**INTRODUCTION**

As a father grieving the loss of a son who sacrificed his young life in service of his country, Albert Snyder deserves only sympathy and compassion. Unfortunately, members of the Westboro Baptist Church (hereinafter “the Phelps”) expressed themselves in a manner that only added to the emotional anguish that Mr. Snyder has endured. In the limited context of the law, however, Mr. Snyder’s suffering is tangential to the fundamental question of *Albert Snyder v. Fred Phelps, et. al.*: Did the Phelps cause Albert Snyder to suffer the specific torts of Intrusion Upon Seclusion and Intentional Infliction of Emotional Distress (IIED)?

The United States Court of Appeals for the Fourth Circuit only addressed the foregoing question in a concurrence. The answer was in the negative, arguing that the evidence presented at trial did not

---

* Lecturer, University of Virginia School of Law. Associate Director, Thomas Jefferson Center for the Protection of Free Expression. This Article was a collaborative effort. I owe thanks to Courtney Marello (UVA Law ’12) and Armon Pollack (UVA Law ’11) both of whom could have fabulous careers as book editors if they decide not to practice law. I would also like to thank the students enrolled in the First Amendment Practice Clinic at the University School of Law whose invaluable work preparing amicus curiae briefs filed in *Snyder v. Phelps* served as the basis for this Article. Particular thanks to my boss, mentor, and friend, Robert M. O’Neil, without whose insight and support this Article would not be possible. Finally, I would like to dedicate this Article to my father, John P. “Jake” Wheeler, the best constitutional lawyer never to go to law school.

1 The Phelps were also held liable for civil conspiracy by the United States District Court of Maryland. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 581-82 (D. Md. 2008). Because the unlawful activity required for this count is the substantive offense of Intrusion Upon Seclusion or IIED, addressing the civil conspiracy is unnecessary for the purposes of this Article. See *Green v. Washington Suburban Sanitary Comm’n*, 269 A.2d 815, 824 (Md. 1970) (noting that “[a] civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act”).

constitute the requisite elements of the two torts remaining on appeal.\textsuperscript{3} By contrast, the Fourth Circuit majority resolved the case on the ground that the Phelps’ expression was protected under the First Amendment and therefore immune from tort liability.\textsuperscript{4} Albert Snyder’s tort allegations were predicated on two separate and distinct activities: a protest conducted by the Phelps near the funeral service for his son Matthew, and the posting on Westboro Church’s website several weeks later of a distasteful, self-proclaimed “epic” statement entitled “The Burden of Marine Lance Cpl. Matthew A. Snyder.”\textsuperscript{5} The thesis of this Article is that the Fourth Circuit was correct in reversing the district court’s finding of liability, but did so for the wrong reason. Specifically, the majority unnecessarily addressed the constitutional status of the Phelps’ expression instead of resolving the case exclusively on the insufficiency of the evidence, as urged in Judge Shedd’s concurring opinion. By choosing not to address the fundamental issue of whether the Phelps had actually committed the alleged torts, the Fourth Circuit failed to adhere to the doctrine of constitutional avoidance, a rule of judicial self-restraint not to adjudicate constitutional questions—even if properly presented by the record—if any other ground exists to decide the case.\textsuperscript{6} According to the appellate majority, addressing the constitutional status of the Phelps’ expression was required because the Phelps failed to raise an evidentiary challenge on appeal, thereby waiving the issue and leaving no alternative ground for the court to decide the case.\textsuperscript{7} The court reasoned that the doctrine of constitutional avoidance was therefore “inapplicable.”\textsuperscript{8} An evaluation of both the factual and jurisprudential bases for this determination reveals several weaknesses in the court’s reasoning. One such frailty is that the analysis does not include a proper independent review of the record as mandated by the United States Supreme Court in cases that have the potential to affect the perimeters of First Amendment protection.\textsuperscript{9} Indeed, this Article will propose that in such cases the mandate of independent appellate review of the record, coupled with the doctrine of constitutional avoidance, rarely allows for the waiver of challenges to evidentiary conclusions of law.

The need for independent appellate review of the evidence is inescapable in a case such as this one, which involves messages that most members of society find deeply offensive as well as profoundly unpatriotic. The United States Supreme Court has repeatedly held that the offensiveness and shock value of speech cannot serve as a basis for

\textsuperscript{3} Id. at 232-33.
\textsuperscript{4} Id. at 226.
\textsuperscript{5} Id. at 210-12.
\textsuperscript{7} Snyder, 580 F.3d at 217 n.9.
\textsuperscript{8} Id.
liability. “The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” A case such as this one, in which the message is almost universally abhorrent, is precisely the kind of case that calls for the most sensitive and rigorous review.

This Article will proceed in four Parts. Part I will provide the factual and procedural background of *Snyder v. Phelps*. Part II will compare and contrast the facts of the case to the requisite elements of Maryland’s tort for Intrusion Upon Seclusion. Part III will conduct a similar exercise as applied to the elements of Intentional Infliction of Emotion Distress required under Maryland law. Finally, Part IV will address the degree to which avoidance of constitutional questions should play a role in determining waiver of evidentiary issues in this and other cases that have the potential to affect the perimeters of First Amendment protection.

At the outset it deserves noting that the availability of a non-constitutional ground does not challenge the Fourth Circuit’s analysis that the Phelps’ expression was protected under the First Amendment; rather, it merely represents an alternative basis for adjudicating the matter. With regard to each of the specific tort claims, two deceptively simple principles bound the inquiry. On one hand, both Maryland law and the United States Constitution permit recovery for injuries inflicted upon a plaintiff through harmful expression. Equally clear, on the other hand, is the severely limited scope of such remedies essential to maintain their consistency with the free expression guarantees of the First Amendment. Thus, even if the First Amendment is not the basis for deciding this case, it should nonetheless serve as a constitutional backdrop informing the analysis.

I. BACKGROUND

The following summary of the case is an abridged version of the “Background and Procedural History” found in the United States District Court for the District of Maryland’s opinion *Snyder v. Phelps*, supplemented with key facts contained in the record but which were not reported in the opinion.

On March 3, 2006, Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. . . . Plaintiff, Albert Snyder, [was Matthew Snyder’s father]. . . . As Matthew Snyder had lived in Westminster, Maryland, and graduated from Westminster High

---

School, St. John’s Catholic Church in Westminster was selected as the site for his funeral, which was scheduled for March 10, 2006. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.\footnote{Id. at 571.}

Between the time of Matthew Snyder’s death on March 3, 2006, and the funeral service on March 10, 2006, Albert Snyder allowed himself to be interviewed by the press about his son “two or three times.”\footnote{Brief of Appellant app. at 2150, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2008) (No. 08-1026) [hereinafter Appendix to Appellant’s Brief] (Appendix to Appellant’s Brief, Vol. VIII, testimony of Albert Snyder).}

Defendant Fred W. Phelps, Sr., founded Defendant Westboro Baptist Church, Inc. in Topeka, Kansas, in 1955. For fifty-two years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. Among these family members are Defendants Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. . . . According to the testimony of Defendants’ expert, the members of this church practice a “fire and brimstone” fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as www.godhatesfags.com in order to publicize their religious viewpoint.

Defendants’ testimony at trial established that their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years. Members of the Phelps family prepare signs at an on-site sign shop at their Kansas church to take with them in their travels. . . .

Phelps testified that members of the Westboro Baptist Church learned of Lance Cpl. Snyder’s funeral and issued a news release on March 8, 2006, announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral. On March 10, 2006, Phelps, his daughters Phelps-Roper and Phelps-Davis, and four of his [minor] grandchildren arrived in Westminster, Maryland, to picket Matthew Snyder’s funeral.\footnote{Appendix to Appellant’s Brief, supra note 12, at 2083 (Vol. VII, testimony of Albert Snyder).}

A more precise recitation of the facts would state that the Phelps picketed Matthew Snyder’s funeral \textit{service} but not the burial at the cemetery.\footnote{Id. at 2082 (testimony of Albert Snyder).} The latter occurred after the service, approximately 15 miles from the church where the service was held.\footnote{Id. at 571.}
testimony establishes that the Phelps were not present at the burial.\footnote{Id. at 2083 (testimony of Albert Snyder).} Further, the record clearly demonstrates that the Phelps did not actually picket at the funeral service but rather in the vicinity of the service.\footnote{Id. at 3758 (Vol. XV, Defendants Exhibit 2, aerial photo of area with protest areas marked).} As will be argued in Part II of this Article, the difference is not only descriptive but also legally dispositive of the Intrusion claim.

Defendants’ rationale was quite simple. They traveled to Matthew Snyder’s funeral in order to publicize their message of God’s hatred of America for its tolerance of homosexuality.\ldots{} By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as “God Hates the USA,” “America is doomed,” “Pope in hell,” and “Fag troops.” The signs also carried more specific messages, to wit: “You’re going to hell,” “God hates you,” “Semper fi fags,” and “Thank God for dead soldiers.” Phelps testified that it was Defendants’ “duty” to deliver the message “whether they want to hear it or not.” [None of the signs listed the names of Matthew or Albert Snyder.\ldots{}]

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church.\footnote{Snyder, 533 F. Supp. 2d at 571-72.}

The Phelps protested over 1000 feet from the church\footnote{See Appendix to Appellant’s Brief, supra note 12, at 3758 (Vol. XV, Defendants Exhibit 2, aerial photo of area with distance between protest and church marked); Brief of Appellant at *4, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2008) (No. 08-1026), 2008 WL 2563404.} and remained in a “25-foot by 10-foot” area bounded by an orange mesh snow fence designated by police.\footnote{Appendix to Appellant’s Brief, supra note 12, at 2285 (Vol. VIII, testimony of Major Thomas Long, Westminster City Police).}

Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program that day with footage of the Phelps family at his son’s funeral.\footnote{Snyder, 533 F. Supp. 2d at 572.}

Mr. Snyder did see demonstrators other than the Phelps both as he arrived and left the funeral service.\footnote{Appendix to Appellant’s Brief, supra note 12, at 2080 (Vol. VII, testimony of Albert Snyder).} An organized group of motorcycle riders who refer to themselves as the “Patriot Guard” travelled to Westminster, Maryland to honor Matthew Snyder.\footnote{Id.; see also id. at 2272 (Vol. VIII, testimony of Captain Vincent Maas, Carroll County Sheriff’s Office).} Members of the Patriot Guard were stationed at two places during the funeral service,
both of which were closer to the church than the location of the Phelps
protest.\footnote{Id. at 2080-82 (Vol. VII, testimony of Albert Snyder).} One group
of the Patriot Guard formed what Mr. Snyder described as a “tunnel” that he
had to walk through to enter the church.\footnote{Id. at 2080; see also id. at 3762
(Vol. XV, Defendants’ Exhibit 42, photo of Patriot Guard outside of church).}
The other group of Patriot Guard riders was stationed near the Phelps.\footnote{See
Brief of Appellee supp. app. at 159a, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2008)
(No. 18-1026) (Plaintiff/Appellee’s Supplemental Appendix, photograph of Phelps
protest with Patriot Guard members in background).} Although the record
does not reveal the exact number of Patriot Guard demonstrators present at the
funeral service, an approximate number may be deduced by reviewing photos of
the group that are in the trial record. Such a process indicates there were
approximately twenty Patriot Guard members immediately outside the church
and at least another twenty-six stationed near the Phelps.

After returning to Kansas, Phelps-Roper published an “epic” on the
Matthew Snyder” . . ., Phelps-Roper stated that Albert Snyder and his ex-wife
“taught Matthew to defy his creator,” “raised him for the devil,” and
“taught him that God was a liar.” In the aftermath of his son’s funeral, Snyder
learned that there was reference to his son on the Internet after running a search
on Google. Through the use of that search engine, he read Phelps-Roper’s “epic”
on the church’s website. . . .

On June 5, 2006, Albert Snyder filed this case against Fred W.
Phelps, Sr. and the Westboro Baptist Church, Inc. (the “church
Defendants”). Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis
(the “pro se Defendants”) were added as Defendants on February 23,
2007. . . . Snyder originally brought five counts against
Defendants—defamation, intrusion upon seclusion, publicity given
to private life, intentional infliction of emotional distress, and civil
conspiracy. After hearing oral arguments on October 15, 2007, th[e
District] Court granted Defendants’ motions for summary judgment
as to the defamation and publicity given to private life claims.

As to the defamation count, th[e District] Court . . . held that the first
element, a defamatory communication, was not satisfied because the
content of the “epic” posted on the church’s website was essentially
Phelps-Roper’s religious opinion and would not realistically tend to
expose Snyder to public hatred or scorn. . . .

As to the publicity given to private life claim, th[e District] Court . . . held that no private information was made public by Defendants.
Defendants learned that Snyder was divorced and that his son was
Catholic from the obituary in the newspaper. In addition, any
publication of this information would not be highly offensive to a
reasonable person as it was already a matter of public record. . . .
This Court held, however, that the remaining three claims—intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy—raised genuine issues of material fact to be determined by a jury. Accordingly, the case was tried before a jury from October 22, 2007 to October 30, 2007. On October 31, 2007, the jury returned a verdict in favor of Plaintiff and against all four Defendants on the three claims . . . .

The Phelps appealed the district court’s decision to the United States Court of Appeals for the Fourth Circuit on June 16, 2008. On September 24, 2009, a three-judge panel of the Fourth Circuit reversed the decision of the district court. The majority opinion held that the Phelps’ expression was protected speech under the First Amendment and therefore immune from tort liability. A concurring opinion argued that the evidence presented at was insufficient to prove the elements of the alleged torts. Mr. Snyder filed a Petition for Certiorari with the United States Supreme Court which was granted on March 8, 2010. Oral argument is expected to take place in Fall 2010.

II. INTRUDING UPON THE SECLUSION OF ANOTHER IN MARYLAND

A. Limitations on the right “to be let alone”

In Maryland, Intrusion Upon Seclusion is but one of four torts encompassed under a state law right of privacy. “The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff ‘to be let alone.’” Maryland courts have conscientiously emphasized the importance of differentiating the four privacy torts.

It is evident that these four forms of invasion of privacy are distinct, and based on different elements. It is the failure to recognize this which has been responsible for much of the apparent confusion . . . . Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not.

27 Snyder, 533 F. Supp. 2d at 572-73.
28 Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009).
29 Id. at 226.
30 Id. at 227 (Shedd, J., concurring).
32 Hollander v. Lubow, 351 A.2d 421, 426-27 (Md. 1976) (superseded by statute on other
The district court correctly itemized the requisite elements of an Intrusion claim in Instruction No. 18 to the jury: “(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person.”

The critical issue posed by an Intrusion claim is “whether there has been an intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs.” An Intrusion plaintiff therefore must have a reasonable expectation of privacy in the location or information that allegedly is being intruded upon.

Under Maryland law, an Intrusion plaintiff does not possess a reasonable expectation of privacy in information that is publicly available. In Hollander v. Lubow, an Intrusion claim was brought against a defendant for researching and then disclosing that the plaintiff was a partner in a competing firm. The court rejected the claim holding that there was no reasonable expectation of privacy in the information because it was contained in the formal documents creating the partnership that were on file in the public records office.

Maryland law further holds that a reasonable expectation of privacy does not exist in a place that is publicly visible. In Furman v. Sheppard, surveillance conducted while the plaintiff was on a yacht in a public waterway was not actionable as Intrusion Upon Seclusion, even though defendant was trespassing on a private club’s property to observe the plaintiff, because “[t]here is no liability for observing him in public places since he is not then in seclusion.”

Similarly, in Barnhart v. Paisano Publications, LLC, the plaintiff had no reasonable expectation of privacy and thus no valid Intrusion claim for semi-nude photographs taken of her at a public event but published without her consent because the photographs constituted nothing more than “giving publicity to what is already public . . . .” And finally, in Solomon v. National Enquirer, Inc., a plaintiff who was photographed while standing at a window in her house with the curtains open did not have a reasonable expectation of privacy for purposes of an Intrusion claim.

33 Appendix to Appellant’s Brief, supra note 12, at 3110 (Vol. XII, Jury Instruction No. 18).
36 See Hollander, 351 A.2d at 427.
37 Id. at 421-22.
38 Id. at 428.
39 See Furman, 744 A.2d at 586.
40 Id.
because she did nothing to take steps to “conceal herself from uninvited eyes” when she was in full view of the general public.\textsuperscript{42}

\textbf{B. Applying the Elements of Maryland’s Intrusion Upon Seclusion Tort to the Phelps’ Protest}

The evidence before the district court left no doubt that information about Matthew Snyder’s funeral service was publicly available. “Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.”\textsuperscript{43} In addition, Mr. Snyder spoke with the press about his son “two or three times” after learning of his death but prior to the funeral service.\textsuperscript{44} Thus, the Phelps did not make public either the news of Matthew Snyder’s death or the time and location of his funeral service.\textsuperscript{45}

Even if Mr. Snyder had a right of seclusion within the confines of the church, that right did not extend to public spaces out of sight of the church. The Phelps’ protest took place outside the church, 1000 feet away.\textsuperscript{46} In finding that a protest near—but not at—a funeral service unseen by the plaintiff\textsuperscript{47} constitutes Intrusion Upon Seclusion, the district court essentially declared that Mr. Snyder’s right to seclusion was geographically boundless. Indeed, there is nothing in the lower court’s reasoning that would preclude a finding of liability if the Phelps’ protest had taken place 1000 miles, rather than 1000 feet, from the funeral service. Such a prospect was enhanced by the district court’s determination that the intrusion element could be satisfied by the turning on of a television set.

A reasonable jury could find . . . that when Snyder turned on the television to see if there was footage of his son’s funeral, he did not “choose” to see close-ups of the Defendants’ signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion.\textsuperscript{48}

\textsuperscript{44} Appendix to Appellant’s Brief, \textit{supra} note 12, at 2150 (Vol. VIII, testimony of Albert Snyder).
\textsuperscript{45} Cf. Showler v. Harper’s Magazine Found., 222 F. App’x 755, 764 (10th Cir. 2007) (magazine’s publication of a photo taken at a funeral service showing the open casket of a Oklahoma soldier killed in the Iraq war did not constitute an intrusion because a newspaper previously published details that the funeral service was open to the public).
\textsuperscript{46} Snyder v. Phelps, 580 F.3d 206, 230 (4th Cir. 2009) (Shedd, J., concurring); Brief of Appellant at *4, Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2008) (No. 08-1026), 2008 WL 2563404 [hereinafter “Fourth Circuit Brief of Appellant”; Appendix to Appellant’s Brief, \textit{supra} note 12, at 3758 (Vol. XV, Defendants Exhibit 2, aerial photo of area with distance between protest and church marked)].
\textsuperscript{47} \textit{Id.} at 572.
\textsuperscript{48} \textit{Id.} at 581.
This analysis confuses an intrusion with the receipt of unpleasant information. Mr. Snyder never observed the actual protest; rather, he only saw a television report on the protest filtered (for better or worse) through the eyes of a television camera crew.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son’s funeral.49

Rather than imposing audio and visual images on Mr. Snyder against his will, the act of turning on a television set of his own volition represents Mr. Snyder’s willingness to accept whatever content was on the channels he selected. The district court’s analysis to the contrary transforms every television viewer in Maryland into a potential Intrusion plaintiff anytime they view something that they find personally offensive.

The plain meaning of Instruction No. 18 is that the intent to intrude or pry is insufficient to find liability unless it leads to an actual act of intrusion or prying.50

An obviously different form of invasion of privacy consists of intrusion upon the plaintiff’s physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag in a store. The principle has, however, been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wire tapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls.51

At a minimum, therefore, engaging in legally-actionable “intrusion” pre-supposes entry into a physical space or access to private information.

The facts presented at trial conclusively establish that, even if the Phelps had intended to disrupt the funeral service, they failed to do so either physically or audibly. At all times, the Phelps’ protest occurred in a public place, designated by local police,52 that was approximately

49 Id. at 572 (emphasis added).
50 See Appendix to Appellant’s Brief, supra note 12, at 3110 (Vol. XII, Jury Instruction No. 18).
52 Appendix to Appellant’s Brief, supra note 12, at 2285-86 (Vol. VIII, testimony of Major Thomas Long, Westminster City Police).
1000 feet from the church where the service was held. Moreover, it was impossible to see the Phelps’ protest from the church because the view was completely obstructed by St. John’s Catholic School. The fact that the Phelps used no sound amplification—combined with the distance and physical obstructions between the protest and the church—prevented any sounds from the protest being heard in the church. Nor were the seven members of the Phelps even seen by many driving to the service as the location of their protest was several hundred feet away from the processional route to the church. Given that Mr. Snyder never saw or heard the actual protest, his Intrusion claim based on the protest lacks proof of the requisite act of an intrusion.

Further, the evidence presented at trial fails to prove the fourth and final element required of a cognizable Intrusion claim: the act of intrusion must be “in a manner which is highly offensive to a reasonable person.” The plain meaning of the instruction centers liability on the manner of intrusion, not the content of the speech. The Phelps’ message may be offensive to a reasonable person, but (as will be discussed further below) peaceful, non-disruptive and lawful picketing is a time-honored manner of expressing one’s views on political and social issues.

The fact that Mr. Snyder brought claims only against the Phelps and not the far greater number of highly visible Patriot Guard demonstrators there to honor Matthew Snyder illustrates that the content of the Phelps’ speech, and not the manner of their alleged intrusion, is at the heart of the Intrusion claim. Indeed, Mr. Snyder conceded that he found the presence of the Patriot Guard at the funeral service “very nice.” While Mr. Snyder’s choice of defendants is certainly understandable from an emotional point of view, the elements

---

53 See Fourth Circuit Brief of Appellant, supra note 46, at *4; Appendix to Appellant’s Brief, supra note 12, at 3758 (Vol. XV, Defendants Exhibit 2, aerial photo of area with distance between protest and church marked).
54 See Appendix to Appellant’s Brief, supra note 12, at 2079 (Vol VII, testimony of Albert Snyder); see also id. at 3758 (Vol. XV, Defendants Exhibit 2, aerial photo of area with distance between protest and church marked); id. at 3795 (Vol. XV, Defendant’s Exhibit 19, DVD with video footage of church grounds and picketing area).
55 Id. at 2165 (Vol. VIII, testimony of Albert Snyder).
56 Id. at 2640 (Vol. X, testimony of Father John Dobranski).
57 Id. at 2164-65 (Vol. VIII, testimony of Albert Snyder).
58 Id. at 3110 (Vol. XII, Jury Instruction No. 18).
60 See Appendix to Appellant’s Brief, supra note 12, at 2083 (Vol VII, testimony of Albert Snyder); id. at 2272 (Vol. VIII, testimony of Captain Vincent Maas, Carroll County Sheriff’s Office).
61 Id. at 2080 (Vol. VII, testimony of Albert Snyder). The fact that Mr. Snyder was able to take some small comfort in knowing that the offensive speech of the Phelps was more than met by patriotic speech confirms that the best remedy for expression with which one disagrees is “counterspeech.” See Robert D. Richards & Clay Calvert, Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech, 2000 BYU L. Rev. 553, 554 (2000) (noting that under the counterspeech doctrine, the preferred remedy for speech with which we disagree is not censorship but is, instead, “to add more speech to the metaphorical marketplace of ideas”).
of an Intrusion tort are not met by offensive speech alone.

Perhaps it might have been reasonable to consider an Intrusion claim had there been an actual disruption of the funeral service, or if the Phelps had protested outside Mr. Snyder’s house, but neither of those scenarios was present in this case. As understandable as it might be to provide legal redress to Mr. Snyder in his time of grief, the requisite elements of an Intrusion Upon Seclusion claim are simply not present in the facts surrounding the Phelps’ protest.

C. Applying the Elements of Maryland’s Intrusion Upon Seclusion Tort to the Posting of the “epic” on the Westboro Baptist Church’s Internet Website

Many of the foregoing factors that would thwart an actionable Intrusion claim based on the protest apply with equal force to the posting of the “epic” on the Westboro Baptist Church’s website. Similar to Mr. Snyder viewing the protest on television,

[i]n posting the “epic,” the Phelps did not do anything to direct it to Snyder’s attention . . . Instead, Snyder learned of the “epic” during an Internet search, and upon finding it he chose to read it. By doing so, any interference with Snyder’s purported interest in seclusion was caused by Snyder himself rather than the Phelps.62

In reviewing the jury’s findings regarding the web posting, the district court stated, “[t]here was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants’ conduct unreasonably invaded Snyder’s privacy and intruded upon his seclusion during a time of bereavement.”63 Under the district court’s analysis, therefore, the Phelps intruded upon Mr. Snyder’s privacy because Mr. Snyder chose to access the Westboro website. Such Jabberwockian reasoning eviscerates the tort’s requirement of an intrusion; a plaintiff cannot willingly seek out information and then claim his seclusion was intruded upon. The statements contained in the “epic” were understandably offensive to Mr. Snyder, but they were not thrust upon him against his will.

Moreover, as previously noted, a plaintiff who alleges Intrusion must have a reasonable expectation of privacy in the arena that is the target.64 For obvious reasons, Mr. Snyder had no expectation of privacy in the Westboro website. Nor could he have had any reasonable expectation of privacy in the content of the so-called “epic.” The

---

implication of the title notwithstanding, the “epic” included only a few actual facts about Matthew Snyder, all of which were publicly known.65 The majority of the content was devoted to detailing the Phelps’ admittedly offensive political and religious opinions.66 Only something “which is and is entitled to be private”67 can serve as the basis for an Intrusion claim. Perhaps Mr. Snyder might have had a reasonable expectation of privacy in some of the factual information contained in the posting if it had not already been publicly shared but such was not the case. Under Maryland law, a plaintiff does not have a reasonable expectation of privacy in information that has already been made publicly available.68

The district court specifically held that the “epic” revealed no private information about Mr. Snyder. Indeed, it was on that basis that the district court granted the Phelps’ motion for summary judgment on the Publicity Given to Private Life claim.69 Given that determination, the district court erred in not also granting the Phelps’ summary judgment on the Intrusion claim, at least as far as it pertained to the “epic.” As previously noted, under Maryland law Intrusion Upon Seclusion and Publicity Given to Private Life claims both “require the invasion of something secret, secluded or private pertaining to the plaintiff . . . .”70 If Mr. Snyder had no reasonable expectation of privacy in the “epic” for the purposes of the Publicity claim, he could have no privacy interest in the exact same information for the purposes of the Intrusion claim.

The fact that no private information was revealed in the website posting, coupled with the district court’s focus on Mr. Snyder’s “time of bereavement,”71 implies that any pejorative statement concerning his son’s death would implicate Mr. Snyder’s privacy interest if made while still grieving the loss of his son. Under this analysis, an anti-Iraq war statement mentioning the name of a deceased soldier would constitute the privacy element required for a grieving family member to claim intrusion upon seclusion. This conclusion would represent an unprecedented judicial expansion of both the tort and the right of privacy in Maryland. In addition, juries and judges would be in the unenviable position of determining what constitutes a legally sufficient period of bereavement for parents who have lost a son or daughter in the war.

---

65 Snyder, 533 F.Supp.2d at 573.
66 Id. at 572-73.
67 Snyder, 580 F.3d at 228 (Shedd, J., concurring).
69 Snyder, 533 F.Supp.2d at 573.
71 Snyder, 533 F.Supp.2d at 581 (“To publish comments on the Internet that a young man . . . was raised for the devil and taught to defy god can clearly be found to not only have inflicted emotional distress . . . but also to have invaded his privacy during a time of bereavement.”).
III. INTENTIONALLY INFlicting EMOTIONAL DISTRESS ON ANOTHER IN MARYLAND

A. IIED: A Remedy “Meted Out Sparingly”

In the Court’s Instruction No. 19, the jury was informed that the elements of IIED were “(1) that the Defendants’ conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress to the Plaintiff; and (4) that the emotional distress was severe.”

Maryland tort law imposes a particularly high standard for IIED recovery. Each element of the claim “must be pled and proved with specificity.” Further, recovery for IIED is a rare and extreme remedy “meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves.” In fact, liability for intentional infliction of emotional distress in Maryland is found so infrequently that twenty years after the claim was first recognized there had only been three instances in which IIED claims were upheld. Five years later, the Maryland District Court reiterated the rarity of a finding of liability by pointing out that


The tort’s requirement of “extreme and outrageous” conduct imposes a particularly high barrier to recovery; for conduct to meet the

---

72 Appendix to Appellant’s Brief, supra note 12, at 3111 (Vol. XII, Jury Instruction No. 19).
test of ‘outrageousness’ it must be “‘so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’”77 This barrier “exists to screen out claims amounting to ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities’ that simply must be endured as part of life.”78 One of the factors making recovery for IIED claims so difficult in Maryland is that a defendant cannot be held liable under the tort for exercising his legal rights in a permissible way.79

Consistent with a literal interpretation of the tort, Maryland courts have upheld IIED liability in cases involving extreme and outrageous conduct, not speech. For example, IIED liability has been imposed on a marriage counselor who had sexual relations with the wife of a patient he was counseling;80 on a physician who had sexual relations with a nurse but did not tell her that he had herpes;81 and on a worker’s compensation insurer that forced a claimant to submit to a psychiatric examination in order to force her to abandon the claim.82

In contrast, Maryland courts do not appear to have upheld liability in IIED cases in which speech was the alleged cause of the distress. For example, even defamatory speech does not automatically translate to IIED liability.83

Derogatory statements made in the workplace regarding gender, religion, national origin and race over a period of five years did not survive a motion for summary judgment on an IIED claim.84 “As inappropriate and repulsive as workplace harassment is, such execrable behavior almost never rises to the level of outrageousness . . . as to reach the high threshold invariably applicable to a claim of intentional

---

77 Harris v. Jones, 380 A.2d 611, 614 (Md. 1977) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965)).
78 Batson, 602 A.2d 1191, 1216 (Md. 1992) (quoting Harris, 380 A.2d at 614).
81 B.N. v. K.K., 538 A.2d 1175 (Md. 1988).
82 Young, 492 A.2d 1270. A common feature among the foregoing cases is a prior relationship between the parties that placed the defendant in a unique position of power over the plaintiff. “In cases where the defendant is in a peculiar position to harass the plaintiff, and cause emotional distress, his conduct will be carefully scrutinized by the courts.” Harris v. Jones, 380 A.2d 611, 615 (Md. 1977); cf. Borchers v. Hyrchuck, 727 A.2d 388 (Md. Ct. Spec. App. 1999) (holding that a pastor who had sexual relations with a congregant in the course of marriage counseling did not amount to a valid claim of IIED since he was not in an officially-sanctioned treatment relationship with the defendant). No such relationship ever existed between the Phelps and Mr. Snyder.
83 Batson v. Shiflett, 602 A.2d 1191, 1217 (Md. 1992) (defamatory statements made in connection with a labor dispute) (“Though we have held that petitioners’ statements were defamatory, this conduct in no way satisfies our exacting standard for ‘extreme and outrageous conduct.’”).
84 See Arbab v. Fred Meyers, Inc., 205 F. Supp. 2d 462, 465-66 (D. Md. 2002); see also Bongam v. Action Toyota, Inc., 14 F. App’x 275 (4th Cir. 2001) (car salesman who referred to a black customer as a “nigger” and breached an agreement to sell a car did not meet the outrageous conduct requirement of IIED); Collier v. Ram Partners, Inc., 159 F. Supp. 2d 889 (D. Md. 2001) (an employer’s persistent use of racial slurs and subsequent threats of bodily harm to an offended employee did not rise to level of outrageous conduct).
Nor was it “extreme and outrageous” conduct for a husband to lie to his wife for twenty years about the fact that he had obtained a divorce from a previous marriage. These cases illustrate the very demanding nature of the “extreme and outrageous” standard in IIED claims, particularly those stemming from speech-related conduct.

B. Applying the Elements of Maryland’s IIED Tort to the Posting of the “Epic” on the Westboro Church’s Website

The district court’s finding that the posting of the “epic” on the Westboro Church’s website constituted “extreme and outrageous” conduct was unwarranted under the limits of the tort set by Maryland law. This is not to suggest that the content of a website posting could never serve as the basis for an emotional distress claim; rather, it is to illustrate that this is not the classic case in which this novel tort remedy seeks to safeguard emotional well-being by allowing liability for a vicious private person-to-person communication—telegram, phone call or individually addressed e-mail—which conveys false information (such as the asserted death of a relative or friend) solely to frighten or torment the recipient, and succeeds in doing so. Awarding damages against the prankster or harasser in such a situation serves neither to expand the reach of IIED nor pose a threat to freedom of expression. The circumstances of Snyder v. Phelps, however, are so radically different as to compel a wholly distinct analysis.

The Phelps’ posting of the “epic” on Westboro Church’s website was entirely lawful and therefore did not constitute “extreme and outrageous” conduct under Maryland law. As noted previously, a defendant is not liable for IIED in Maryland for exercising his legal rights in a permissible way. In Young v. Hartford Accident and Indemnity Co., the plaintiff filed IIED and negligence claims against her insurance company for the emotional stress caused by the insurer’s demand that she submit to an additional psychiatric examination in order to continue receiving her disability benefits. The trial court granted judgment on demurrer for the insurance company as to the IIED claim. On appeal, the Maryland Court of Appeals affirmed the trial court’s IIED decision on the ground that it was the insurance company’s legal right to insist upon the additional evaluation. In reaching this conclusion, the court relied upon the Restatement’s position that an IIED defendant is “never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well

85 Arbabi, 205 F. Supp. 2d at 466.
86 Vance v. Vance, 408 A.2d 728 (Md. 1979).
aware that such insistence is certain to cause emotional distress.”

Similarly, a defendant’s summary judgment motion on an IIED claim was granted in a case involving a man threatening his live-in fiancée, as well as calling her a “bitch,” “whore,” and a “one-breasted woman” while she was recovering from breast cancer treatments in an attempt to get her to move out of his house.

The verbal language directed to Ms. Miller, and the conduct was solely verbal, although it included threats, was for the purpose of pressuring appellant to leave Warren’s house, where, regardless of the morality of his position, she had no legal right to remain. Considering that the appellees had the legal right to require appellant to leave, we do not perceive their verbal actions alone to be, as nauseating as they are if true, of such egregiousness so as to satisfy the elements of the tort.

The act of posting one’s opinion on the Internet today is clearly an accepted act performed widely by an inestimable number of speakers around the world. While the Phelps’ opinions may be offensive, the act of posting them is not extreme and outrageous conduct. Moreover, the statements made in the “epic” do not fall under any of the categorical exceptions to First Amendment protection such as obscenity, incitement to violence or fighting words. The “epic” did not contain personal information or other material obtained by force or without permission. Disclosure did not violate a pre-existing duty or promise between the Phelps and Mr. Snyder, nor did it propose to commit an illegal act, or unlawfully make use of the intellectual property of another. To allow liability for the posting of the “epic” would represent an expansion of IIED liability that would severely chill the exercise of lawful expression on the Internet.

C. Applying the Elements of Maryland’s IIED Tort to the Phelps’ Protest

For a myriad of reasons, it was reversible error to find that the Phelps’ protest in the vicinity of the funeral service constituted

88 Id. (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965)).
90 Id. at 996 (emphasis added).
91 See Snyder v. Phelps, 580 F.3d 206, 224-26 (4th Cir. 2009) (describing and quoting the content of the “epic”).
“extreme and outrageous” conduct. First, as with the posting of the “epic,” the Phelps’ protest was entirely lawful and therefore did not constitute “extreme and outrageous” conduct under Maryland law. Peaceful, non-disruptive picketing is a time-honored means of expressing one’s views on political and social issues. The protest took place in a location of the type that this Court has designated a “traditional public forum.”

This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, “which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Second, the messages displayed on the protest signs purposely did not mention Matthew Snyder’s name and, like the “epic,” did not fall under any of the categorical exceptions to First Amendment protection. Further, “as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.” The unwelcome content of the signs does not alter the substance of the issues they addressed. The fact that the signs addressed matters of public concern should inform the analysis of whether the Phelps’ conduct was “extreme and outrageous.” Indeed, the United States Supreme Court has expressly recognized that the “outrageousness” standard of the IIED tort is problematic when applied to speech that involves matters of public concern:

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

Third, the Phelps took specific steps calculated to ensure that their

---

98 Id. (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
100 Id. at 222-23.
protest would not cause a disruption of the funeral service. For example, rather than simply appearing on the day of the funeral service, the Phelps gave advance notice of their intentions to local law enforcement thereby providing them with the time and opportunity to make arrangements for the protest.\textsuperscript{102} After their arrival in Maryland, the Phelps’ obeyed all applicable laws and regulations as well as all the directions of local law enforcement.\textsuperscript{103} Of particular relevance, the Phelps agreed to protest in a location designated by local law enforcement that could neither be seen nor heard from the church—something they were not obligated to do. Many of the Patriot Guard funeral demonstrators were allowed to form a “tunnel” immediately outside the church through which Mr. Snyder had to pass to access the church.\textsuperscript{104} The undoubted basis for this disparate treatment was the message expressed by the Phelps. While content-neutral and reasonable restrictions on time, place, and manner may have been permissible under the circumstances, restrictions based on viewpoint are prohibited under the First Amendment.\textsuperscript{105} Seeing that the many other demonstrators were not similarly restricted by local law enforcement, the Phelps would have been within their constitutional rights to move beyond their segregated space to an area closer to the church (which they chose not to do). Finally, the Phelps took the ultimate step to ensure the funeral service would not be disrupted by ending their protest just as the funeral service was beginning.\textsuperscript{106} While one might argue that picketing that actually disrupts a funeral service is extreme and outrageous conduct, such an argument is not available in the context of this case.

Yet even if the Phelps’ protest could be considered “extreme and outrageous” conduct, it was not the cause of Mr. Snyder’s emotional distress for the simple reason that he neither saw nor heard it. The true source of Mr. Snyder’s emotional pain was a television news report on the protest that he watched hours after the funeral service.\textsuperscript{107} The Phelps may have desired television coverage of their protest, but they had no control over the broadcaster’s independent editorial decision – a decision protected by the First Amendment – to cover the protest, to choose what to say about it, and ultimately to broadcast their edited version of the protest. The Phelps were only responsible for providing some of the news report’s content.

If a television news report of a political protest can serve as the basis for an IIED claim, then freedom of the press is in jeopardy

\begin{footnotes}
102 Appendix to Appellant’s Brief, supra note 12, at 3776 (Vol. XV, Phelps’ letter to Officer Spaulding).
103 Id. at 2285-86 (Vol. VIII, testimony of Major Thomas Long, Westminster City Police).
104 Id. at 2080 (Vol. VII, testimony of Albert Snyder); id. at 3762 (Vol XV, Defendants’ Exhibit 42d, photo of Patriot Guard outside of church).
106 Appendix to Appellant’s Brief, supra note 12, at 2285-86 (Vol. VIII, testimony of Major Thomas Long, Westminster City Police).
\end{footnotes}
because the television station that covered the protest is potentially as culpable as the Phelps, if not more so. The initial skepticism of such a prospect diminishes when one applies the elements of the tort in the same manner as the district court to the actions of the television station. The broadcast of the news report would certainly be deemed intentional. As with the district court’s finding regarding the Phelps, the content of the news report would serve as the basis for “extreme and outrageous conduct.” Further, knowing that Mr. Snyder had not seen the Phelps’ protest because he was attending the funeral service, the broadcaster would be aware of the high probability that Mr. Snyder would witness the protest only through the news report and that seeing it would cause him severe emotional distress. In such a context, it is reasonable to believe that a jury would conclude that it was “extreme and outrageous” for the television broadcaster to give the Phelps exactly what they wanted—a platform that would not have existed otherwise allowing their highly offensive speech to reach a much greater audience. Of course such a basis for potential liability of a television station seems unlikely—though explaining why the message-creator is liable while the messenger is immune is a daunting task, and suggests the hazards of such a standard as the district court’s analysis suggest.

To hold a speaker accountable for IIED in so public and unfocused a setting invites a nearly limitless potential scope of tort liability: a result clearly at odds with Maryland precedent requiring recovery for IIED claims to be “meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves.”108 “Although reasonable people may disagree about the appropriateness of the Phelps’ protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law.”109

IV. PRESERVING CONSTITUTIONAL VALUES BY AVOIDING CONSTITUTIONAL QUESTIONS

A. Waiver and the Doctrine of Constitutional Avoidance

Endorsed by the United States Supreme Court over 100 years ago, the doctrine of constitutional avoidance is a fundamental rule of judicial restraint.110 Indeed, the doctrine has been described as one of “the

sixteen great maxims of judicial self-restraint.” This prudent approach to adjudicating constitutional issues developed in part out of concern for the potential threat to our democratic system of representative government by having the non-elected federal judiciary too quickly declaring unconstitutional the acts of the democratically-elected Congress. “The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” Included among those rules:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Although the doctrine of constitutional avoidance initially developed in the context of acts of Congress, similar concerns exist when federal courts rule on issues that are in the province of the states to decide. “The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence.”

The Court of Appeals’ failure to review the sufficiency of the evidence created the risk of usurping Maryland’s authority to set the boundaries for imposing civil liability within the state. While that harm was averted by the appellate court’s finding that the Phelps’ expression was constitutionally protected, such would not have been the case had the appellate court deemed the expression unprotected. As previously mentioned, a person is not liable for IIED in Maryland where he has only insisted upon his legal rights in a sanctioned manner, even when he is aware his actions are certain to cause someone emotional distress. Since Maryland had not yet followed the example of approximately forty other states by enacting a statute restricting funeral protests, the

113 See Ashwander, 297 U.S. at 346.
115 Huffman, 420 U.S. at 603.
Phelps were within their legal rights to protest where they did, obeying all directions of local law enforcement officers.\textsuperscript{118} If a stricter standard is deemed necessary to harness activities such as protests \textit{near} funerals, it should be left to the individual states to decide. Had the district court’s decision been upheld, the Court of Appeals would have effectively endorsed the federal expansion of Maryland tort liability beyond the well-established limits previously set by Maryland state courts. Avoiding federal judicial interference with state civil functions has long been recognized as one of the goals served by the doctrine of constitutional avoidance.\textsuperscript{119}

In the Court of Appeals, both the majority opinion and the concurrence determined that, although the Phelps challenged the sufficiency of the evidence in the district court, they failed to do so on appeal.\textsuperscript{120} This conclusion is somewhat puzzling in that a review of the Phelps’ brief filed in the Fourth Circuit reveals that they made several challenges to the sufficiency of the evidence. For example, the Phelps claimed that Mr. Snyder “had no privacy right in his son’s funeral or his own mourning under \textit{the circumstances of this case}.”\textsuperscript{121} The difference between this claim and an explicit “sufficiency of the evidence” claim is one of semantics, not substance. The reference to “the circumstances of the case” obviously addresses the adequacy of the evidence as it applied to the only privacy-based tort still at issue. Once a claim is presented, “a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”\textsuperscript{122}

Further, to buttress their claim that the circumstances of the case presented no valid privacy interest, the Phelps provided several examples of similar factual situations in which this Court and lower courts have determined that a right of privacy does not exist.\textsuperscript{123} The Phelps’ brief also notes a case in which a court found that a right of privacy does not exist in the specific context of a public funeral.\textsuperscript{124} The clear purpose of highlighting these cases was to demonstrate by contrast that the evidence presented in the case failed both as a finding of fact and a matter of law that to constitute the elements of the only torts at issue on appeal.

The Phelps also claimed on appeal that the jury’s “verdict was the product of passion and bias.”\textsuperscript{125} Such an argument is simply an

\textsuperscript{118} Maryland has since passed a statute regulating funeral protests; however, even under the statute the Phelps’ conduct is still immune from liability. \textsc{Md. Code Ann., Crim. Law} § 10-205(c) (LexisNexis 2010) (“A person may not engage in picketing activity within 100 feet of a funeral . . . that is targeted at one or more persons attending the funeral . . .”).

\textsuperscript{119} See \textit{Huffman}, 420 U.S. at 603.

\textsuperscript{120} \textit{Snyder}, 580 F.3d at 216, 227.

\textsuperscript{121} Fourth Circuit Brief of Appellant, \textit{supra} note 46, at *14.


\textsuperscript{123} Fourth Circuit Brief of Appellant, \textit{supra} note 46, at *14-17.

\textsuperscript{124} \textit{Id.} at *15-16.

\textsuperscript{125} \textit{Id.} at *23.
alternative way of stating a challenge to the sufficiency of the evidence for both Intrusion and IIED in that it claims the jury’s verdict was based on factors other than the presented evidence.

Whether or not the Phelps could have more effectively disputed the sufficiency of the evidence in the Court of Appeals is certainly debatable, but dealing with such imprecise court filings is not unusual. As a descriptive and practical matter, determining such issues as whether a claim has been made or waived on appeal is more of an art than a science. Appellate courts should approach making such determinations with a degree of flexibility.

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where “injustice might otherwise result.”

According to the appellate majority, addressing the constitutional status of the Phelps’ expression was appropriate because the Phelps failed to raise an evidentiary challenge on appeal, thereby waiving the issue and leaving no alternate ground for the court to decide the case. The doctrine of constitutional avoidance was therefore “inapplicable,” reasoned the Court of Appeals. Under the majority’s opinion, therefore, waiver trumps constitutional avoidance.

In contrast, the concurrence argued that the court’s “judicial power to decide a case is not limited by the arguments and actions of the parties,” particularly when an issue has been raised in an amicus curiae brief. While appellate courts “normally’ decline to decide an issue not raised by the parties,” the doctrine of constitutional avoidance counsels doing so in this case. Failing to do so would “turn the principle of

126 See Lebron, 513 U.S. at 380 (“The argument in the petition, moreover, though couched in terms of a different but closely related theory, fairly embraced the argument that Lebron now advances.”); U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99, (1991))).
128 Snyder v. Phelps, 580 F.3d 206, 217 n.9 (4th Cir. 2009).
129 Id. at 227 (Shedd, J., concurring); see also Davis v. United States, 512 U.S. 452, 457 n.1 (1994) (noting that “we will consider arguments raised only in an amicus brief”) (footnote 1 in the opinion is designated by an asterisk); Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion) (considering issue raised only in an amicus brief).
131 Snyder, 580 F.3d at 227 (Shedd, J., concurring).
constitutional avoidance on its head; rather than avoiding unnecessary constitutional issues, we allow the parties to structure the case in order to force . . . [courts] to reach constitutional issues.”

According to the concurrence, therefore, constitutional avoidance trumps waiver.

B. The Necessity of Independent Appellate Review

The differing analyses employed in the Fourth Circuit’s majority opinion and concurrence illustrate the need to look beyond the substantive focus of each (respectively, whether the Phelps expression is protected under the First Amendment and whether the requisite elements of the torts at issue are present in the facts) and address a basic question involving appellate review: Does the combination of constitutionally-mandated independent appellate review of the record and the doctrine of constitutional avoidance effectively eliminate waiver of evidentiary questions of law in cases potentially involving the First Amendment?

In Bose Corp. v. Consumers Union of U.S., Inc., the Supreme Court stated that in cases alleging particular expression as unprotected under the First Amendment, it has “regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.”

Such review is not discretionary but constitutionally required. Moreover, independent appellate review reflects “a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”

While the Fourth Circuit recognized the obligation to “make an independent examination of the whole record,” it cited waiver to exclude review of the district court’s findings of fact concerning the evidence and limited its examination to a single conclusion of law, namely whether the Phelps’ expression was protected under the First Amendment and therefore immune from tort liability. This analysis represents a far too narrow application of the appellate court’s constitutional obligation in cases potentially defining the perimeters of

136 Snyder, 530 F.3d at 218 (quoting Bose Corp., 466 U.S. at 499).
137 Id. at 217 & n.9.
First Amendment protection. Appellate courts are to examine finding of facts “where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it.”138 Such encompassing scrutiny by appellate courts is vital

Because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that “findings of fact . . . shall not be set aside unless clearly erroneous,” we are obliged to make a fresh examination of crucial facts.139

In appeals not involving the First Amendment, deference to a lower court’s finding of facts is both reasonable and necessary for the efficient administration of justice. Indeed, even in cases potentially defining First Amendment protection, deference to some of the trial court’s findings of fact is still appropriate. In determining the credibility of a witness, for example, the trial court has the benefit of not only learning the content of the witness’ testimony, but also observing the witness’ demeanor while testifying.140 Yet the Fourth Circuit’s decision to treat the evidentiary challenge as waived implies that all of a trial court’s findings of fact should receive the same deference on appeal as witness credibility. The United States Supreme Court takes a different view.

The requirement that special deference be given to a trial judge’s credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same “clearly erroneous” standard applies to findings based on documentary evidence as to those based entirely on oral testimony, . . . but the presumption has lesser force in the former situation than in the latter.141

The Fourth Circuit’s decision not to consider the sufficiency of the evidence represents a failure to recognize that not all findings of fact are the same, or to put it more accurately, not all findings of fact deserve the same degree of deference. This is particularly true when findings of fact are so intermingled with a conclusion of law that it becomes

141 Bose Corp., 466 U.S. at 500 (citation omitted).
necessary to analyze the facts in order to determine if First Amendment rights are being properly respected. Yet in Snyder v. Phelps, a challenge to the sufficiency of the evidence would not have required the appellate court to question or evaluate any of the district court’s findings of fact. As the district court noted, “[t]he facts of this case as presented at trial were largely undisputed.” What was in dispute were the district court’s conclusions of law that its factual findings constituted the elements necessary to prove claims of Intrusion and IIED. Had the Court of Appeals reviewed the district court’s conclusions of law regarding the evidence, the insufficiency of the evidence would have become readily apparent. A review of the facts to determine if some particular speech is protected under the First Amendment by necessity includes examining the basis for claiming the expression is unprotected.

Of course, the mere fact that an appellate court discovers a district court’s evidentiary error does not always require the appellate court to correct the error. Some errors may be harmless in that even if they had not been made, the outcome of the case would remain the same. In addition, it must be acknowledged that the purpose of Bose-type independent appellate review is both to verify that the speech in question is actually unprotected and to confine the perimeters of any unprotected speech within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. That being the case, it could be argued that evidentiary errors that do not speak to those purposes are irrelevant.

Yet such an argument should be qualified by the doctrine of constitutional avoidance. While it initially might appear ironic to argue that an approach to applying the law—one born out of concern for protecting First Amendment rights—should result in not addressing the First Amendment question, such irony dissipates upon further consideration. An independent review of the record does not presuppose a finding that the speech at issue is protected or not. The review therefore may result in a determination that the First Amendment is not an issue. Further, constitutional avoidance will only play a role if the independent review of the record reveals an alternative that will fully resolve the case without having to address the First Amendment question. Most importantly, however, the merits of constitutional avoidance are unchanged if in the course of a Bose-type review an appellate court determines the evidence to be insufficient as a matter of law to prove the underlying offense. As such, the doctrine of constitutional avoidance should counsel courts to determine if a case can be resolved on evidentiary grounds even if the issue was not raised on appeal.

142 See Fiske, 274 U.S. at 385-386.
144 Bose Corp., 466 U.S. at 505.
CONCLUSION

In cases that have the potential to shape the perimeters of First Amendment protection, it is difficult to see why challenges to a trial court’s conclusions of law on evidentiary matters should be deemed waived on appeal in light of the U.S. Supreme Court’s mandate that appellate courts conduct an independent review of the trial record. This is especially true given that evidentiary conclusions of law may provide an appellate court a readily-apparent, non-constitutional basis on which to resolve the case. Of course, in many cases such review will have little practical effect; the fact that a court reviews an evidentiary issue that a party failed to raise on appeal hardly guarantees the party will prevail on the issue.

An independent review of the record in Snyder v. Phelps reveals that the elements required for cognizable claims of IIED and Intrusion Upon Seclusion are simply not present in the facts of the case. Arriving at this conclusion does not require evaluating or questioning the findings of fact made at trial but only requires assessing whether the district court misapplied Maryland law to the facts presented. As such, the Fourth Circuit majority opinion failed both to properly conduct a full independent review of the record and to adhere to the doctrine of constitutional avoidance.

The U.S. Supreme Court granted Mr. Snyder’s Petition for Certiorari on March 8, 2010. All of the Questions Presented in the petition addressed various issues concerning the degree of protection the First Amendment provides the Phelps’ expression. None dealt with the sufficiency of evidence. While it is not common for the Court to address issues other than those presented in the petition, it is certainly not unprecedented, for many of the reasons put forward in this Article. Certainly it is within the plenary power of the Court to decide the case on issues other than those presented in a petition. “At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.”145 In the matter of Snyder v. Phelps, the record simply does not contain evidence proving the elements of the alleged torts. That deficiency, combined with the Court’s own mandate of independent review of the record and the doctrine of constitutional avoidance, clearly warrants the Supreme Court’s review of the sufficiency of the evidence.

145 SUP. CT. R. 24(1)(a).