Intentional Infliction of Emotional Distress & The Hulk Hogan Sex Tape: Examining a Forgotten Cause of Action in Bollea v. Gawker Media, the Gap It Reveals in IIED’s Constitutionalization, and A Path Forward for Revenge Porn Victims

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CLAY CALVERT*

ABSTRACT

This Article examines Hulk Hogan’s successful, yet largely overlooked, cause of action for intentional infliction of emotional distress (IIED) before a Florida jury in 2016 in Bollea v. Gawker Media, LLC. In doing so, the Article explores critical factual differences between Bollea and the U.S. Supreme Court’s two decisions constitutionalizing the IIED tort, Hustler Magazine v. Falwell and Snyder v. Phelps. Despite such distinctions, the Article discusses the trial court’s instruction to the jury to consider a First Amendment-based, public-concern defense—one closely akin to that in Snyder—on Hulk Hogan’s IIED claim. The Article also proposes a jury instruction on the extreme and outrageous conduct element in IIED that would require jurors to consider the substantive value of the speech in question. Finally, the Article suggests that Hulk Hogan’s victory for IIED bodes well for revenge porn victims who pursue civil lawsuits pivoting on this cause of action.

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INTRODUCTION

In March 2016, a Florida jury awarded Terry Gene Bollea, better known as former professional wrestler Hulk Hogan, $115 million in compensatory damages and another $25.1 million in punitive—amounts meted out against Gawker Media that the trial court judge refused to set aside. Bollea v. Gawker Media, LLC pivoted on Gawker’s Internet posting of part of a videotape—one Hogan claimed was taken without his knowledge—that showed Hogan having sex in a bedroom with a friend’s wife.

1 The jury, which sat in St. Petersburg, Florida, was composed of two men and four women. Tom Kludt, Hulk Hogan Awarded $115 Million in Gawker Sex Tape Case, CNN MONEY (Mar. 18, 2016, 8:44 PM), http://money.cnn.com/2016/03/18/media/hulk-hogan-gawker-jury-deliberations [https://perma.cc/FJ7X-FPLE].

2 Although Hulk Hogan’s real name is Terry Gene Bollea, this Article refers to him as Hulk Hogan because that stage name is the one presumably better known to most people. See Hulk Hogan Biography, BIO., http://www.biography.com/people/hulk-hogan-9542305 (last updated Nov. 2, 2016) [https://perma.cc/5AJW-J592].


5 Gawker Media refers here not only to corporate defendant Gawker Media, LLC, but also to individual Gawker defendants Nick Denton (Gawker’s founder and chief executive) and A.J. Daulerio (Gawker’s former editor in chief who wrote commentary that accompanied the sex tape showing Hogan). See Les Neuhaus, On Stand, Denton Justifies Posting of Hulk Hogan Sex Video, N.Y. TIMES (Mar. 15, 2016), http://www.nytimes.com/2016/03/16/business/media/nick-denton-on-stand-justifies-publishing-of-hulk-hogan-sex-video.html?_r=0 [https://perma.cc/5EY9-XZSM] (describing the job positions of Denton and Daulerio at Gawker).


7 913 F. Supp. 2d. 1325, 1327 (M.D. Fla. 2012).

8 See Erwin Chemerinsky, Privacy Versus Speech in the Hulk Hogan Sex Tape Trial, L.A. TIMES (Mar. 14, 2016, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-0314-chemerinsky-hulk-hogan-gawker-20160314-story.html (observing that the case “revolves around a videotape showing the wrestler Hulk Hogan, whose real name is Terry G. Bollea, having sex
Legal scholars and news outlets largely framed the case as pitting First Amendment speech and press freedoms against the right to privacy. Indeed, public disclosure of private facts—one of the four fundamental with the wife of a friend. Apparently, the friend, radio host Bubba 'the Love Sponge' Clem, took the video without Bollea’s consent or knowledge.”) [https://perma.cc/X9N5-JK7N]; Carolina A. Miranda, Hogan Verdict Raises Crucial Privacy Issues in the Digital Age, L.A. TIMES (Mar. 20, 2016, 3:00 AM), http://www.latimes.com/entertainment/la-et-cam-hulk-hogan-privacy-20160320-story.html [https://perma.cc/QFE7-SRFA] (noting that the case centered on a “videotape featuring wrestling star Hulk Hogan having sex in a canopy bed with the young wife of a good friend”).

As Professor Amy Gajda captured it before the trial in her most recent book, “the Hulk Hogan case exemplifies the dash between a bolder media and the privacy it can decimate.” AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 7 (2015). She notes that “Gawker’s first response was to raise a First Amendment newsworthiness defense when it published the Hogan sex tape.” id. at 232.

See, e.g., Erik Eckholm, Hulk Suit Over Sex Tape May Test Limits of Online Press Freedom, N.Y. Times (Mar. 4, 2016), http://www.nytimes.com/2016/03/05/us/hulk-hogan-vs-gawker-suit-over-sex-tape.html?_r=0 [https://perma.cc/19EJ-MDH5] (describing Hogan’s case as an “invasion of privacy lawsuit,” noting that the case involves what “legal scholars say are important and largely unresolved questions about the line between privacy and free expression in the Internet era,” and quoting an attorney representing Gawker for the proposition that “Gawker is defending its First Amendment right to join an ongoing conversation about a celebrity when others are talking about it and the celebrity is talking about it”); Paul Farhi, Hulk Hogan’s $140.1 Million KO in Courtroom Could Have ‘Chilling Effect’ on Media, WASH. POST (Mar. 21, 2016), https://www.washingtonpost.com/lifestyle/style/hulk-hogans-115-million-ko-in-courtroom-could-have-chilling-effect-on-media/2016/03/21/0fa94aa4-e581-11e5-89c3-a647ccee9560_story.html [https://perma.cc/HP93-L642] (describing the case as an “invasion of privacy lawsuit” that could have “deeper implications for the debate between the public’s right to know (and the media’s right to report) and an individual’s right to privacy”); Nick Madigan & Ravi Somaiya, Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html [https://perma.cc/UTY2-7AE3] (describing Hogan’s lawsuit as “an invasion of privacy case,” and noting that Gawker contended that the “posting of the video was an act of journalism and was therefore protected under the First Amendment”).

The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than 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).

As recognized under Florida law that was applied in Bollea, the elements of the public disclosure of private facts tort “can be summarized as 1) the publication, 2) of private facts, 3) that are offensive, and 4) are not of public concern.” Cape Publ’ns, Inc. v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989).
privacy torts categorized by Dean William Prosser—was a key cause of action in Bollea. As Professor Amy Gajda recently wrote, the privacy-centric frame was reinforced when “a jury decided that Hulk Hogan should receive more than $100-million from Gawker for its invasion of his privacy.”

Largely ignored, however, was the fact that Hogan also prevailed on a separate cause of action for intentional infliction of emotional distress ("IIED"). Of the $115 million in compensatory damages awarded to Hogan, $60 million was specifically designated by the jury to compensate him "for the emotional distress, which resulted from the Defendants posting the video on the Internet." The verdict form, however, did not ask the jury to parcel out which torts were responsible for what percentage of that $60 million total for emotional distress, so it is impossible to know the relative impact of either of the torts of public disclosure of private facts or IIED on that sum. The IIED tort, which is recognized in all states and in Florida is "sometimes called the tort of outrage," typically "consists of four

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13 See William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960) (identifying four privacy torts, including: 1) intrusion into seclusion; 2) public disclosure of embarrassing private facts; 3) false light publicity; and 4) appropriation of one’s name or likeness).


16 See Verdict at 5-6, Bollea v. Gawker Media, LLC, Case No. 12012447CI-011 (Fla. Cir. Ct. Mar. 18, 2016) [hereinafter “Verdict”] (copy on file with author) (setting forth the jury’s decision in favor of Hulk Hogan on his cause of action for IIED).

17 Id. at 9. The other $55 million in compensatory damages was for "economic injuries, losses or damages." Id.

18 Emotional distress damages are available not only for IIED, but also for invasion of privacy under the tort of public disclosure of private facts. See Samantha Barbas, When Privacy Almost Won: Time, Inc. v. Hill, 18 U. Pa. J. Const. L. 505, 507 (2015) (observing that "[s]ince the early twentieth century, states had recognized a ‘right to privacy’ that permitted the victims of unwanted, embarrassing media publicity to recover damages for emotional distress") (emphasis added). This principle applies in Florida, which was the locus of Bollea. See Kush v. Lloyd, 616 So. 2d 415, 422 (Fla. 1992) (observing that "it is well settled that mental suffering constitutes recoverable damages in cases of . . . invasion of privacy").

19 See Elizabeth M. Jaffee, Sticks and Stones May Break My Bones But Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps, 57 Wayne L. Rev. 473, 479 (2011) ("IIED is recognized as a recoverable cause of action in all U.S. jurisdictions.").

20 Food Lion, Inc. v. Clifford, 629 So. 2d 201, 202 (Fla. Dist. Ct. App. 1993); see also Winter Haven Hosp., Inc. v. Liles, 148 So. 3d 507, 515 (Fla. Dist. Ct. App. 2014) (using the term “tort of
elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.”

More simply put, a successful IIED claim requires “severe emotional distress caused by outrageous conduct that exceeds the bounds that ought to be tolerated by civilized society.”

This Article explores Hulk Hogan’s successful cause of action for IIED against Gawker. Initially, Part I provides a primer on IIED, concentrating on the IIED principles under Florida law that applied in Bollea. Part I also reviews the constitutional layer of protection for defendants added by the U.S. Supreme Court in Hustler Magazine v. Falwell and Snyder v. Phelps for speech-based IIED claims.

Part II then argues that Bollea fails, on its facts, to fit neatly within the Supreme Court’s constitutional framework for IIED embraced in Falwell and Snyder, thereby exposing an important and unresolved issue in the constitutionalization of IIED. Next, Part III focuses on the jury instructions for IIED provided by Circuit Judge Pamela A. M. Campbell in Bollea, and it reveals how those instructions, in fact, included a First Amendment-based public-concern defense for IIED and all of the torts in the case.

Part IV moves beyond the facts of Bollea and examines whether a First Amendment-based public concern or newsworthiness element—one akin to that in the public disclosure of private facts tort—should also be

outrage” interchangeably with “intentional infliction of emotional distress”).

23 See infra Part I.
26 See infra Part II.
27 See infra Part II.
29 See infra Part III.
30 See Danielle Keats Citron, Mainstreaming Privacy Torts, 98 CALIF. L. REV. 1805, 1829 (2010) (“Courts dismiss public disclosure claims where information addresses a newsworthy matter, in other words, one of public concern.”); Frederick Schauer, Reflections on the Value of Truth, 41 CASE W. RES. L. REV. 699, 701–02 (1991) (noting that one of the basic elements of a successful “action for invasion of privacy based on the public disclosure of truth” is that “the facts disclosed must not be ‘of legitimate concern to the public,’ or, as it is more commonly put,
included in an IIED claim based upon the publication of truthful, factual information about a public figure, especially when such an IIED claim is pled ancillary to a public disclosure cause of action.\(^3\) Put more bluntly, if a plaintiff suing for public disclosure of private facts must prove that the information in question is not of legitimate public concern,\(^4\) then why shouldn't a plaintiff suing for IIED, based on the same set of facts, also face such a burden?

Finally, Part V concludes by asserting that the Bollea verdict gives real-world teeth to the argument of some scholars that IIED provides a strong avenue of civil redress for victims of so-called revenge porn.\(^5\)

I. IIED: A Primer on a Parasitic Tort and Its Constitutionalization by the U.S. Supreme Court

This part has two sections, the first of which provides an overview of IIED and its basic elements, concentrating on IIED in Florida, where the events at issue in Bollea transpired. The second section describes the U.S. Supreme Court’s efforts to balance the IIED tort against First Amendment concerns when emotional distress allegedly is caused by speech.

A. The Basics of the IIED Tort

The fact that the IIED cause of action in Bollea v. Gawker Media, LLC received scant attention probably should not come as a large surprise.\(^6\) That is partly because IIED is considered “a parasitic tort, one that is pled and alleged in circumstances where other, better-established tort or contract claims could also have been put forward.”\(^7\) In Bollea, one thus might view IIED as parasitic to the more high-profile cause of action for

\(^{31}\) See infra notes 165-77 and accompanying text.

\(^{32}\) See Stephen Bates, *The Prostitute, the Prodigy, and the Private Past*, 17 COMM. L. & POL’Y 175, 181 (2012) (observing that in the public disclosure of private facts tort, “[t]he burden falls on the plaintiff to demonstrate that the revelation was not of legitimate public concern”).

\(^{33}\) See infra Part V.

\(^{34}\) In addition to claims for IIED and public disclosure of private facts, the Bollea jury ruled on several other causes of action—and did so in favor of Hulk Hogan on all of them—including intrusion into seclusion, common law right of publicity, and Florida statutory Security of Communications Act. See Verdict, supra note 16, at 3-4, 7-8.

\(^{35}\) Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Tort*, 45 GA. L. REV. 107, 115-16 (2010); see also Patricia Sanchez Abril, *A (My)Space of One’s Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 81 (2007), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1058&context=njti p [https://perma.cc/7XB3-6NNY] (asserting that IIED “has traditionally been a parasitic tort with more academic hullabaloo than real-world success”).
public disclosure of private facts.\textsuperscript{36} Formally, recognition of the IIED tort, which largely finds its roots in academic literature dating to the 1930s,\textsuperscript{37} is of relatively recent vintage.\textsuperscript{38} For instance—and of particular relevance for the Florida-based Bollea case—the Florida Supreme Court first officially recognized IIED in the Sunshine State in 1985.\textsuperscript{39} Florida adopted the Restatement (Second) of Torts’ definition of IIED\textsuperscript{40}—that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.”\textsuperscript{41}

This definition, as articulated by Florida courts and which does not require proof of physical injury,\textsuperscript{42} breaks down into a quartet of elements: “(1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused the emotional distress; and (4) the distress was severe.”\textsuperscript{43} The first element mandates that the “wrongdoer’s conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result.”\textsuperscript{44} Thus, even if an IIED defendant does not intend for a plaintiff to suffer emotional distress, the defendant can still be held liable for recklessly inflicting such distress if he acts either “in deliberate disregard of a high degree of probability that the result will follow”\textsuperscript{45} or “if he knows that emotional distress is certain to result.”\textsuperscript{46}

\textsuperscript{36} This pleading strategy—adding an IIED claim to a complaint, along with more prominent causes of action—comports with Professor Robert Drechsel’s observation that, since about 1980, “libel and privacy plaintiffs have been attaching independent claims for intentional infliction to their suits against media defendants.” Robert E. Drechsel, Intentional Infliction of Emotional Distress: New Tort Liability for Media Defendants, 89 DICK. L. REV. 339, 339 (1984).


\textsuperscript{39} See Metro. Life Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985).

\textsuperscript{40} See Lopez v. Target Corp., 676 F.3d 1230, 1236 (11th Cir. 2012) (“Florida has adopted § 46 of the Restatement (Second) of Torts as the appropriate standard for IIED claims.”).

\textsuperscript{41} RESTATEMENT (SECOND) OF TORTS §46 (AM. LAW INST. 1965).

\textsuperscript{42} See Clemente v. Horne, 707 So. 2d 865, 866 (Fla. Dist. Ct. App. 1998) (“[P]roof of physical injury or impact is not necessary to sustain an action for the intentional infliction of emotional distress.”).


\textsuperscript{44} Gallogly v. Rodriguez, 970 So. 2d 470, 471 (Fla. Dist. Ct. App. 2007).

distress is certain or substantially certain to result from his act.” 46 Florida courts allow the use of circumstantial evidence to prove such reasonable foreseeability or knowledge. 47

As for the second element—outrageous conduct—Florida courts have adopted language from a comment to the Restatement (Second)’s definition of IIED. 48 That comment specifies that conduct is actionable only if it goes “beyond all possible bounds of decency” and is “regarded as atrocious, and utterly intolerable in a civilized community” such that it would arouse an average community member “to exclaim, ‘Outrageous!’” 49

The problem with this language, as one Florida appellate court wrote, is that it “is almost impossible to apply in any consistent way essentially because outrageousness is not only highly subjective it is an extremely mutable trait.” 50 Indeed, another Florida appellate court noted that any IIED claim is “highly fact-dependent and turns on the sum of the allegations in the specific case at bar.” 51 Nonetheless, one Florida appellate court made it clear that “mere insults, indignities, threats, or false accusations” 52 do not rise to the level of outrageousness necessary to prevail for IIED.

The third and fourth elements require proof that the defendant’s conduct caused the plaintiff to suffer severe emotional distress. 53 The Supreme Court of Florida, in approving standard jury instructions for IIED, has determined that “[e]motional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.” 54 In proving whether the distress allegedly caused is severe, the plaintiff’s own testimony, as well as the character of the defendant’s conduct, may be considered as evidence. 55

46 Id.
47 Id. at 693.
48 See Lashley v. Bowman, 561 So. 2d 406, 409 (Fla. Dist. Ct. App. 1990) (noting that IIED “applies to the present case provided the conduct is ‘extreme and outrageous.’ The difficulty lies in the description of this tort as set forth in comment d to section 46 of the Restatement and adopted by the courts of this state.”) (emphasis added).
50 Lashley, 561 So. 2d at 409.
54 In re Standard Jury Instructions – Civil Cases No. 94-1, 645 So. 2d 999, 1000 (Fla. 1994).

Additionally, Florida Standard Jury Instruction §410.6 taps into the question of causation as it applies to IIED, providing that:

*Extreme and outrageous conduct is a legal cause of severe emotional distress if it directly and in natural and continuous sequence produces*
With this background on the IIED elements in mind, this Article now turns to efforts by the U.S. Supreme Court to balance the tort against First Amendment-based speech concerns.

B. The Constitutionalization of IIED

The U.S. Supreme Court twice has added a First Amendment gloss to IIED that all courts must follow. The Court’s first effort to constitutionalize IIED came in 1988 in *Hustler Magazine v. Falwell.* The case pivoted on an ad parody published in *Hustler* magazine that satirized the Reverend Jerry Falwell, “a nationally known minister who ha[d] been active as a commentator on politics and public affairs.” Specifically, the parody suggested Falwell had drunken sex with his mother in an outhouse and that he was “a hypocrite who preaches only when he is drunk.”

In ruling against Jerry Falwell, the Supreme Court held that when a public figure sues for IIED based on speech that takes the form of an offensive parody and involves “ideas and opinions on matters of public interest and concern,” he or she must prove, in addition to the requisite IIED tort elements, “that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” Falwell lost under this constitutional requirement because, as Professor Nicholas Wolfson notes, “there was no false statement of fact since the story was an obvious satire, not a statement of fact.”

The rule from *Falwell,* as Robert Post observes, is “an explicitly instrumental device designed to ensure that the operation of the legal system not unduly curtail legitimate public discussion.” In borrowing or contributes substantially to producing such severe emotional distress, so that it can reasonably be said that, but for the extreme and outrageous conduct, the severe emotional distress would not have occurred.


51 Id. at 47–48.

52 Id. at 48.

53 As the Court framed the issue, it was “whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.” Id. at 50.

54 Id.

55 Id. at 56.


actual malice from defamation law and *New York Times Co. v. Sullivan*, the *Falwell* Court essentially concluded that IIED claims based on offensive satire are "subject to the same First Amendment limitations as defamation claims."[65] In brief, the Court blocked public-figure IIED plaintiffs from making end-runs around libel law[66] when IIED is pleaded ancillary to a libel claim.[67] Post explains that because Jerry Falwell could not prevail under libel law, given that the speech in question was not factual,[68] "Falwell was forced to offer a theory of his case that predicated liability on the basis of the comparatively more recent tort of intentional infliction of emotional distress."[69]

Ultimately, as Professor Roy Gutterman recently wrote, *Falwell* "speaks to an important right under the First Amendment in the democracy: the right to mock our leaders."[70] Despite this broad sounding principle, Post stresses that "*Falwell* is drafted quite narrowly and holds only that nonfactual ridicule is constitutionally privileged from the tort of intentional infliction of emotional distress if the plaintiff is a public figure or public official, and if the ridicule occurs in publications such as the one here at issue."[71]

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64 376 U.S. 254 (1964). In *Sullivan*, the Court held that public officials who sue for libel based upon speech that relates to their official conduct must prove that the defamatory statement at issue "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-280; see Nat Stern, *The Force of a Legal Concept: The Steady Extension of the Actual Malice Standard*, 12 First Amend. L. Rev. 449, 456 (2014) (noting that, in *Falwell*, "the Court not only introduced the actual malice standard to IIED doctrine, but also injected libel's requirement of a false statement of fact into a tort that had not included this element").


66 Markin, supra note 21, at 475.

67 Alan Isaacman, the attorney for Larry Flynt who argued *Falwell* before the U.S. Supreme Court, explained that *Falwell* "was always a defamation case. We all looked at it as a defamation case—not just our side, but the other side and the judge. It was getting common in those days to do some ancillary kind of pleadings." Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 Cardozo Arts & Ent. L.J. 313, 337 (2001).

68 Indeed, the jury ruled against Jerry Falwell on his defamation claim because it found that the ad parody could not have been interpreted as describing actual events involving him. Hustler Mag. v. Falwell, 485 U.S. 46, 49 (1988).

69 Post, supra note 63, at 621.


71 Post, supra note 63, at 662 (quoting Hustler Mag. v. Falwell, 485 U.S. 46, 56 (1988)).
The Supreme Court again considered the tension between IIED and the First Amendment freedom of speech in 2011 in *Snyder v. Phelps*. The case centered on an IIED claim by Albert Snyder, the father of a U.S. soldier killed on duty in Iraq, against members of the Westboro Baptist Church (WBC), including its leader, the Reverend Fred Phelps. Seven members of the WBC—a church that believes American soldiers are killed as part of God’s retribution for the country’s tolerance of homosexuality—picketed the funeral for Snyder’s son. Specifically, they stood on public property about 1,000 feet away from the church where the funeral was held and hoisted signs with messages such as “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys” and “God Hates Fags.”

The Court faced the question of whether the First Amendment protected the members of the WBC from tort liability based upon their offensive speech. In ruling for Phelps and the WBC, Chief Justice John Roberts reasoned for the eight-justice majority that “[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, as determined by all the circumstances of the case.” Roberts wrote that speech addresses “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.’” The Chief Justice also identified three factors—the content, form, and context of the speech—to apply in deciding if speech involves a matter of public concern.

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73 Id. at 448.
74 See Howard M. Wasserman, *Holmes and Brennan*, 67 Ala. L. Rev. 797, 820 (2016) (describing the WBC as “a small religious denomination (its membership consisting mainly of members of the Phelps family) that believed God was punishing the United States for a variety of public-policy sins, primarily related to homosexuality, by causing the deaths of soldiers fighting in Iraq and Afghanistan”).
75 *Snyder*, 562 U.S. at 448-49.
76 Id.
77 Id. at 447.
78 The lone dissent was issued by Samuel Alito. *Id.* at 463 (Alito, J., dissenting). Alito stressed the fact that the plaintiff was “not a public figure.” *Id.* In doing so, he distinguished *Snyder* from *Falwell*, in which the plaintiff “was a public figure.” *Id.* at 474.
79 Id. at 451.
80 Id. at 453 (internal citations omitted) (quoting, respectively, *Connick v. Myers*, 461 U.S. 138, 146 (1983) and *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).
81 See *Snyder*, 562 U.S. at 453.
The Snyder majority, in turn, found that the WBC’s speech “plainly relates to broad issues of interest to society at large,”82 such as “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.”83 Because the WBC’s “speech was at a public place on a matter of public concern,”84 the majority set aside the jury’s verdict for Snyder on the IIED claim.85 As Roberts wrote, “[w]hat Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.”86 In a nutshell, although the plaintiff recovered before a jury on the four basic IIED elements, “the Court vitiated all tort liability in light of the First Amendment interests”87 and essentially “stated that the speech interests in question completely trumped any tort interests such that the plaintiff was entitled to nothing.”88

While the Snyder majority ruled for the WBC, Roberts explained that the Court’s opinion was “narrow”89 and “limited by the particular facts before us.”90 Indeed, the opinion has been dubbed minimalist.91 A conspicuous omission in the majority’s minimalist opinion, Professor Benjamin Zipursky notes, is that it “fails to confront expressly the argument that Falwell’s First Amendment shield against IIED claims only applies to public figures, not to private figures.”92 Indeed, Professor Joseph Russomanno observes that plaintiff Albert Snyder’s “public/private status is not mentioned at all in Chief Justice Roberts’ opinion of the Court.”93

Thus, rather than focusing on the plaintiff’s status as either a public or private figure—plaintiff Albert Snyder was clearly a private figure94—the

82 Id. at 454.
83 Id.
84 Id. at 458.
85 Id. at 459.
86 Id. at 458.
87 David S. Han, Re-Thinking Speech-Tort Remedies, 2014 Wis. L. Rev. 1135, 1165 (2014).
88 Id.
89 Snyder, 562 U.S. at 460.
90 Id.
94 Wasserman, supra note 74, at 822.
Court concentrated on the status of the speech as relating to a matter of public—not private—concern.95 The Court ruled as it did for the WBC, Professor Frederick Schauer notes, “primarily because the picketing was related to a matter of public concern.”96

Despite Roberts’ admonition that Snyder be read narrowly and limited to its facts, some scholars have predicted the death knell for IIED in cases involving media defendants. For example, Professor Elizabeth Jaffe averred that “with the Supreme Court’s recent holding in Snyder v. Phelps, the claim is all but obsolete.”97 Similarly, Professor Russomanno asserted that “[a]fter Snyder, intentional infliction of emotional distress is weaker – and perhaps disabled – in claims stemming from speech. First Amendment protection is now stronger. The circumstances under which an intentional infliction claim could prevail have narrowed.”98 Professor Mark Strasser, however, contended that the Court in Snyder “failed to explain how the holding fits into current defamation and privacy jurisprudence. The opinion raises more questions than it answers, and is sufficiently opaque that one cannot tell whether it marks a sea-change in the jurisprudence or, instead, is a straightforward application of it.”99

Indeed, as the next part of this Article illustrates, Bollea exposes a critical question regarding IIED speech-based claims that the Supreme Court never addressed in either Falwell or Snyder. Specifically, the question is whether an IIED claim that pivots on the publication of truthful, factual expression about a public-figure plaintiff requires courts to add a First Amendment layer of protection on top of the tort’s four traditional elements.

II. Distinguishing Falwell and Snyder from Bollea: Why Bollea Does Not Fit Within the Supreme Court’s Constitutionalization of IIED

It is important to understand why the Supreme Court’s ruling in Hustler Magazine v. Falwell, addressed above in Section B of Part I, is readily distinguishable from Bollea. In particular, Falwell—unlike Bollea—dealt with decidedly non-factual, parodic assertions of opinion critical of a public

95 See Adam Lamparello, “God Hates Fags” is not the Same as “Fuck the Draft”: Introducing the Targeted, Non-Sexual Obscenity Doctrine, 84 UMKC L. Rev. 61, 75 (2015) (asserting that the Court ruled as it did “primarily because the speech related to a matter of public concern”).


97 Jaffe, supra note 19, at 475.

98 Russomanno, supra note 93, at 171.

figure’s beliefs and values. The speech in *Falwell* was clearly fictitious, given both that it was labeled as a parody and that readers were told it was “not to be taken seriously.” As Chief Justice William Rehnquist wrote, the “speech could not reasonably have been interpreted as stating actual facts about the public figure involved.” The purpose of the fictitious speech, in turn, was to tar and feather Jerry Falwell—someone “active as a commentator on politics and public affairs”—by creating a “caricature” of him as “a hypocrite who preaches only when he is drunk.”

In ruling against Falwell, the Supreme Court noted that Hustler’s speech fell within “[t]he sort of robust political debate encouraged by the First Amendment” and that the First Amendment must protect “the free flow of ideas and opinions on matters of public interest and concern.” Professor Robert Post therefore contends that one of the key pillars of *Falwell* is that “nonfactual communications in public discourse cannot constitutionally be penalized because of their ‘outrageousness.’” Post adds that *Falwell* turned on the “distinction between fact and opinion.” Similarly, Professor Alexander Tsesis notes that the *Falwell* decision “followed well-developed precedent that is not focused on veracity,” but rather on “the right to exaggeration and political satire.”

In stark contrast, *Bollea* dealt with factual, truthful speech—the contents of a sex tape. As the jury instructions for IIED in *Bollea* admonished, the claim centered on “[w]hether the Defendants engaged in extreme and outrageous conduct in posting the VIDEO on Gawker.com.” The expression of an opinion by Gawker about Hogan therefore simply was not at issue in the IIED claim in *Bollea*.

Additionally, it is less than clear that images of a former professional

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101 Id. at 50.
102 Id. at 47.
103 Id. at 55.
104 Id. at 48.
105 Id. at 51.
106 *Hustler*, 485 U.S. at 50.
107 Post, supra note 63, at 613 (emphasis added).
108 Id. at 605.
110 Id.
111 See supra note 8 and accompanying text (providing an overview of the key facts in *Bollea*).
112 Jury Instructions, supra note 28, at 7.
wrestler and reality TV star\textsuperscript{113} having sex amount to speech on a matter of public concern. A Florida appellate court found, however, “that as a result of the public controversy surrounding the affair and the Sex Tape, exacerbated in part by Mr. Bollea himself, the report and the related video excerpts address matters of public concern.”\textsuperscript{114} Yet, the appellate court’s determination occurred in the context of considering whether an injunction stopping Gawker from publishing both a written report about Hogan’s sexual actions and excerpts of the tape violated the First Amendment, not on Hogan’s tort claim for IIED.\textsuperscript{115} The Florida appellate court also considered the images on the sex tape as “complementary”\textsuperscript{116} to Gawker’s written report about Hogan’s sexual affair, not as stand-alone content that was at issue in the trial. Furthermore, the jury in Bollea certainly did not find the images of sex on the tape to be a matter of public concern, as it specifically concluded on the verdict form for Hogan’s claim for public disclosure of private facts that Hogan proved that the video was “not a matter of legitimate public concern.”\textsuperscript{117} This disagreement between the appellate court and jury suggests that if the concept of outrageousness in IIED is problematic because of its amorphousness,\textsuperscript{118} then so too is the concept of public concern.

\textit{Bollea} also is readily distinguished from \textit{Snyder}. As with \textit{Falwell}, the speech in \textit{Snyder} constituted statements of opinion—the views and beliefs of WBC members—rather than objectively verifiable factual truths. As Chief Justice Roberts wrote for the Court in \textit{Snyder}, the signs hoisted by WBC members reflected “the church’s view that the United States is overly tolerant of sin and that God kills American soldiers as punishment”\textsuperscript{119} and its “position”\textsuperscript{120} on issues such as “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.”\textsuperscript{121} Roberts noted that the WBC staged its protest where it did in order to “increase publicity for


\textsuperscript{115} See id. at 1198.

\textsuperscript{116} See id. at 1202.

\textsuperscript{117} Verdict, supra note 16, at 2.

\textsuperscript{118} See supra notes 56–58 and accompanying text.


\textsuperscript{120} Id. at 454 (emphasis added).

\textsuperscript{121} Id.
its views.”

In direct contrast, the speech alleged to have caused emotional distress in Bollea had nothing to do with the views, positions, or opinions of Gawker. Rather, the speech was purely factual in nature—images showing the plaintiff having sex.

The importance of the opinion-versus-fact dichotomy in both Falwell and Snyder has been recognized by the judiciary. For example, in Holloway v. American Media, Inc., U.S. Magistrate T. Michael Putnam pointed out that neither Falwell nor Snyder dealt with factual expressions. He observed that:

like the “ad parody” in Falwell, the speech at issue in Snyder did not involve asserted “facts,” at least in the sense that a reasonable person could understand the offending speech to assert ascertainably “false” statements. The expressions “God Hates Fags” and “You’re Going to Hell” and “Thank God for IEDs” are, at best, opinions, not factual statements.

The bottom line is that both Falwell and Snyder involved outrageous and offensive expressions of opinions, not assertions of fact. In Falwell, those opinions were about a public figure who was “active as a commentator on politics and public affairs,” while in Snyder the opinions “plainly relate[d] to broad issues of interest to society at large” and the WBC’s views “that America is morally flawed.”

The Supreme Court, in turn, felt compelled to shield both sets of opinions from IIED liability. In Falwell, it did so by requiring the plaintiff to prove the speech entailed “a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” Falwell thus stopped the plaintiff from using IIED to make an end-run around the strictures of libel law. In Snyder, the Court didn’t adopt such an additional hurdle for

122 Id. at 455 (emphasis added).
123 Supra note 9 and accompanying text.
125 Id.
126 See Snyder, 562 U.S. at 460 (calling the WBC’s speech “hurtful”); Hustler Mag. v. Falwell, 485 U.S. 46, 50 (1988) (calling the speech in question “doubtless gross and repugnant in the eyes of most”).
127 Falwell, 485 U.S. at 57.
128 Id. at 47.
129 Snyder, 562 U.S. at 454.
130 Id. at 460.
131 Falwell, 485 U.S. at 56.
132 Supra notes 75–85 and accompanying text.
an IIED plaintiff to clear, but rather simply held that IIED liability could not be imposed, given “the particular facts” of the case, because it would “stifle public debate” on “broad issues of interest to society at large.”

Bollea’s IIED claim, unlike those in both Falwell and Snyder, did not involve any expressions of opinion. Bollea, as the title of this Article suggests, thus exposes a glaring gap in the constitutionalization of IIED—namely, the Court’s failure to consider an IIED speech-based claim pivoting on the publication of truthful, factual information.

Additionally, unlike Falwell, where IIED was pleaded ancillary to a libel cause of action, the IIED claim in Bollea was pleaded ancillary to a claim for public disclosure of truthful private facts. Libel, in fact, was not even a cause of action in Bollea on which the jury was instructed. Thus, the central concern of the Court in Falwell about not allowing IIED claims to squelch otherwise protected expression of opinions—opinions safeguarded under libel law—is simply absent in Bollea.

Because Bollea does not fit factually within the framework of either Falwell or Snyder, a key question arises: Does the factual scenario upon which Hulk Hogan’s IIED claim against Gawker was based require judges and juries to consider a First Amendment-based hurdle or defense—one above and beyond the tort’s basic elements—that public-figure plaintiffs must prove in order to prevail for IIED? To provide better context for addressing that issue later in Part IV, the next part examines the jury instructions for IIED in Bollea to determine the precise elements on which Hulk Hogan prevailed and, specifically, whether those elements included a layer of First Amendment protection beyond the four traditional IIED elements.

133 Snyder, 562 U.S. at 460.
134 Id. at 461.
135 Id. at 454.
136 See Falwell, 485 U.S. at 48.
137 The first claim on the jury verdict form was for publication of private facts. Verdict, supra note 16, at 1. Additionally, and as discussed above, legal scholars and the news media both considered the case more prominently to be about an invasion of privacy rather than IIED. Supra notes 9–13 and accompanying text.
138 See Verdict, supra note 16, at 1–10 (providing the causes of actions, which do not include a cause of action for libel).
III. Considering IIED in Bollea: The Presence of a Constitutional “Public Concern” Defense

To better understand how Hulk Hogan prevailed on his IIED claim, it is helpful to examine the jury instructions on that cause of action. Initially, Circuit Judge Pamela Campbell provided the Bollea jurors with an overview of the IIED tort in her instructions.139

The instructions later broke the IIED tort down into its four constituent elements, which Judge Campbell set forth as follows:

1. Whether the Defendants engaged in extreme and outrageous conduct in posting the VIDEO on Gawker.com; and, if so,
2. Whether the Defendants acted either with the intent to cause Plaintiff severe emotional distress, or acted with reckless disregard of the high probability of causing Plaintiff severe emotional distress; and, if so,
3. Whether Plaintiff in fact suffered severe emotional distress; and, if so
4. Whether that extreme and outrageous conduct was a legal cause of severe emotional distress.140

These four elements neatly track the traditional quartet of IIED elements described earlier in Part I of the Article.141 But importantly, Judge Campbell went beyond instructing the jury about those four elements. Specifically, she also asked the jury to consider a separate instruction that she called “legitimate public concern.”142 That instruction reads, in its entirety, as follows:

The issue “legitimate public concern” or “newsworthiness” is an element of Plaintiff’s claim for publication of private facts, as well as a First Amendment defense raised by Defendants to each of Plaintiff’s claims. I will now define legitimate public concern.

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139 The overview specified that an IIED:

claim consists of extreme and outrageous conduct by a defendant that causes severe emotional distress and was engaged in either with an intent to cause severe emotional distress or a reckless disregard of the high probability that it would cause, severe emotional distress. Extreme and outrageous conduct is behavior which, under the circumstances, goes well beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized community. Emotional Distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.

Jury Instructions, supra note 28, at 4.

140 Jury Instructions, supra note 28, at 7.

141 See supra notes 43–55 and accompanying text.

142 Jury Instructions, supra note 28, at 10.
The right of privacy and the right of freedom of the press are both fundamental rights, which must be balanced. The right to privacy can be outweighed if a publication relates to matters of legitimate public concern.

A matter of public concern is one that can be fairly considered as relating to any matter of political, social, or other concern to the community or that is subject to general interest and concern to the public. The mere fact that a publication contains arguably inappropriate content does not remove it from the realm of legitimate public interest.

In weighing this issue, you should take into account the content, context and form of the material at the time of publication to determine whether it relates to a matter of public concern. The line between the right to privacy and the freedom of the press is drawn where the publication ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he or she had no concern.143

Two aspects of this instruction are striking. First, the emphasized portion makes it clear that whether the speech at issue in Bollea related to a matter of public concern provided a First Amendment-based defense to each cause of action, not just to the claim for public disclosure of private facts. In other words, Judge Campbell did, in fact, add a constitutional layer of speech-based protection for Gawker against the IIED claim—a layer above and beyond the tort’s four standard elements. Had the jury determined that the videotape of Hogan having sex related to a matter of public concern, then Hogan would have lost on his IIED claim, even if he had proven the basic elements of the tort.

Indeed, the jury verdict form on the cause of action for public disclosure of private facts asked the jurors to resolve the following question: “Did Plaintiff prove that the VIDEO was NOT a matter of legitimate public concern?”144 The jury answered that question “yes,” in favor of Hulk Hogan.145

Had, however, the jury answered “no” to the question regarding legitimate public concern, Judge Campbell explained on the verdict form that this meant “your verdict is against Plaintiff on ALL of his claims, and in favor of Defendants on their First Amendment Defense; and your deliberations are over and you will not consider any further claims, or damages. You should only sign this Verdict form and return it to the

143 Jury Instructions, supra note 28, at 10-11 (emphasis added).
144 Verdict, supra note 16, at 2.
The fact that Judge Campbell included a public-concern defense on the IIED tort is a Pyrrhic victory for the news media. As described in Part II, neither Falwell nor Snyder—both of which involved protecting expressions of viewpoints and opinions, rather than factual content, and the latter of which was specifically “limited by the particular facts before” the Court—compelled Campbell to mandate that the Bollea jury consider the question of public concern as a First Amendment-based defense to IIED. Thus, although Gawker failed to convince the Bollea jury that images of a former professional wrestler having sex related to a matter of public concern, media defendants in future IIED cases that are pleaded parasitically to a public disclosure of private facts claim may take heart that it is possible to convince a trial court judge that a public-concern defense is required for such IIED cases.

A second striking aspect of Judge Campbell’s public concern instruction is the amount of language it borrows from the Supreme Court’s ruling in Snyder on that case’s consideration of an IIED claim. Specifically, the following two parts of Campbell’s instruction are nearly identical to, or a very close paraphrase of, Snyder’s language defining matters of public concern within the context of Albert Snyder’s IIED cause of action against the WBC:

“A matter of public concern is one that can be fairly considered as relating to any matter of political, social, or other concern to the community or that is subject to general interest and concern to the public.”

This language from Campbell’s instruction closely tracks Snyder’s statement that “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’ This approach is a disjunctive test—as the emphasized word “or” above indicates—in which a matter of public concern exists if either the subject matter is of community concern or if it is of general interest and concern.

“In weighing this issue, you should take into account the content, context and form of the material at the time of publication to determine

148 Jury Instructions, supra note 28, at 11 (emphasis added).
149 Snyder, 562 U.S. at 453 (citations omitted) (emphasis added).
The Supreme Court in *Snyder* emphasized that the same trio of factors—the content, context and form of the speech—requires examination on the question of whether speech relates to a matter of public or private concern.152

In brief, Judge Campbell provided the jury with both the *Snyder* Court’s two-part, disjunctive definition of public concern and *Snyder’s* three-factor approach for analyzing that concept. This illustrates a real-world example of *Snyder’s* early impact not only in defining for lower courts the meaning of public concern, but also in its application in a tort context that includes both public disclosure of private facts and IIED claims. Simply put, *Snyder’s* definition of public concern appears not to be limited or confined in its applicability to only one particular tort.

Furthermore, Judge Campbell’s instruction on public concern melds these facets of the Supreme Court’s ruling in *Snyder* with older language drawn from a comment in the *Restatement (Second) of Torts* on the public disclosure of private facts cause of action. That comment provides that, in determining what separates a matter of public concern from one of private interest, “[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake.”153 This language has been embraced by numerous courts.154

In summary, Judge Campbell stretched the application of the public-concern defense for IIED beyond the narrow factual confines of *Snyder*—despite Chief Justice Roberts’ admonition in *Snyder* that the Court’s decision was narrow and limited to its facts. In doing so, she provided Gawker with a First Amendment defense and added a constitutional hurdle to the four-element burden that Hulk Hogan needed to prove to prevail for IIED. Despite this judicial decision in Gawker’s favor to ratchet up the plaintiff’s IIED burden, Hogan won by successfully convincing a jury that his sex tape was not a matter of public concern.

The next part explores some reasons militating in favor of adding a First Amendment-based, public-concern defense in IIED claims like those.

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151 Jury Instructions, supra note 28, at 11 (emphasis added).
152 See *Snyder*, 562 U.S. at 453 (“Deciding whether speech is of public or private concern requires us to examine the ‘content, form, and context’ of that speech, ‘as revealed by the whole record.’” (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985)).
154 See, e.g., *Toffoloni v. LFP Publ’g Group*, LLP, 572 F.3d 1201, 1211 (11th Cir. 2009); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1219 (10th Cir. 2007); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975).
brought by Hulk Hogan that are pled as ancillary causes of action to public disclosure of private facts claims. In addition, the next part proposes a jury instruction that incorporates the public-concern consideration directly into the element of extreme and outrageous conduct, thereby providing an extra layer of First Amendment protection beyond the addition of a separate public-concern defense.

IV. Some Further Considerations Regarding a Separate Public-Concern Defense in IIED Cases and a Proposed Jury Instruction

As asserted earlier, neither *Falwell* nor *Snyder* compelled Judge Campbell to impose a First Amendment-grounded, public-concern defense on Hulk Hogan’s IIED claim. Yet, if the Court in *Falwell* was primarily concerned about plaintiffs using IIED to make end-runs around the strictures of libel law, then logically it follows that the Supreme Court might be similarly concerned about plaintiffs using IIED to make end-runs around the requirements of the public disclosure of private facts tort.

In other words, if the Court in *Falwell* borrowed actual malice from libel law and *Sullivan* to plug the hole in IIED through which Jerry Falwell attempted to run, then the Court arguably would likely borrow the public concern or newsworthiness element—one embodying First Amendment concerns—from the tort of public disclosure of private facts to plug the hole in IIED through which Hulk Hogan attempted to run. Indeed, Judge Campbell, as noted above, gave the jury instructions in *Bollea* on such a First Amendment-based, public-concern defense on the IIED claim. Thus, if a public disclosure of private facts cause of action and an IIED claim are pled using the same set of facts in the same case, as they were in *Bollea*, then it comports with *Falwell’s* gap-plugging approach and concern for First Amendment interests to require plaintiffs to prove the speech involved a matter of public concern on both causes of action. Viewed in this light, Judge Campbell was correct to add the public-concern defense to Hogan’s IIED claim.

155 See *supra* Part II and accompanying text.
156 See *supra* notes 65–68 and accompanying text.
157 See *supra* notes 63–64 and accompanying text.
158 The Supreme Court of California, for example, has observed 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 . . . .” Shulman v. Group W Prods., Inc, 955 P.2d 469, 478 (Cal. 1998). The Supreme Court of Colorado, in turn, notes that the “requirement that the facts disclosed must not be of legitimate concern to the public protects the rights of free speech and free press guaranteed by the United States . . . .” Ozer v. Borquez, 940 P.2d 371, 379 (Colo. 1997).
159 See *supra* notes 144–47 and accompanying text.
Furthermore, if one ignores both the Court’s admonition in *Snyder* that its decision is narrow and confined to the case’s facts and the reality that the speech safeguarded in *Snyder* dealt with expressions of opinion rather than statements of fact, then *Snyder* stands for a much broader principle: that, as Professor Eugene Volokh writes, IIED “may not be used to impose liability based on the distress caused by the content of speech on matters of public concern.”161 Professor Mark Tushnet concurs, noting that *Snyder* can be understood as embracing “a rule that a victim cannot recover for a speaker’s intentional infliction of emotional distress if the vehicle for inflicting that distress is a comment on a matter of public concern.”162 Under such an expansive reading of *Snyder*, Judge Campbell was correct to add a public-concern hurdle to Hulk Hogan’s burden for IIED recovery.

There may be an additional way to bolster First Amendment protection for defendants in IIED speech-caused harms cases like *Bollea*—one beyond consideration of a separate public-concern defense. In particular, in the jury instructions for the IIED tort element that requires examination of whether a defendant engaged in extreme and outrageous conduct,163 judges might admonish jurors to consider or factor in the public concern or newsworthiness of the speech as part of their determination.

For example, the Connecticut Supreme Court recently observed in *Gleason v. Smolinski*,164 in the context of considering both an IIED claim and the *Snyder v. Phelps* opinion, that the concepts of extreme and outrageous conduct and public concern simply may be “inversely correlated. Specifically, the more the speech in question is about a matter of public concern, the less likely it is for publication of that speech to be deemed extreme and outrageous.”165 This observation seems intuitive because publishing newsworthy information—information of concern to the public—appears to be anything but outrageous conduct. Instead, it is conduct that may be intended to help the public make better sense of either an issue or a person (or both) with which it—the public—is concerned.

A jury thus might be given, as part of the instruction on the meaning of extreme and outrageous conduct in speech-based IIED cases, the following

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160 See supra notes 89–90 and accompanying text.
163 See supra notes 48–52 and accompanying text (describing this element of the IIED tort).
164 125 A.3d 920 (Conn. 2015).
proposed language:

In determining whether publication of the speech at issue in this case constitutes outrageous conduct, you should consider the political, social or other values served by the public becoming aware of the content of the speech. The greater the value to the public of being exposed to the content of the speech at issue, the less likely it is that the publication of that speech constitutes extreme and outrageous conduct. Conversely, if the publication of the speech serves little or no value to the public other than a morbid and sensational prying into the plaintiff’s life for its own sake, then the more likely it is that the publication of that speech constitutes extreme and outrageous conduct.

Such an instruction on the element of extreme and outrageous conduct, when considered in addition to a separate instruction on a First Amendment-grounded, public-concern defense, further bolsters the free speech and press interests in speech-based IIED cases. It makes the jury consider twice—not simply once—the value of the defendant’s speech.

CONCLUSION

This Article argues that neither the Supreme Court’s ruling in *Falwell* nor *Snyder* mandates consideration of a separate public-concern defense for IIED claims in cases like *Bollea* that pivot on the publication of truthful, factual statements. *Falwell* and *Snyder* dealt with protecting expressions of opinion, not—as in *Bollea*—assertions of fact, and thus *Bollea* reveals a gap in the Court’s constitutionalization of IIED, with its failure thus far to consider such a scenario. Yet, as this Article also shows, Judge Campbell nonetheless took a pro-First Amendment approach by supplying jury instructions that incorporated a public-concern defense for IIED that embraced several key snippets of language from *Snyder* explicating public concern.

Campbell’s decision to add a public-concern defense comports, this Article notes, with the *Falwell* Court’s concern for preventing plaintiffs from using IIED claims to make end-runs around other causes of action (libel in *Falwell*) that already encompass constitutional protections (in libel law, that protection is the actual malice fault standard). In *Bollea*, IIED—if not padded with an additional public-concern defense—might have been used by Hulk Hogan to make an end-run around the public disclosure of private facts tort, which includes a public-concern element that functions as a First Amendment-based check on liability.

Imagine, for instance, that the *Bollea* jury had determined that the video of Hogan having sex with his friend’s wife was, in fact, about a matter of public concern. Such a conclusion would have blocked Hogan’s cause of action for public disclosure of private facts. Yet, without the addition of a
similar public-concern consideration on his IIED claim, Hogan might have been able to convince a jury that posting the sex tape constituted extreme and outrageous behavior and, in turn, he might have prevailed for IIED. In other words, under this hypothetical, Hogan would have lost for public disclosure of private facts, but won for IIED simply because the former cause of action entailed a public-concern evaluation while the latter did not. But the inclusion of a public-concern defense on IIED—one akin to that in the public disclosure of private facts tort—would thwart this “win public disclosure, lose IIED” possibility.

One final point regarding the IIED claim in Bollea merits consideration. It concerns the relationship between IIED and revenge porn.

Revenge porn, at its most basic level, is simply defined as “nonconsensual pornography”\(^{166}\) or, in slightly more extended fashion, “a practice where sexually explicit images or videos are disclosed online without the consent of the pictured individual.”\(^{167}\) Typically, as Professor Mary Anne Franks writes, revenge porn is “a practice where ex-boyfriends and husbands post to the web sexually explicit photographs and videos of [women] without their consent.”\(^{168}\) Although victims of revenge porn “commonly file civil suits for invasion of privacy,”\(^{169}\) Harvard lecturer Erica Goldberg points out in a 2016 article that “[i]nvasion-of-privacy tort claims against individuals who post the pictures yield mixed results.”\(^{170}\)

Some legal commentators, however, argue that the IIED tort “is well suited for revenge porn cases.”\(^{171}\) Indeed, attorney Paul Larkin, Jr. of the Heritage Foundation contends that “the online posting of revenge porn would seem to be an eminently suitable example of outrageous conduct”\(^{172}\) for which IIED should provide relief. The harm wrought by revenge porn certainly seems appropriate for an IIED cause of action because revenge porn targets “the human emotional spectrum: shame, humiliation, fear, and disgust.”\(^{173}\)

\(^{166}\) Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 WAKE FOREST L. REV. 345, 346 (2014).


\(^{169}\) Samantha Kopf, Avenging Revenge Porn, 9 AM. U. MODERN AM. 22, 23 (2014).


The jury verdict for Hulk Hogan on IIED should provide revenge porn victims enhanced hope for success under this cause of action. If a public figure like Hulk Hogan can prevail on an IIED claim over the Internet posting of a sex tape—even in the face of a First Amendment-based public-concern defense added by the judge—then surely private-figure plaintiffs have an excellent opportunity for IIED recovery. In fact, the typical revenge porn victim’s case for IIED should be stronger because “the photos are often accompanied by the victim’s name, address, phone number, Facebook page, and other personal information.”

Hogan’s IIED claim was based only on the posting of the video itself, not on any other accompanying information.

Perhaps the only complicating factor for revenge porn victims is the matter of consensuality in the initial taking of sexual images. Whereas Hulk Hogan claimed he did not know the images were being recorded, many victims of revenge porn initially consent to the images being captured. Nonetheless, if the jury is instructed to focus only on the posting and distribution of the images and other data and information about the victim, then the impact of the consensuality in the original taking of the images should be rendered nugatory. Whether victims of revenge porn turn to IIED claims more in light of Bollea, of course, remains to be seen.

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175 As the first part of the jury instruction for IIED in Bollea put it, jurors considered only “[w]hether the Defendants engaged in extreme and outrageous conduct by posting the VIDEO on Gawker.com.” Jury Instructions, supra note 28, at 7.

176 See supra note 8 and accompanying text.