Roberts and the majority failed to articulate or otherwise explain the differences between the two prongs. This leaves multiple unresolved questions that now must be addressed and resolved by lower courts, including:

• **What is the difference between the meaning of the phrase “concern to the community,” in the first part of the test, and the phrase “of legitimate news interest,” in the second part?**

Is the difference a qualitative one about the substantive value of the speech to the public or community or is it a mere semantic difference – a difference without a difference, as it were? If it

82. See *supra* notes 74-75 and accompanying text (furthering significance of Robert’s two-part test).

83. See *Snyder*, 131 S. Ct. at 1216 (detailing significance of Chief Justice Roberts’s two prong test as being disjunctive, rather than conjunctive).

84. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defining “actual malice” as publication of statement “with knowledge that it was false *or* with reckless disregard of whether it was false or not”) (emphasis added).

85. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (writing that certain categories of speech are devoid of First Amendment protection, including “the lewd and obscene, the profane, the libelous, and the insulting *or* ‘fighting’ words—those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace”) (emphasis added); see also Burton Caine, *The Trouble With “Fighting Words”: Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 471-72 (2004) (asserting that “[t]he maddening imprecision of this language is antithetical to the First Amendment because precision of meaning is essential to First Amendment analysis. The two instances of disjunctive—that is the use of the word ‘or’—are virtually designed to confound the reader”).

86. See *supra* note 74-75 and accompanying text (setting forth two parts of test).



amounts only to a difference without a difference, then the two separate prongs – community concern and news interest – should be collapsed and compacted into one definition and the disjunctive nature of the test – the “or” separating the two prongs – is rendered meaningless.

**• Who or what individuals, in the first part of the test, are to be counted among the constituents of “the community” within which a matter would be considered of public concern?**

Put more simply, who comprises the community by which a matter is to be judged? Is it a geographic community? If it is a geographic community, do local standards apply, akin to the Supreme Court’s test for obscenity in *Miller v. California*?<sup>87</sup> What if it is an online community, an issue the Court avoided by not considering the epic?<sup>88</sup> These questions are left unresolved by *Snyder*.

**• Within the phrase “any matter of political, social, or other concern,” does the word “other” broadly encompass any topic or subject matter or are there certain constraints or limitations upon its scope?**

Does “other,” for instance, include matters of sports, sex, education, and/or dining? Are there any limits at all on what falls within the sweep and reach of the word “other?”

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87. 413 U.S. 15 (1973). In *Miller*, the Court held that what is obscene must be measured by contemporary local community standards, reasoning that “it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Miller v. California*, 413 U.S. 15, 32 (1973). The Court elaborated that:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

*Id.* at 30. The Court in *Miller* ultimately concluded that the test for obscenity must focus on whether the material in question: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) lacks serious literary, artistic, political or scientific value. *Id.* at 24.

88. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 n.1 (finding that “[t]he epic is not properly before us and does not factor in our analysis,” and adding that “we decline to consider the epic in deciding this case”).

• Does the phrase “fairly considered as relating to,” as it is used in the first half of the test, require too loose of a nexus or connection between the topic in question and whether it is a matter of public concern?

In other words, rather than using a phrase like “directly related to” or “closely considered as relating to”—terms indicative of a much more proximate linkage—does the *Snyder* Court’s phrasing of “fairly considered” provide too much legal leeway for future courts to stretch this standard beyond reason, and even to apply it inconsistently because of its vague nature?

• On the second part of the test, does the phrase “legitimate news interest” mean that courts should— or, even must— now take into account standards of professional news or journalism organizations, such as the Society of Professional Journalists, when deciding what constitutes “news” and, in turn, a matter of public concern?<sup>89</sup>

Certainly, the inclusion of the word “legitimate” to modify the term “news interest” implies that some types of interest in news are illegitimate, much like the phrase “public concern” itself necessarily implies that there must be some contrasting matters that are of private concern.<sup>90</sup> What does legitimate mean? The Washington Supreme Court has held, in the context of interpreting the phrase “legitimate public concern,” that the word “legitimate” simply

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89. See generally Clay Calvert, *What Is News?: The FCC and the New Battle Over the Regulation of Video News Releases*, 16 *COMMLAW CONCEPTUS* 361, 367-70 (2008) (summarizing difficulties of defining news). Use of a journalistic definition of “news” within the law creates its own set of problems, given the ambiguity regarding the meaning of that term among journalists. As described on its website:

The Society of Professional Journalists works to improve and protect journalism. The organization is the nation’s most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

*About the Society*, SOCIETY FOR PROFESSIONAL JOURNALISTS, <http://www.spj.org/spjinfo.asp> (last visited Oct. 5, 2011).

90. See *supra* note 50 and accompanying text (detailing meaning of “newsworthiness,” and its application to issues presented in *Snyder*).

means “reasonable.”<sup>91</sup> Whether the United States Supreme Court intended this result in *Snyder*, however, is unclear.

Alternatively, does a complete reading of the rest of the statement that immediately follows the term legitimate news interest—namely, “*a subject of general interest and of value and concern to the public*”—eliminate the need to consider journalism news standards by attempting to define what is of “legitimate news interest?”<sup>92</sup> The problem with such an interpretation is that, in terms of providing a helpful test for defining matters of public concern, it is rather circular. In particular, it would mean that a matter of public concern is defined as a matter of “concern to the public.”<sup>93</sup> In addition, the use of the phrase “*a subject of general interest*” is nebulous, adding little help to jurists and fact finders in future cases. The word “general” does, however, indicate that the speech in question must have some broad—i.e., general—appeal to the public to constitute news. This suggests that there must be some certain percentage of the public to whom speech must be of interest in order for it to be of “general interest.”

Perhaps the only word that comes after the phrase “legitimate news interest” that provides some guidance is the word “value,” as used in the phrase “of value and concern to the public.” But, here again, there is no limit placed on the type of value to the public that the speech in question must have or how many members of the public (or what percentage of the public) must find there is “value” in the speech. In brief, the word “value” simply implies its converse — that some speech is valueless to the public.

While the questions posed above are now left on the judicial table for future courts to clean up and resolve, the Supreme Court in *Snyder* did articulate a set of three variables courts are required to consider when deciding if speech involves a matter of public concern, namely: (1) *content* of the speech; (2) *form* of the speech; and (3) *context* of the speech.<sup>94</sup>

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91. See *Dawson v. Daly*, 845 P.2d 995, 1004 (Wash. 1993) (concluding, after examining definitions from *Webster’s Third New International Dictionary*, that “reasonable is the . . . most appropriate meaning for legitimate”).

92. *Snyder*, 131 S. Ct. at 1216 (emphasis added) (quoting *City of San Diego v. Roe*, 125 S. Ct. 521 (2004)).

93. See *id.* (“Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ . . . or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”) (citation omitted).

94. See *id.* (“To determine whether speech is of public or private concern, this Court must independently examine the ‘content, form, and context,’ of the speech ‘as revealed by the whole record.’”) (citation omitted).

The Court made it clear that consideration of these factors is mandatory, not simply suggested or recommended.<sup>95</sup> Yet it also emphasized that “[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including *what* was said, *where* it was said, and *how* it was said.”<sup>96</sup> The first part of this sentence is very important because it embraces a totality of the circumstances approach—no factor is dispositive—to public-concern issues. The concluding component of that statement, in turn, is vital because it adds a second layer of potential inquiry to the trio of content, form and context, namely, what, where, and how.

The Court’s phrase “what was said” seems to overlap directly with its requirement that the content of speech be considered, thus adding relatively little.<sup>97</sup> The “where it was said” factor certainly appears to be relevant as one aspect—a geographic or spatial one—of the context of the speech.<sup>98</sup> Finally, the “how it was said” factor taps both into context—yelling in a heated debate, for instance, involves how speech is communicated (yelling) within the context of a contested dispute—and form of the speech, assuming form relates to the medium or media of communication, such as print, broadcast or Internet.<sup>99</sup>

### C. The Majority’s Application of Its Public Concern Test to the Facts

The majority had little, if any, difficulty in determining that the speech of the members of the Westboro Baptist Church addressed matters of public concern. In making this determination, Chief Justice Roberts turned directly to the trio of variables—content, form and context—that he had identified earlier as pivotal for this inquiry.<sup>100</sup>

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95. *See id.* (“Deciding whether speech is of public or private concern *requires* us to examine the ‘content, form, and context’ of that speech . . .”) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

96. *Id.* (emphasis added).

97. *See id.* (discussing Court’s phrasing and its implications).

98. *See id.* at 1217 (“[S]nyder contends that the ‘context’ of the speech . . . makes the matter of speech a private rather than public concern”).

99. *See id.* (illustrating Snyder’s argument that Westboro’s speech should be afforded less First Amendment protection because speech exploited funeral to increase its own publicity and also that they “mounted a personal attack”).

100. *See id.* at 1211, 1216 (“To determine whether speech is of public or private concern, this Court must independently examine the ‘content, form, and context,’ of the speech ‘as revealed by the whole record.’”) (quotation marks omitted).

First, Chief Justice Roberts focused on the variable of content or, as he alternatively put it, “*what* was said.”<sup>101</sup> Here, he reasoned that although messages such as “Semper Fi Fags,” “Thank God for Dead Soldiers” and “Priests Rape Boys” certainly “may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.”<sup>102</sup> This logic is important because it makes clear that the uncouth or tawdry manner in which speech is conveyed—*how*, in other words, a message is expressed—does not reduce or otherwise negatively affect the amount of First Amendment protection that the underlying substantive component—*what* is said—receives. Put differently, *how* something is said must not be conflated with *what* is being said; the fact that the WBC’s speech “may fall short of refined social or political commentary” must not mitigate its substantive importance.<sup>103</sup>

This distinction finds strong and sturdy support in *Cohen v. California*.<sup>104</sup> Although Paul Robert Cohen might have chosen more socially acceptable phrasing such as “I object to the draft,” rather than “Fuck the Draft,” in order to convey an anti-conscription message while in a Los Angeles courthouse corridor, the Court nonetheless protected his speech, noting that “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”<sup>105</sup> Indeed, in *Cohen*, the Court made it evident that *how* and *what* are distinct components of speech, as it reasoned that “much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.”<sup>106</sup> The emotive component, in brief, equates to how speech is conveyed, while the cognitive aspect equates in the *Snyder* analysis to what is said.

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101. See *supra*, note 94 and accompanying text (observing how content was one of three key variables or factors that Opinion of Court stressed was essential for consideration in public-concern determination). *Snyder*, 131 S. Ct. at 1216 (emphasis added).

102. *Id.* at 1217.

103. See *Snyder*, 131 S. Ct. at 1216 (citing certain phrases as referring to “matters of public import” even though they may be delivered in crude manner).

104. 403 U.S. 15 (1971).

105. See *id.* at 25 (describing difficulty of identifying offensive words as “it is nevertheless often true that one man’s vulgarity is another’s lyric”).

106. See *id.* at 26 (distinguishing cognitive and emotive functions of speech).

Chief Justice Roberts went further in addressing the content factor. In particular, he observed that:

[E]ven if a few of the signs—such as ‘You’re Going to Hell’ and ‘God Hates You’—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.<sup>107</sup>

Two aspects of this statement are striking. First, the emphasized phrase—“*overall thrust and dominant theme*”—suggests that when there are, as it were, mixed messages – some public, some private – courts must decide which one of the two themes provides the prevailing or overriding message.<sup>108</sup> The dominant message will be determinative of the public concern query.

Second, the logic of considering the overall thrust of the message—not merely wrenching one or two signs out of context, in the WBC’s situation—comports directly with defamation law.<sup>109</sup> In particular, Judge Robert D. Sack notes in the latest edition of his treatise on defamation, that “a court will not isolate particular phrases and determine whether, considered alone, they are defamatory. The rule that words are to be read in *the context of the communication as a whole* applies to books and broadcasts, as well as to letters and newspaper and periodical articles and advertisements.”<sup>110</sup> In addition, Chief Justice Roberts’s reasoning squares solidly with that of the Court’s interpretation of a message’s meaning in obscenity cases, under which “the First Amendment requires that redeeming value be judged by considering the *work as a whole*.”<sup>111</sup> As in libel law and obscenity jurisprudence, then, it seems natural for the meaning of the WBC’s signs to be judged by considering all of them collectively, as a whole.

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107. *Snyder*, 131 S. Ct. at 1217 (emphasis added).

108. *See id.* (emphasis added) (explaining that, in addition to private concerns, “Westboro’s demonstration spoke to broader public issues,” and its signs highlighted “political and moral conduct of the United States and its citizens”).

109. *See id.* (concluding that logic of court’s decision fits with defamation law by stating Westboro’s decision to protect at funeral more than satisfied legal tort standard for emotional distress).

110. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:4.2 (4th ed. 2011) (emphasis added).

111. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002) (emphasis added). For a further discussion of the Supreme Court’s three-part test for obscenity, see *supra* note 101 and accompanying text.

Shifting analysis from the content variable to the context factor, Chief Justice Roberts initially made the rather unremarkable observation that the context was in connection with Matthew Snyder’s funeral.<sup>112</sup> But, significantly, the Chief Justice observed that this location, even if it was chosen to help the WBC’s members increase the publicity generated for their views, “cannot by itself transform the nature of Westboro’s speech.”<sup>113</sup> The phrase “by itself” is important because it indicates that geographic proximity near a funeral is only one aspect or sliver of the contextual inquiry. In particular, Chief Justice Roberts turned to what apparently constitute two other dimensions of context—the *history* of the WBC’s speech and the *sincerity* of the beliefs of its members. Roberts wrote:

Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro’s picketing did not represent its “honestly believed” views on public issues. 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.<sup>114</sup>

This analysis indicates that the context variable requires an examination of the history, if any, of the use of similar speech by a defendant involved in such a lawsuit. The true meaning of the WBC’s speech near the Matthew Snyder funeral is best understood when contextualized within the broader framework of an established and well-practiced pattern of identical expression by the members of the WBC that led up to the incident. In other words, the same messages had been used repeatedly by the WBC at many funerals *other than* the one for Matthew Snyder, thus negating the implication that their meaning was specific—was private, as it were—to Matthew Snyder or his father.<sup>115</sup>

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112. See *Snyder*, 131 S. Ct. at 1217 (explaining context was in connection with Snyder’s funeral).

113. *Id.*

114. *Id.* (citations omitted).

115. See *id.* at 1213 (noting majority’s language). The WBC “frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.” *Id.* (citing Rutherford Institute Br. as Amicus Curiae 7, n. 14).

The sincerity dimension of context—that “there can be no serious claim that Westboro’s picketing did not represent its ‘honestly believed’ views on public issues”—neutralized the bootstrapping or pretext argument asserted by Albert Snyder.<sup>116</sup> In particular, Albert Snyder contended that the WBC “mounted a personal attack on Snyder and his family, and then attempted to ‘immunize their conduct by claiming that they were actually protesting the United States’ tolerance of homosexuality or the supposed evils of the Catholic Church.’”<sup>117</sup>

The other critical aspect of context for Chief Justice Roberts that apparently was indicative of the speech involving a matter of public concern was its very public location, even if the public location was near a funeral.<sup>118</sup> This taps directly into the “where it was said” dimension of context.<sup>119</sup> “Westboro’s signs, displayed *on public land* next to *a public street*, reflect the fact that the church finds much to condemn in modern society,” Roberts wrote.<sup>120</sup> In other words, what better place to convey a message about the policies of modern society than out in the middle of that society where they will be noticed by its members, if only because the news media cover it? Furthermore, hoisting signs in a “public place adjacent to a public street” takes on added importance because such venues occupy places for heightened speech protection under the Court’s public forum doctrine.<sup>121</sup>

#### D. The Dissent’s Analysis of the Public Concern Issue

A close analysis of Justice Samuel Alito’s dissent reveals that he utilized a trio of different tactics to reach the conclusion that the WBC’s speech was private in nature and, in turn, was “not speech on a matter of public concern.”<sup>122</sup> These three strategies are roughly encapsulated as follows:

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116. *See id.* at 1217 (finding unpersuasive Snyder’s argument that WBC’s protest was personal attack) .

117. *Id.* (quoting Reply Brief for Petitioner at 10).

118. *See id.* at 1216 (discussing how location influenced Chief Justice Roberts’ thought process).

119. *See id.* (writing that “[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, *where it was said*, and how it was said”) (emphasis added).

120. *Id.* at 1217 (emphasis added).

121. *See id.* at 1218 (noting heightened protection under public forum doctrine).

122. *Id.* at 1226 (Alito, J., dissenting).



- (1) branding the WBC’s speech as personalized attacks, akin more to conduct than speech;
- (2) focusing on the private-figure status of the plaintiff and his deceased son; and
- (3) employing a reasonable-reader standard in which meaning is derived from the nexus between the content of the WBC signs and their situs.

These three factors merit further elaboration because, when viewed collectively, they facilitated Justice Alito’s argument that the WBC’s speech was not a matter of public concern.

First, Justice Alito deployed the rhetorical technique of repeatedly branding the speech of the WBC as a personal “assault” or an “attack” on the plaintiff, Albert Snyder, and his deceased son, Matthew.<sup>123</sup> In other words, the WBC’s speech was *not* a general message directed at all the world about matters of public concern—not a general message aimed at no one in particular, such as Paul Robert Cohen’s “Fuck the Draft” jacket in the corridor of a courthouse in *Cohen v. California*<sup>124</sup>—but rather was a pinpointed communication targeting specific individuals. For instance, Justice Alito described the WBC’s signs as amounting to “vicious verbal attacks that make no contribution to public debate” and explained that the WBC “brutally attacked Matthew Snyder.”<sup>125</sup>

The latter quotation not only equates speech with conduct—a personal attack—but stretches credulity. In particular, Matthew Snyder was dead—he could not have been attacked, either physically or verbally, thus exposing the flaw with Justice Alito’s trope. Yet by focusing on specific individuals who allegedly would be harmed by the WBC’s speech, Justice Alito cleverly shifted the frame away from the public speech realm to the private speech domain, noting that the “verbal assaults will wound the family and friends of the deceased . . . .”<sup>126</sup> As Justice Alito summed it up, the speech “specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military.”<sup>127</sup>

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123. *See id.* at 1222 (Alito, J., dissenting) (characterizing speech as “vicious verbal assault” and referring to speech as “verbal attack on Matthew and his family”).

124. 403 U.S. 15, 16 (1971) (explaining general message found in case).

125. *Snyder*, 131 S. Ct. at 1222-23 (Alito, J., dissenting).

126. *Id.* at 1224.

127. *Id.* at 1226.

To gain a better understanding of Justice Alito's rhetorical strategy of characterizing the speech as a private, personal attack rather than a generalized message of public concern, it helps to visualize just how frequently he attempted to frame the debate in such terms. In particular, he used the following terms over the course of his solo dissent: (i) "vicious verbal *assault*;" (ii) "malevolent verbal *attack*;" (iii) "respondents' right to *brutalize* Mr. Snyder;" (iv) "vicious verbal *attacks*;" (v) "an *attack* like the one at issue here;" (vi) "respondents *brutally attacked* Matthew Snyder;" (vii) "verbal *assaults*;" (viii) "this *attack* was not speech on a matter of public concern;" (ix) "a verbal *attack*;" (x) "respondents' *attack* on Matthew Snyder;" (xi) "respondents' personal *attack* on Matthew Snyder;" (xii) "the sting of their *attack*;" (xiii) "a cold and calculated strategy to *slash a stranger*;" (xiv) "actionable verbal *attacks*;" (xv) "a verbal *assault*;" (xvi) "the wounds inflicted by vicious verbal *assaults*;" (xvii) "the verbal *attacks* that severely wounded petitioner;" (xviii) "a personal verbal *assault*;" and (xix) "*brutalization* of innocent victims."<sup>128</sup>

That Justice Alito somehow felt it necessary to employ the same "attack" trope over and over again perhaps suggests that he recognized the steep, uphill battle on the public concern question. By using words that invoke imagery of fisticuffs and fighting—the image of WBC members taking direct swings at specific individuals—Justice Alito seemingly hoped to leave the public aspects of the speech behind and, instead, to direct attention to the personal abuse the speech allegedly renders.

Parsed differently, Justice Alito's language suggests the speech of the WBC is more akin to unprotected fighting words, which, under current First Amendment doctrine, are limited to "to face-to-face confrontations likely to provoke immediate violence."<sup>129</sup> Professor Michael Mannheim, for instance, notes that in several cases during the 1970s, the Supreme Court clarified the fighting words doctrine "as a narrowly-tailored device designed to address the problem of responsive violence by the recipient of insulting lan-

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128. *Id.* at 1222-24, 1226-29 (Alito, J., dissenting) (emphasis added).

129. See Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009) (limiting definition of fighting words to confrontations likely to result in immediate violence); see also Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1138 (1994) (describing fighting words as "a category of expression historically unprotected by the First Amendment").

guage.”<sup>130</sup> For example, in *Cohen v. California*,<sup>131</sup> the Court described fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>132</sup>

The second technique used by Justice Alito to conclude that the WBC’s speech was of private concern was to concentrate on the status of the plaintiff as a private figure rather than a public one. In fact, Justice Alito framed the case in the second sentence of his dissent as focusing on a private individual, asserting that “Albert Snyder is not a public figure.”<sup>133</sup> He also characterized Matthew Snyder as “a private figure.”<sup>134</sup> This tactic of focusing on the status of the plaintiff and his deceased son diverts attention away from the public content of the speech to the private individuals it allegedly victimized. In contrast, the majority never addressed the question of whether Albert Snyder was a private figure or how that affected its public concern analysis.

Finally, Justice Alito deployed a third tactic to reach the conclusion that the WBC’s speech was private in nature. The strategy used was to suggest how a hypothetical reasonable person viewing the signs would have interpreted their meaning, in light of both their geographic and temporal proximity to the church-situated funeral held for Matthew Snyder. In other words, the nexus between the content of signs and the location where they were held would lead a reasonable observer to interpret them as private attacks rather than a generalized public commentary. For example, Justice Alito wrote:

Since respondents chose to stage their protest at Matthew Snyder’s funeral and not at any of the other countless available venues, a *reasonable person* would have assumed that there was a connection between the messages on the placards and the deceased. Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents’ signs – e.g., “God Hates You,” “Not Blessed Just Cursed,” and “You’re Going

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130. Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1528 (1993).

131. 403 U.S. 15 (1971).

132. *See id.* at 20. (defining fighting words as words directed at private figures and likely to provoke violent reactions).

133. *See Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting) (explaining difference between public and private figures).

134. *See id.* at 1227 (Alito, J., dissenting) (focusing on person’s status as private figure in relation to fighting words).

to Hell” – would have likely been interpreted as referring to God’s judgment of the deceased.<sup>135</sup>

Despite the fact not a single sign held by WBC members used the name of either Albert Snyder or Matthew Snyder, Justice Alito’s emphasis on the geographic context in which the signs were held led him to consider they amounted to private attacks:

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading “God Hates Fags,” “Semper Fi Fags,” “Fags Doom Nations,” and “Fag Troops.” Another placard depicted two men engaging in anal intercourse. A *reasonable bystander* seeing those signs would have likely concluded that they were meant to suggest that the deceased was a homosexual.<sup>136</sup>

Justice Alito, however, offered no evidence of how the signs were actually interpreted by those near the funeral. He simply gave his own view of how a reasonable person would have interpreted them—namely, as personally directed attacks on Matthew Snyder, rather than as commentary on issues of public concern such as gays in the military and sexual abuse committed by priests. For Justice Alito, then, the context of the speech created a sufficient nexus between content of the signs and the plaintiff (as well as the plaintiff’s deceased son) to render them private in nature.<sup>137</sup>

#### IV. MEDIA BLAME GAME OR RIGHTFUL CRITICISM? THE ROLE OF THE NEWS MEDIA IN MAKING THE SPEECH PUBLIC

In the course of his dissent, Justice Alito criticized the seemingly symbiotic relationship between the WBC and the news media and, in particular, how the WBC effectively exploits the news media to gain widespread attention for its controversial views.<sup>138</sup> In blasting what he called the WBC’s “well-practiced strategy for attracting public attention,”<sup>139</sup> Justice Alito observed that the WBC provides the media with press releases in advance of their funeral protests

135. *Id.* at 1225 (Alito, J., dissenting) (emphasis added).

136. *Id.* (Alito, J., dissenting) (emphasis added).

137. *See id.* (Alito, J., dissenting) (indicating where speech occurs may influence whether speech is private in nature).

138. *See id.* at 1224-25 (Alito, J., dissenting) (commenting on purposeful media actions to gain more publicity).

139. *Id.* at 1223 (Alito, J., dissenting).

and contended that “the media is [sic] irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain.”<sup>140</sup> The end result of this strategy in the case of Matthew Snyder’s funeral was “a raucous media event.”<sup>141</sup> These observations are incredibly important because the second half of Chief Justice Roberts’s two-part test for determining if speech involves a matter of public concern examines whether it “is a subject of legitimate *news interest*.”<sup>142</sup> To the extent the news media are interested in the WBC—to the extent that the news media actively cover and report on their activities—it seems that the WBC has found an effective way of solidifying its position that its speech is of legitimate news interest and, in turn, involves matters of public concern. Conversely, the degree to which the news media chose to ignore the WBC signals that its speech is not of legitimate news interest.

The WBC certainly are media savvy and continue in the aftermath of *Snyder* to attract news media attention by protesting at—or threatening to protest at—funerals, as well as other high-profile events.<sup>143</sup> Yet some members of the news media finally appear to be waking up to the fact that WBC is using them. For example, *Palm Beach Post* columnist Frank Cerabino observed in July 2011 that “if it weren’t for the group’s reliable access to mass media, nobody would see its ‘Thank God for 9/11’ signs, or hear its message that everything bad that happens to Americans is divine punishment because ‘God Hates Fags’ and America is too permissive when it comes to homosexuals.”<sup>144</sup> Cerabino argued that “Westboro’s protests shouldn’t be news anymore . . . They’ve been parading their nonsense for years. It’s not ‘new’ anymore, and ‘new’ is three-quarters of the word ‘news.’”<sup>145</sup> Journalist Bert Sahlberg agrees with Cerabino, pointing out that “for a guy who has such a dislike

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140. *Id.* (Alito, J., dissenting).

141. *Id.* at 1225 (Alito, J., dissenting).

142. *Id.* at 1216 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)) (emphasis added).

143. See, e.g., Shawn Cetrone, *Controversial Church Mulls Funeral Protest*, *HERALD* (July 14, 2011), available at <http://www.heraldonline.com/2011/07/14/3218316/controversial-church-mulls-fort.html>. For instance, the WBC received news media coverage when it protested outside of a KISS concert in Illinois. See *Westboro Church Members Protest KISS*, *SPRINGFIELD STATE J. REGISTER*, July 19, 2011, available at 2011 WL 14347161 (reporting Westboro Baptist Church protest of rock concert).

144. Frank Cerabino, *Press Can’t Cave If Hate ‘Church’ Pickets in Florida*, *PALM BEACH POST*, July 12, 2011, at 1B, available at <http://www.palmbeachpost.com/news/cerabino-press-cant-cave-if-hate-church-pickets-1600594.html>.

145. *Id.*

for the media, the [WBC founder] Rev. Fred Phelps certainly knows how to manipulate it.”<sup>146</sup> Sahlberg bluntly adds that “Fred Phelps and his family know how to use the media. The duped media need to learn how to deal with it.”<sup>147</sup>

The editorial board of *USA Today* opined similarly after the high court’s ruling in *Snyder*, arguing that “the best way to respect the American tradition of free speech is simply to ignore those who hatefully seek to exploit it, depriving them of the attention they so desperately crave.”<sup>148</sup> Beyond members of the news media, others with a vested interest in the matter encourage ignoring the WBC.<sup>149</sup> For example, Deborah Lauter, director of civil rights for the Anti-Defamation League, calls on others to “[i]gnore them, turn away, don’t engage with them, because that’s exactly what they want.”<sup>150</sup>

Because Chief Justice Roberts defined what constitutes a matter of public concern by, in part, using the phrase “legitimate news interest,” the choice of the news media whether or not to cover the WBC is more than just an ethical quandary.<sup>151</sup> It is a choice that now has legal ramifications when journalists transform the funeral protests into news stories. When mainstream news organizations report on the WBC’s activities, they arguably are providing more legal fodder for the WBC’s assertions that its speech is of public concern—that it is, in brief, newsworthy.

Stunts become news when the media cover the WBC.<sup>152</sup> Writing in the *Advocate* in May 2009, James Kirchick condemned what he called “opportunistic journalists looking for a good story” when they choose to cover the WBC.<sup>153</sup> Engagement in self-censorship by

146. Bert Sahlberg, *Phelps Leads the Media Around by Their Noses*, LEWISTON MORNING TRIB. (Idaho), July 9, 2002, at 8A.

147. *Id.*

148. *Yes, Even Hateful Funeral Protests are Free Speech*, USA TODAY, Mar. 3, 2011, at 8A, available at [http://www.usatoday.com/printedition/news/20110303/editorial03\\_st.art.htm](http://www.usatoday.com/printedition/news/20110303/editorial03_st.art.htm).

149. See *infra* note 150 and accompanying text (noting one example in which person advocated ignoring WBC).

150. Rebecca Dube, *How to Handle Hate: Jews Debate Response to the Westboro Road Show*, JEWISH DAILY FORWARD, Oct. 16, 2009, at 3, available at <http://www.forward.com/articles/116261/>.

151. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

152. Cf. William Murchison, *Free Speech and the American Decline*, AM. SPECTATOR, May 2011, at 38-39, available at <http://spectator.org/archives/2011/05/14/freedom-and-speech-and-america> (addressing WBC’s speech, and observing that “in our time free speech has come to . . . well, this: . . . a sthick or a stunt will do”).

153. See James Kirchick, *God Hates Censorship*, ADVOCATE, May 2009, available at <http://www.advocate.com/printArticle.aspx?id=95847> (noting that journalists have given WBC “undue attention”).

journalists might well help to blunt the argument that the speech of the WBC amounts to news.

Consideration of whether speech is of legitimate news interest, as a criterion for the public concern determination, ultimately places journalists in a very difficult situation. On the one hand, as individuals engaged in a profession that is safeguarded by the First Amendment, they must support the right of the WBC to engage in expression, no matter how offensive it may be. Indeed, the Society of Professional Journalists (SPJ) joined in a friend-of-the-court brief in support of the WBC’s free speech rights.<sup>154</sup> SPJ President Kevin Smith explained that “[t]his case is a bitter one and while we outwardly reject their words and behavior, we must support the defense of free speech, even the most disdainful of it.”<sup>155</sup>

On the other hand, giving coverage to the WBC’s speech feeds directly into the public concern question under the second part of the test fashioned by the majority in *Snyder*. Kelly McBride, a journalist now with the Poynter Institute, wrote shortly after the Supreme Court’s decision in *Snyder* that “[w]hen you give hate speech too much attention, or the wrong kind of attention, you cause more harm than good.”<sup>156</sup> There is, of course, a critical difference between supporting a group’s right to engage speech and reporting on that group’s speech. A test for public concern that involves whether something is of legitimate news interest, as does the test fashioned by Chief Justice Roberts, puts the news media in a legal predicament about its future coverage (or lack thereof) of the WBC and similar hate-mongering fringe groups.

## V. CONCLUSION

Much of the law, ultimately, is about drawing lines between concepts.<sup>157</sup> Perhaps, when it comes to the question of whether

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154. See Press Release, *SPJ Joins Amicus Brief in First Amendment Case Involving Westboro Baptist Church*, SOC’Y OF PROF. JOURNALISTS (July 15, 2010), <http://www.spj.org/news.asp?ref=986> (providing, in relevant part, that “[i]n joining the brief, which is authored by the Reporters Committee for Freedom of the Press, SPJ reiterates the importance of defending the First Amendment even when that includes the objectionable use of hate speech”).

155. *Id.*

156. See Kelly McBride, *How to Cover Hate Speech as Supreme Court Allows Westboro Baptist Church Funeral Protests*, POYNTER INST (Mar. 2, 2011), <http://www.poynter.org/how-tos/newsgathering-storytelling/121576/how-to-cover-hate-speech-supreme-court-allows-westboro-baptist-church-funeral-protests> (listing “common negative affects [sic] of hate speech stories”).

157. See, e.g., Kris Franklin, *Pedagogy, Theory Saved My Life*, 8 N.Y. CITY L. REV. 599, 627 (2005) (contending that “[s]o much of law is about drawing lines somewhere”).

speech constitutes a matter of public concern, the line between public and private is deliberately left ambiguous in order to provide courts with flexibility and legal leeway to make difficult judgments based on the unique facts of each case. Yet such a system without a clearly demarcated fence line, as it were, is liable to breed inconsistency which, in turn, may spawn judicial illegitimacy because deciding what constitutes “a matter of public concern is for the Court to determine as a matter of law.”<sup>158</sup>

This article raises many questions regarding the definition and test of public concern fashioned by Chief Roberts in *Snyder*.<sup>159</sup> The two-part test is, in a nutshell, riddled with ambiguities that lower courts must now sort through.<sup>160</sup> Furthermore, the test’s use of the term “legitimate news interest” means, as Part IV asserts, that when the news media choose to report on the WBC, they may help to bolster the argument that the speech of the WBC is newsworthy. This problem stretches beyond coverage of the WBC to other fringe elements of the hate-speech world, such as the massive media coverage of the previously unknown Florida Pastor Terry Jones when he vowed to burn Qurans.<sup>161</sup> Under the test for public concern, the news media now face, not only an ethical dilemma in deciding whether to report on such groups, but also a legal one to the extent their coverage shores up public concern claims.

Finally, while this article has stressed the importance of the public concern concept in multiples areas of communications law, it should be noted that concluding a matter is of public concern does not inevitably lead to First Amendment protection.<sup>162</sup> Professor Danielle Keats Citron notes, for instance, that a person “cannot

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158. *Mackin v. Cosmos Broad., Inc.*, 2008 U.S. Dist. LEXIS 40715, \*7 (W.D. Ky. May 21, 2008). *Cf.* A FEW GOOD MEN (Columbia Pictures 1992) (describing a fenceline as a “big wall separating the good guys from the bad guys”); Memorable Quotes From A Few Good Men, IMDB.Com, <http://www.imdb.com/title/tt0104257/quotes> (last visited Oct. 5, 2011) (setting forth relevant quotation from the movie); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2041 (1996) (asserting that “the goal of consistency must be given independent normative weight in the court’s decisionmaking [sic] process”).

159. For a discussion of the issues regarding the *Snyder* test, see *supra* notes 74-99 and accompanying text.

160. For a discussion of the issues regarding the *Snyder* test, see *supra* notes 74-99 and accompanying text.

161. See generally Brooke Gladstone, *The Quran-Burning Coverage Conundrum*, NPR.ORG, (Sept. 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=129773873> (addressing media coverage of Terry Jones).

162. For further discussion of the fact that matters of public concern do not necessarily receive First Amendment protection, see *supra* notes 8-32 and accompanying text.



escape responsibility merely by combining the threatening language with an issue of public concern.”<sup>163</sup>

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163. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 107 (2009).

