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Think of the Children: Using IIED to Reformulate Disturbing Speech Restrictions

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THINK OF THE CHILDREN: USING IIED TO REFORMULATE DISTURBING SPEECH RESTRICTIONS

Richard Lorren Jolly*

The Colorado State Court of Appeals recently upheld an injunction restricting public displays of aborted fetuses. The court held that the restriction passed strict scrutiny because the state had a compelling interest in protecting children from the psychological harm of “disturbing images” and the injunction was narrowly tailored. This marked the first time an injunction had been upheld on this rationale. This Note critiques that holding and others. It contends that while some federal and state courts have recognized the interest in protecting the psychological well-being of children from disturbing speech as compelling, the interest is not supported by precedent. It then argues that courts have formulated the interest with a breadth that is flawed and antithetical to the First Amendment. It concludes by proposing that the state’s interest in protecting children from disturbing speech should be reformulated in the mold of intentional infliction of emotional distress.

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INTRODUCTION

On Palm Sunday in 2005, demonstrators gathered outside of St. John's Church in Denver, Colorado to protest the Episcopal Church's liberal stance on abortion.¹ They stood on the public sidewalk and in the street, carrying signs depicting aborted fetuses.² The signs measured approximately three-and-a-half by four-and-a-half feet and were visible to the parishioners as they arrived, as well as during outdoor church services.³ Children were among the parishioners, and roughly two hundred of them saw the graphic images.⁴ The signs frightened many children and at least one exhibited distress for several days.⁵

St. John's Church successfully sued the demonstrators on claims for nuisance and the trial court enjoined further protests.⁶ On appeal, the Colorado Court of Appeals modified the injunction but maintained a restriction on "*displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events . . .*"⁷ The demonstrators again appealed. The Colorado Court of Appeals upheld the modified injunction, stating that although the restriction on "gruesome images" was content-based and thus subject to strict scrutiny, there existed a "compelling governmental interest in protecting children from disturbing images, and . . . conclude[d] that the prohibition [was] narrowly tailored."⁸ It then defined disturbing images as "the kind of image[s] likely to cause young children psychological harm."⁹ The Colorado Supreme Court and the United States Supreme Court denied certiorari.¹⁰

Saint John's Church in the Wilderness v. Scott is the first case to uphold an injunction based on a compelling state interest in protecting children's psychological well-being from disturbing images. The interest itself, however, is not entirely novel. A number

1. *Saint John's Church in the Wilderness v. Scott (Saint John's I)*, 194 P.3d 475, 478 (Colo. App. 2008).

2. *See id.*

3. *See Saint John's Church in the Wilderness v. Scott (Saint John's II)*, 296 P.3d 273, 275, 284 n.12 (Colo. App. 2012), *cert. denied*, 133 S. Ct. 2798 (2013).

4. *Saint John's I*, 194 P.3d at 484.

5. *Id.*

6. *Id.* at 479.

7. *Saint John's II*, 296 P.3d at 276.

8. *Id.* at 281.

9. *Id.* at 285.

10. *Scott v. Saint John's Church in the Wilderness*, 133 S. Ct. 2798 (2013); *Scott v. Saint John's Church in the Wilderness*, No. 12SC658, 2013 WL 119791 (Colo. Jan. 7, 2013).

of recent federal and state courts have also found that protecting children from disturbing speech is a compelling interest.¹¹ Furthermore, no court has explicitly found the interest not to be compelling.¹² And while it must be noted that in all of these cases the disturbing speech at issue has been pro-life abortion speech—a category that some argue has become judicially disfavored¹³—this does not mean the holdings will remain a jurisprudential anomaly. Legislatures have increasingly attempted to restrict gruesome speech in other contexts, including in areas such as video games and animal cruelty.¹⁴ Recognizing this interest as compelling therefore represents a significant development that may have rippling consequences.

Surprisingly, though, disturbing speech cases have seen little academic scrutiny. At the time of writing, only two journal articles and a student note have emerged on the topic.¹⁵ These writings, particularly the recent piece by Eugene Volokh, provide an excellent initiation. But despite their insightful analyses, none of the authors

11. See *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999); *Bering v. SHARE*, 721 P.2d 918, 935 (Wash. 1986); *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 461 (Wyo. 2012).

12. Two decisions have come close to this conclusion. In *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, the Sixth Circuit held that a police officer who stopped a billboard truck displaying images of aborted fetuses while children were present was not covered by qualified immunity because a reasonable officer would have known that detaining a subject because of his speech violated the First Amendment. 477 F.3d 807 (6th Cir. 2007). Nevertheless, the court did not address whether protecting children from the images was a compelling interest. See *id.* at 828–29. Likewise, in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, the Ninth Circuit dealt with images of aborted fetuses displayed around a public middle school. 533 F.3d 780 (9th Cir. 2008). The opinion concerned the compelling interest of schools to be free from disruption, not the compelling interest in protecting children from disturbing images. *Id.* In short, no court has refused to recognize a compelling state interest in protecting children from disturbing speech.

13. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (“What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the ‘ad hoc nullification machine’ that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.”). The notion that restrictions on disturbing speech are an example of impermissible viewpoint discrimination will not be discussed; rather, this Note assumes that courts are earnestly concerned with the psychological well-being of children.

14. For an overview of recent legislative restrictions on gruesome and disturbing speech, see Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901 (2015).

15. Volokh, *supra* note 14 (providing the first general review of courts’ treatment of disturbing speech in various contexts); Clay Calvert et al., *Gruesome Images, Shocking Speech & Harm to Minors: Judicial Pushback Against the First Amendment After Brown v. Entertainment Merchants Association?*, 13 VA. SPORTS & ENT. L.J. 127 (2014) (critiquing the *St. John’s II* opinion in light of *Brown*); Katie J. Koski, Note, *Constitutional Law-Freedom of Expression: Wyoming Says Protecting Children Comes Second to Protecting Freedom of Speech*; *Operation Save America v. City of Jackson*, 275 P.3d 438 (Wyo. 2012), 13 WYO. L. REV. 679 (2013) (critiquing the Wyoming court for not recognizing the restriction as content-neutral in the titular case).

attempt to reconcile the state's desire to protect children from psychological distress with speakers' First Amendment rights. This is especially true of Volokh's piece. Though his argument for protecting most all forms of disturbing speech is informative, he fails to acknowledge that states have any legitimate interest in protecting children from the resulting effects. And though Katie Koski argues in favor of recognizing this state interest, she undervalues speakers' rights by advancing an exceedingly broad reading of the First Amendment's juvenile exceptions.¹⁶ Consequently, these writings provide little guidance on how to proceed in this developing area of the law.

This Note takes a different tack. It assumes that courts are not necessarily mistaken in recognizing some state interest in protecting children from disturbing speech, but asserts that they have heretofore formulated that interest with an imprecision antithetical to the First Amendment. Part I provides an overview of the First Amendment's protection of offensive speech. It then reviews those cases that have recognized the state interest in protecting children from disturbing speech as compelling. Part II contends that in support of this interest, these courts have relied upon inapplicable precedent concerning speech that is obscene for minors and indecent broadcasts. In so doing, it argues, these decisions have created a new category of disfavored speech that runs contrary to First Amendment principles. Part III proposes a more precise formulation of the interest, asserting that it should be reformulated in the mold of the tort of intentional infliction of emotional distress (IIED). It concludes by addressing some of the potential obstacles associated with this proposal.

I. BALANCING THE FIRST AMENDMENT AND COMPELLING INTERESTS

The issues in *Saint John's II* and similar cases implicate the core of the First Amendment. It is therefore necessary to situate the discussion around the protections and judicial approaches to that provision. Section I-A provides an overview of the First Amendment's breadth, stressing that its protections extend to speech that is offensive to audiences. Section I-B reviews those cases that have acknowledged a compelling state interest in protecting children from disturbing speech. It notes that although the Supreme Court

16. Koski, *supra* note 15, at 705–07. See Section II.A., *infra*, for a comprehensive analysis of the First Amendment's juvenile exceptions.

has been silent, a number of federal and state courts have recognized the interest as compelling and no court has explicitly found it not to be.

A. *The First Amendment Provides Broad Protection*

The First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”¹⁷ Through this rich and unregulated marketplace, the truth of an idea is tested, citizens are informed, and democracy is realized.¹⁸ As a result, the First Amendment protects almost all speech, especially that which touches on political and religious issues. The current formulation of the compelling state interest in protecting children from disturbing speech is repugnant to these ideas.

There is no question that the images at issue in the disturbing speech cases implicate the First Amendment. The Supreme Court has read “speech” expansively to encompass all mediums and conduct that contain sufficient communicative elements.¹⁹ Likewise, images of aborted fetuses do not fall within the “well-defined and narrowly limited” categories of speech that are of “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁰ Among those categories of low-value speech are false statements of fact, incitement, obscenity, fighting words, and child pornography.²¹ Graphic images of aborted fetuses may be objectionable, but they are not obviously proscribable.

Not only are depictions of aborted fetuses not low-value speech, they often represent the kind of core political speech that lies at the heart of the First Amendment.²² The Supreme Court has consistently held that speech on political issues occupies the “highest rung

17. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

18. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”).

19. *See Texas v. Johnson*, 491 U.S. 397, 405–06 (1989) (holding that burning the American flag is speech for purposes of the First Amendment).

20. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

21. Even these particular classes of low-value speech are not wholly without constitutional protection. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194–95 (1983).

22. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (“[S]peech to protest racial discrimination is essential political speech lying at the core of the First Amendment.”) (internal quotations omitted).

of the hierarchy of First Amendment values” and is entitled to special protection.²³ And while it is in the nature of political and religious speech to result in excesses and abuse, broad protection is essential to enlightened public opinion and a functioning democracy.²⁴ Pro-life protests provide an apt example of such quintessentially protected speech. And though the legality of abortion is settled, the First Amendment protects the “right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”²⁵ Thus, any restrictions on this kind of speech are highly suspect.

Of course the injunction in *St. John’s II* did not explicitly target communication on abortion. Rather, it prevented protestors from displaying certain types of images at a specific time and place at which children were most likely to be present.²⁶ But this does not mean that the injunction was a permissible time, place, and manner restriction.²⁷ Such restrictions are permissible only if they are justified without regard to the content of the speech.²⁸ Indeed, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”²⁹ The injunction in *St. John’s II* deviates from this rule by explicitly restricting “displays depicting gruesome images.”³⁰ The adjective ‘gruesome’ directly modifies the noun ‘images,’ meaning that the injunction touched only images with specified content while leaving all others unregulated.³¹ Without

23. *Id.* at 913 (internal quotation omitted).

24. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, sharp differences arise To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that . . . these liberties are . . . essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).

25. *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (upholding a statute prohibiting any person from approaching within eight feet of another person near a health care facility without consent).

26. *Saint John’s Church in the Wilderness v. Scott* (*Saint John’s II*), 296 P.3d 273, 276 (Colo. App. 2012).

27. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (upholding an ordinance that completely banned picketing “before or about” any residence).

28. *See id.*

29. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

30. *Saint John’s II*, 296 P.3d at 276.

31. The *Saint John’s II* court’s more broad formulation of disturbing images as those “likely to cause young children psychological harm” is still a content-based restriction despite being defined by the audience’s reaction. 296 P.3d at 284–85. Because the audience’s reaction is derived from the content of the speech, the restriction is content-based. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (finding that limiting the psychological impact of speech is a

satisfying precise requirements, content-based restrictions such as this are generally invalid.³²

B. State and Federal Courts Have Recognized the Interest in Protecting Children from Disturbing Speech as Compelling

Although the images in *St. John's II* fall within the broad protection of the First Amendment, this does not necessarily render the injunction unconstitutional. Courts may uphold content-based injunctions if the state demonstrates that the restriction passes strict scrutiny; that is, the restriction must be “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.”³³ The injunction in *St. John's II* was the first to pass strict scrutiny based on the compelling state interest in protecting children from the psychological effects of disturbing images. However, the Eighth Circuit Court of Appeals, the Wyoming Supreme Court, and the Washington Supreme Court have also recognized this interest as compelling.

In *Olmer v. City of Lincoln*, the city passed an ordinance proscribing all “focused picketing” of churches and other religious premises “thirty minutes before, during, and thirty minutes after any scheduled religious activity.”³⁴ In passing the ordinance, the city council found that “infants and young children are emotionally vulnerable to focused picketing . . . [and] tend to react with fear, unhappiness, anxiety and other emotional disturbances when such activity is imposed on them.”³⁵ The Eighth Circuit agreed, explaining: “The city’s interest in protecting very young children from frightening images is constitutionally important; that is, the interest is ‘significant,’ ‘compelling,’ and ‘legitimate.’”³⁶ Nevertheless, the court concluded that the ordinance was overly broad because it applied to all images rather than just those which were psychologically harmful to children.³⁷

content-based purpose). For a recent and in-depth discussion of the content-based versus content-neutral distinction within the context of disturbing speech, see Volokh, *supra* note 14, at 908–10.

32. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

33. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

34. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999), *overruled in part as to a different matter* by *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc).

35. *Id.* at 1183.

36. *Id.* at 1180.

37. *Id.*

The Wyoming Supreme Court has also acknowledged a compelling state interest in protecting children from disturbing images. The preliminary injunction in *Operation Save America v. City of Jackson* thwarted a pro-life group from displaying graphic images of aborted fetuses at a public Boy Scouts festival.³⁸ In reviewing the injunction, the court explicitly declared: “The need to protect the psychological well-being of children has been recognized as a compelling government interest.”³⁹ Nevertheless, the court struck down the preliminary injunction, reasoning that the record did not demonstrate a sufficiently clear causal link between the disturbing speech and the supposed injury.⁴⁰ The state interest itself, however, was firmly certified as compelling.⁴¹

Finally, in *Bering v. SHARE*, the Washington Supreme Court upheld an injunction against abortion protestors using particular language, rather than images, that the court considered harmful to children.⁴² In that case, the injunction prohibited “referring, in oral statements while at the picket site, to physicians or patients, staff, or clients as ‘murdering’ or ‘murderers,’ ‘killing’ or ‘killers’; or to children or babies as being ‘killed’ or ‘murdered’ by anyone in the Medical building.”⁴³ The Washington Supreme Court found that these words “inflicted trauma” and that there existed a compelling state interest in “avoiding subjection of children to the physical and psychological abuse inflicted by the picketers’ speech.”⁴⁴ It concluded, however, that the injunction was not narrowly tailored because it applied at all times, and therefore remanded the case with instructions to narrow the injunction so as to apply only when children were present.⁴⁵

Irrespective of these decisions, protecting children’s psychological well-being from disturbing images is not clearly established as a compelling state interest. There is no direct United States Supreme Court precedent on the matter. In fact, the closest Supreme Court support for recognizing the interest is found in a recent dissenting opinion. In *Brown v. Entertainment Merchants Association*, Justice Stephen Breyer supported recognizing a proscribable category of speech based on the general “protection of children.”⁴⁶ Yet even

38. *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 445 (Wyo. 2012).

39. *Id.* at 460.

40. *Id.*

41. *Id.*

42. *Bering v. SHARE*, 721 P.2d 918, 933 (Wash. 1986).

43. *Id.* at 924.

44. *Id.* at 933, 935.

45. *Id.* at 936.

46. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2762 (2011) (Breyer J., dissenting).

there, Justice Breyer relied on precedent that establishes far narrower formulations of the state interest in protecting children.⁴⁷ Thus, aside from the above-outlined cases, there is no precedent that recognizes a state interest in protecting children’s nondescript psychological well-being from disturbing speech. To the contrary, there is a substantial body of case law antagonistic to speech restrictions based on audiences’ reactions—even audiences comprised of children.

II. THE COURTS’ FORMULATION OF THE INTEREST IS FLAWED

Those courts recognizing a compelling state interest in protecting children from disturbing speech have drawn inappropriately from case law governing children’s access to other categories of speech. Section II-A addresses speech that is obscene for minors. It argues that this constitutional exception is narrow and applies only to explicitly sexual speech. Section II-B considers indecent speech. It notes that this constitutional exception is also narrow, applying only in the limited context of broadcast media. Finally, Section II-C argues that restrictions on disturbing speech are an affront to established First Amendment principles. These restrictions grant children a heckler’s veto, deprive audiences’ access to protected speech, and limit substantially the opportunities for effective communication of certain ideas.

A. *Disturbing Speech is Not Obscene for Minors*

Those courts that acknowledge a compelling state interest in protecting children from disturbing speech have invariably relied upon the obscene-for-minors exception to the First Amendment.⁴⁸ This reliance is erroneous. At the core of the obscene-for-minors line of cases is explicitly sexual communication.⁴⁹ Because disturbing

47. For instance, Justice Breyer cites *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) to support his claim. *Brown*, 131 S. Ct. at 2762. However, the state interest recognized there was in protecting the psychological well-being of children from the specific harms of child labor. *Prince*, 321 U.S. at 170.

48. See *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999) (quoting the district court, which relied on *Sable Communications of California Inc. v. FCC*, 492 U.S. 115, 126 (1989), which cited directly to *Ginsberg*); *Bering v. SHARE*, 721 P.2d 918, 933 (Wash. 1986); *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 461 (Wyo. 2012); *Saint John’s Church in the Wilderness v. Scott (Saint John’s II)*, 296 P.3d 273, 284 (Colo. App. 2012).

49. See *Brown*, 131 S. Ct. at 2735 (“[*Ginsberg v. New York*] approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child.”).

speech is not necessarily sexual, it cannot be restricted under this rationale.

Though it has long been clear that the First Amendment does not protect obscene speech,⁵⁰ only fifty years have passed since the Supreme Court articulated the definition of obscenity in *Miller v. California*. There, the Court held that the determinative guideline is whether an average person, applying contemporary community standards, would find that the work taken as a whole: appeals to the prurient interest; depicts in a patently offensive way, sexual conduct; and lacks serious literary, artistic, political, or scientific value.⁵¹ Speech meeting these criteria may be completely proscribed by appropriate legislation.

But there are certain types of speech that while not obscene under *Miller* are nevertheless inappropriate for children and may be regulated. The foundational case on this point is *Ginsberg v. New York*, in which the Supreme Court upheld New York legislation restricting minors' access to pornographic magazines.⁵² The Court summarily accepted that the magazines were not obscene for adults and thus could not be generally outlawed.⁵³ However, the Court accepted New York's reasoning that the pornographic nature of the material was "a basic factor impairing the ethical and moral development of its youth," and found that it was "utterly without redeeming social importance for children."⁵⁴ The Court then upheld the regulation, famously recognizing "that even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."⁵⁵

Although *Ginsberg's* broad language suggests that the obscene-for-minors exception can stretch to reach all content with undesirable effects on children, subsequent cases have foreclosed this reading. For instance, in *Brown v. Entertainment Merchants Association* the Supreme Court struck down a California statute that prohibited the sale of violent video games to minors, holding that violent

50. See, e.g., *Miller v. California*, 413 U.S. 15, 36 (1973); *Roth v. United States*, 354 U.S. 476, 481 (1957) ("[T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press."); see also Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1865 (2007) ("Although there was no clear consensus in 1792 that obscenity was not protected by the First Amendment, obscenity has in fact been regulated by every state in the nation since Anthony Comstock launched his anti-obscenity campaign in the 1860s.")

51. *Miller*, 413 U.S. at 24 (internal citations omitted).

52. *Ginsberg v. New York*, 390 U.S. 629 (1968).

53. *Id.* at 634.

54. *Id.* at 633, 641.

55. *Id.* at 638.

speech did not fall within the obscene-for-minors exception.⁵⁶ The Court specified that *Ginsberg* stood for the narrow proposition that the legislature could “adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children.”⁵⁷ But as the Court explained, the restriction attempted to “create a wholly new category of content-based regulation that is permissible only for speech directed at children.”⁵⁸ Concluding “violence is not part of the obscenity that the Constitution permits to be regulated,” the Court deemed the statute unconstitutional.⁵⁹

Disturbing speech, like violent speech, is not a traditionally restricted category of communication and thus its parameters may not be adjusted in order to apply to children.⁶⁰ Indeed, the Supreme Court has recognized only one category of speech—explicit sexual communication—as obscene-for-minors. Disturbing speech is not necessarily explicitly sexual⁶¹ and thus does not fall within *Ginsberg*’s narrow exception.⁶² Nevertheless, every court that has recognized a compelling state interest in shielding children from disturbing speech has cited *Ginsberg* for the general proposition that the state may protect children’s psychological well-being.⁶³ This misapplication of precedent is one of kind, not simply degree. It conflates the established interest in regulating children’s access to sexual material with the unprecedented interest in securing children from nondescript psychological harm. These two interests are distinct, and the obscene-for-minors precedent is immaterial to the disturbing speech cases.

56. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741 (2011).

57. *Id.* at 2735.

58. *Id.*

59. *Id.*

60. It is likely impossible to articulate a difference between these two categories based on their content. For instance, it is not clear whether footage from a video game depicting “a character who shoots out a police officer’s knee, douses him with gasoline, lights him on fire, urinates on his burning body, and finally kills him with a gunshot to the head” (*see id.* at 2764 (Breyer J., dissenting)) is protected as violent speech, or proscribable as disturbing speech.

61. Even the images of aborted fetuses that are invariably at issue in disturbing speech cases are not inherently sexual. Though they broadly imply sexual activity through their subject matter, it cannot be seriously argued that the images appeal to the prurient interest.

62. For an additional discussion on the inapplicability of the obscene as to youths exception, see Volokh, *supra* note 14, at 939.

63. *See Olmer*, 192 F.3d at 1180; *Bering*, 721 P.2d at 933; *Operation Save Am.*, 275 P.3d at 461; *Saint John’s II*, 296 P.3d at 284.

B. Disturbing Speech is Not Indecent Speech

Courts approving a compelling state interest in protecting children from disturbing speech have also invariably drawn from case law governing indecent speech.⁶⁴ Like these courts' references to *Ginsberg's* obscene-for-minors doctrine, this comparison is also ill-founded. The indecent speech cases focus on broadcast media, and their outcomes turn on the idea that radio and television constitute an intrusion. The intrusion problem is absent in the public display of disturbing speech. Thus, the indecent speech line of cases provides no countenance for addressing disturbing images.⁶⁵

The state has broad regulatory control over the content that is broadcast through traditional media channels such as radio and television. The Court first recognized this power in *FCC v. Pacifica Foundation*.⁶⁶ In that case, the Court considered a parent's complaint over a radio broadcast of comedian George Carlin's monologue titled "Filthy Words."⁶⁷ The monologue involved the repeated use of "vulgar and offensive" language, and aired at two in the afternoon.⁶⁸ In reviewing the complaint, the Federal Communications Commission (FCC) found that it had the power to regulate "any obscene, indecent, or profane language by means of radio communications."⁶⁹ The Supreme Court agreed with the Commission and held that the state's compelling interest in protecting children went beyond regulating material that is obscene for minors and included indecent speech.⁷⁰

Central to the holding in *Pacifica* is that the indecent speech broadcasted at a time when children were likely in the audience. The Court reasoned that "the concept of 'indecent' is intimately connected with the exposure of children [to speech that is] patently offensive as measured by contemporary community standards

64. See *Olmer*, 192 F.3d at 1185 n.4; *Bering*, 721 P.2d at 935; *Operation Save Am.*, 275 P.3d at 460; *Saint John's II*, 296 P.3d at 283.

65. For an additional take on the argument that the *Saint John's II* court misapplied the indecent speech precedent, see Volokh, *supra* note 14, at 939.

66. See *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

67. The monologue was, fittingly, a comic satire of words permitted and prohibited on television and radio. See *id.* at 751 (transcript of the monologue included in opinion appendix).

68. *Id.* at 757.

69. *Id.* at 731 (quoting 18 U.S.C. § 1464 (1976)).

70. *Id.* at 758 (Powell J., concurring in part and concurring in the judgment) ("The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.").

for the broadcast medium.”⁷¹ The unique qualities of broadcasts make them subject to greater regulation. The Court emphasized that radio and television “have established a uniquely pervasive presence in the lives of all Americans.”⁷² Indecent broadcasts confront citizens like an intruder in the home, where they are “uniquely accessible to children, even those too young to read.”⁷³ The Court concluded that the state therefore has an interest in supporting “parents’ claim to authority in their own household,” and may channel indecent speech to times when children are less likely to be in the audience.⁷⁴

Moreover, the understanding that broadcast audiences are captive in their homes is critical to understanding the indecent speech cases. Audiences may be considered “captive” when the context of the situation “makes it impractical for the unwilling viewer or auditor to avoid exposure.”⁷⁵ Because of the ease with which broadcasts may be accessed accidentally, courts perceive audiences as lacking any meaningful opportunity to avoid unwanted content. *Sable Communications of California, Inc. v. FCC* clarified the legal significance of this point.⁷⁶ That case dealt with a regulation targeting explicitly sexual telephone messages.⁷⁷ The Court noted that telephones, while also pervasive in homes, did not pose the same concerns as traditional broadcasts because telephones require the audience “to take affirmative steps to receive the communication.”⁷⁸ Consequently, unlike in *Pacifica*, there was no “captive audience problem” and the FCC could not constitutionally block the provocative calls.⁷⁹

Publicly displayed images of aborted fetuses are not comparable to indecent speech since citizens in a traditional public forum are not captive.⁸⁰ Although citizens in public spaces are similarly subjected to sudden and unwanted speech, they do not have the same privacy interests as they do inside their homes.⁸¹ To the contrary, the First Amendment provides its most expansive protection to

71. *Id.* at 731–32 (emphasis added) (internal citation omitted).

72. *Id.* at 748.

73. *Id.* at 749.

74. *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

75. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209–10 (1975).

76. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

77. *Id.* at 117–18.

78. *Id.* at 128.

79. *Id.* For an alternative argument that *Saint John’s II* does raise a captive audience problem, see Koski, *supra* note 15, at 684.

80. For a discussion of the captive audience problem in relation to disturbing speech, see Volokh, *supra* note 14, at 901, and Koski, *supra* note 15.

81. This is true even within the narrow context of worship services. Though some may argue that parishioners are rendered captive by their spiritual duties, this does not eradicate the protection afforded to traditional public fora. See, e.g., Survivors Network of Those

speech in parks, streets, and sidewalks, as these places 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.”⁸² In these public fora, the Supreme Court rationalized, citizens can “effectively avoid further bombardment of their sensibilities simply by averting their eyes.”⁸³

The Supreme Court’s ocular advice applies to children in public as well. In *Erznoznik v. City of Jacksonville*, decided three years before *Pacifica*, the Supreme Court struck down an ordinance prohibiting drive-in movie theaters with publicly visible screens from screening movies containing nudity.⁸⁴ Jacksonville maintained that the regulation was motivated by its interest in protecting children from the purportedly harmful images.⁸⁵ The Court acknowledged that the city’s compelling interest in regulating pornographic material was established in *Ginsberg*, but held that the ordinance failed, as it was not narrowly tailored.⁸⁶ The Court explained that completely banning all movies containing nudity regulated too much protected content to serve the state’s compelling interest in protecting children from the adverse effects of pornography.⁸⁷

Important for public forum analysis, however, is that in nearly the same breath the Court concluded that Jacksonville’s ordinance could also not be justified as preventing an intrusion. This is because the regulation sought “only to keep these films from being seen from public streets and places where the offended viewer readily [could] avert his eyes.”⁸⁸ Taken together, these points confirm that even in public, “[s]peech that is neither obscene as to youths

Abused by Priests, Inc. v. Joyce, 779 F.3d 785, 793 (8th Cir. 2015) (holding that Texas’ Worshiper Protection Act, which prohibited “intentionally disturbing a house of worship by using profane discourse, rude or indecent behavior . . . either within the house of worship or so near it as to disturb the order and solemnity of the worship services,” impermissibly restricted speech in the public fora surrounding houses of worship).

82. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

83. *See* *Cohen v. California*, 403 U.S. 15, 21 (1971); *See also* *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 773 (1994) (holding that an injunction on “images observable” from inside an abortion clinic was too broad because the clinic could simply “pull its curtains . . . to avoid seeing placards . . .”).

84. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206–07 (1975).

85. *Id.* at 212–13.

86. *Id.*

87. The Court concluded that children had a First Amendment right to access such protected speech as “the nude body of a war victim.” *Id.* at 213. Of course, that children’s access to images of war victims is quintessentially protected speech raises again the definitional problem of recognizing disturbing speech as a proscribable category of speech.

88. *Id.* at 212.

nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that [the government] thinks unsuitable for them.”⁸⁹ As a result, the indecent speech reasoning is patently inapplicable to disturbing speech in a traditional public forum.

C. The Current Formulation is Antithetical to the First Amendment

By drawing on inapposite case law, those courts recognizing a compelling state interest in protecting children from disturbing speech have created an unprecedented category of proscribable communication. And while the interest in safeguarding the psychological well-being of children is not necessarily suspect in itself, the courts’ broad formulation of the interest is discordant with several established First Amendment principles. The current formulation grants children a heckler’s veto, deprives audience access to protected content, and limits substantially the opportunities for effective communication of certain ideas.

First, it is firmly settled that “the [F]irst [A]mendment knows no heckler’s veto.”⁹⁰ That is to say, “under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”⁹¹ Moreover, it is equally established that there is no “‘minors’ exception to the prohibition on banning speech because of listeners’ reactions.”⁹² Yet those courts recognizing a compelling state interest in protecting children from disturbing speech have ignored these First Amendment axioms. For example, as the court in *St. John’s II* defined it, disturbing speech refers only to those communications that are “likely to cause . . . psychological harm.”⁹³ Communication that is unlikely to negatively affect children may not be restricted. For example, despite its graphic imagery, the crucifix displayed inside of St. John’s Church does not pose a risk of psychological harm and

89. *Id.* at 213–14.

90. *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001).

91. *Bacchellar v. Maryland* 397 U.S. 564, 567 (1970) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

92. *See* *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep’t*, 533 F.3d 780, 790 (9th Cir. 2008) (“It would . . . be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children.”).

93. *Saint John’s Church in the Wilderness v. Scott* (*Saint John’s II*), 296 P.3d 273, 285 (Colo. App. 2012).

remains free from the injunction.⁹⁴ Indeed, under the current approach to disturbing speech, the fear of the audience's reaction alone creates the state interest in regulating the content—a textbook heckler's veto.

Second, by predicating protection of disturbing speech on the presence of minors, courts have created a perverse incentive to strategically wield children so as to deprive audiences of messages they have a constitutional right to receive.⁹⁵ The Supreme Court has noted this concern before. In addressing legislation that prohibited knowingly communicating indecent material to minors over the Internet, the Court held that the law unconstitutionally conferred “broad powers of censorship . . . upon any opponent of indecent speech who might simply log on and inform the would-be discourers that [a minor] would be present.”⁹⁶ The current context amplifies that concern because in a traditional public forum even children have a right to receive communication.⁹⁷ As Judge Richard Posner eloquently stated, “[Children] must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise.”⁹⁸ The current approach to disturbing speech robs children and adults alike of opportunities for political growth.

Finally, the current articulation of the state's interest substantially limits the effective communication of certain ideas. The Supreme Court has observed that messages conveyed without powerful imagery may not be as forceful as those conveyed with it.⁹⁹ Disturbing images have an emotive function that “may often be the more important element of the overall message.”¹⁰⁰ This is particularly true with images of aborted fetuses, which have been the only content subject to disturbing speech restrictions thus far. Professor Laurence Tribe has argued that because of the political vitriol surrounding abortion, “for [many], the life of the fetus becomes an

94. *Id.*

95. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (“[T]he First Amendment protects the public's interest in receiving information.”).

96. *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

97. *See supra* Section II.B.

98. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2011) (addressing a city ordinance seeking to limit minors' access to violent video games).

99. *See Texas v. Johnson* 491 U.S. 397, 416 n.11 (1989) (holding a prohibition on burning the American flag unconstitutional, and stating that “messages conveyed without use of the flag are not “just as forcefu[l]” as those conveyed with it.”).

100. *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the conviction of a man wearing a vulgar anti-war jacket in place where women and children were present was not justified.).

invisible abstraction.”¹⁰¹ As a result, prohibiting citizens from confronting public audiences with often unseen images of aborted fetuses greatly restricts the speakers’ ability to effectively advance their message.¹⁰² Thus, by imprecisely equating disturbing speech with inapplicable precedent, courts have granted audiences the power to silence speakers and limit public discourse “to that which would be suitable for a sandbox.”¹⁰³

III. THE FIRST AMENDMENT REQUIRES A REFORMULATION OF THE INTEREST

Although the current formulation of the state’s compelling interest in preventing psychological harm to children poses the aforementioned complications, this does not mean that the interest is unimportant or illegitimate. It does mean, however, that the interest must be more precisely drawn in order to limit its impact on constitutional freedoms. For these reasons, Section III-A proposes the state interest be reformulated in the mold of intentional infliction of emotional distress (IIED), with an emphasis on the assaultive aspect of the tort. Section III-B addresses some of the problems associated with this proposal, including that disturbing speech might cause unique harms not reached by an IIED model, that the proposal might be foreclosed by *Snyder v. Phelps*, and that the proposal might not effectively protect children’s psychological well-being.

A. *Intentional Infliction of Emotional Distress as a Model*

In order to regulate otherwise protected content, a state must relate the speech to a specific, identifiable harm and further show that the regulation will alleviate that harm.¹⁰⁴ This is a two pronged analysis: the court first considers whether there is a compelling state

101. LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 5 (1980); *see also* Volokh, *supra* note 14.

102. Even the court in *Saint John’s Church in the Wilderness v. Scott* (*Saint John’s II*) recognized that for the protestors the disturbing nature of the images was the message itself. 296 P.3d 273, 283 (Colo. App. 2012).

103. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (holding a restriction on unsolicited contraception advertisements was an illegal restriction of commercial speech).

104. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“[The state] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”).

interest in preventing the harm, and second, whether the restriction is narrowly tailored to achieve that interest.¹⁰⁵ These prongs operate in conjunction with one another: meaning, how the interest is articulated dictates how much tailoring is needed.¹⁰⁶ Adjusting the contours of the state interest can therefore affect which speech is protected and which is regulable. The chief problem with disturbing speech restrictions is that the state interest has been formulated so broadly that even narrowly tailored restrictions sweep up quintessentially protected speech. Courts can prevent this overreach by recasting the state's interest in protecting children's psychological well-being in the mold of intentional infliction of emotional distress (IIED).

It is initially necessary to note that psychological harm has not always been a legally cognizable injury. In fact, the 1934 *Restatement of the Law of Torts* claimed that there was no legal redress for emotional harms.¹⁰⁷ Yet this position was not entirely consistent with precedent and was steadfastly disputed among academics.¹⁰⁸ IIED as a distinct tort thus originated as an academic endeavor in the pages of the Harvard and Michigan law reviews.¹⁰⁹ Though early definitions of the tort were not models of clarity, William Prosser articulated an initial approach by saying: "It is something very like assault . . . [consisting] of the intentional, outrageous infliction of mental suffering in an extreme form."¹¹⁰ His article and others helped this ostensibly novel tort become generally recognized, and by 1948 the *Restatement* had changed its position on recovery for emotional harms.¹¹¹ Today, the tort is recognized in all fifty states

105. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

106. For example, in *Erznoznik v. City of Jacksonville* the Court held that the state did not have an interest in restricting all nude movies because not all nudity is considered obscene for minors or falls within another proscribable category of speech. 422 U.S. 205, 213–14 (1975). The Court then concluded that if the "ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription." *Id.* at 214. Notice that it is the interest itself which dictates how narrowly tailored the prescription must be. So, if the Court in *Erznoznik* had articulated an alternative interest, the narrow tailoring analysis would have been different and perhaps the regulation would have been upheld. The line between protected and regulable speech turns on the shape of the state interest.

107. RESTATEMENT (FIRST) OF TORTS § 46 (Am. Law Inst. 1934).

108. See, e.g., Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982).

109. See Calvert Magruder, *Mental and Emotional Disturbance in the Law*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

110. Prosser, *supra* note 109.

111. See Givelber, *supra* note 108.

and the District of Columbia.¹¹² Although the precise formulation differs by jurisdiction, the *Restatement (Second) of Torts* outlines four common elements of IIED: (1) the defendant's conduct must be intentional or reckless, (2) must be extreme and outrageous, and (3) must be the cause of (4) severe emotional distress.¹¹³

The most critical is the "extreme and outrageous" element. The chief concern that initially prevented courts from recognizing IIED was that a plaintiff's claim of psychological harm may be disingenuous. According to the comments to the *Restatement*, because of "fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress."¹¹⁴ The "extreme and outrageous" element mostly quiets these concerns, as "[i]t is the character of such conduct itself which provides the necessary assurance that genuine harm has been done."¹¹⁵ It guarantees that annoyances and trivialities do not result in liability.¹¹⁶ And "outrageousness" is determined by an objective, reasonable person standard such that individuals cannot claim unreasonably subjective harm.¹¹⁷

The state's compelling interest in restricting disturbing speech should be reformulated according to these elements of IIED. As in IIED, disturbing speech restrictions aim to secure persons from unreasonable psychological assault.¹¹⁸ Yet unlike the precise formulation of IIED, the current articulation of the state's interest does not compel courts to assess disturbing speech claims with the cautiousness that redressing psychological harms requires. Parties can therefore win speech injunctions by making spurious or even hypothetical claims of psychological harm. For example, consider again the injuries described in *St. John's II*: there, the court noted only that "[p]arents were concerned" about the effects of the

112. See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806, app. B (2007).

113. RESTATEMENT (SECOND) OF TORTS § 46 (Am. Law Inst. 1965).

114. *Id.* at cmt. b.

115. Prosser, *supra* note 109, at 879.

116. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965) ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. . . . There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.").

117. See *id.* ("Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'").

118. For a discussion on this, see *infra* Section III.B.

images and found that “[the priest’s] daughter buried her face in her hymnal . . . and remained upset about the images several days later.”¹¹⁹ It is unlikely that such nondescript emotional distress would be privately actionable, and it is not clear that the state has any interest—let alone a compelling interest—in preventing it.¹²⁰

Courts employing the current formulation credit such harms because, in contrast to the IIED inquiry, the current approach to disturbing speech focuses on the content rather than on the speaker’s conduct. That is, there is no equivalent of either the intentional or the extreme and outrageous elements in the current disturbing speech test. As a result, courts currently cannot assess the veracity of the psychological harm that a given restriction purports to remedy. Some might be tempted to argue that the disturbing content of the speech itself ensures injuries are authentic. But the inquiry into the content of the speech is an inadequate substitute because courts have defined disturbing speech as that which causes psychological harm.¹²¹ As a result, the link between the speech and the harm is assumed rather than scrutinized, allowing for restrictions to be based merely on purportedly disturbing content and the presence of children. And it is this ad hoc emphasis on the content that makes the current approach to disturbing speech more likely to be used for censorship than for preventing actual harms.

Adopting an IIED-based approach would correct these analytic shortcomings. Under this formulation, the state would have a compelling interest in restricting speech that amounts to an intentional assault that is outrageous or extreme and the cause of psychological harm to children. This formulation would shift the analysis away from the audience’s subjective response to the disturbing content and onto the speaker’s intentional and assaultive conduct. Shaping the state’s interest along the contours of the private interest would provide the necessary indicia of genuine harm and ensure that the plaintiff’s claims are not unreasonable or brought solely to silence the speaker. It would also align the state’s interest with established First Amendment doctrine, as the state would be claiming a compelling interest in directly restricting speech that it may already indirectly restrict by enforcing civil judgments.¹²²

Of course, there are constitutional limits to traditional IIED claims, particularly when the speech involves a matter of public

119. *Saint John’s Church in the Wilderness v. Scott* (*Saint John’s II*), 296 P.3d 273, 284 (Colo. App. 2012).

120. For an argument that the court in *Saint John’s II* failed to apply the evidentiary standard demanded by *Brown v. Entm’t Merchs. Ass’n*, see Calvert et al., *supra* note 15, at 133.

121. See, e.g., *Saint John’s II*, 296 P.3d at 285.

122. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

concern. As the Supreme Court first stated in *Hustler Magazine, Inc. v. Falwell*: “‘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.”¹²³ *Snyder v. Phelps* recently reemphasized this point.¹²⁴ The Court there expanded on its definition of public concern for IIED purposes, stating that “speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community”¹²⁵ Though one can imagine disturbing speech falling outside of this definition, abortion speech certainly implicates public concern.

Because of this precedent, it is imperative that the proposed reformulation of the state interest emphasizes the speaker’s intent in directing the speech at children. If the speaker’s primary purpose is to cause children distress—rather than, say, to promote her ideological position—then the speaker may be restricted from making further psychological attacks.¹²⁶ But, alternatively, if the demonstrator shows grotesque images to children for the purpose of educating them as to the results of abortion, or to persuade their views on the matter, this would not be proscribable although it presents the same disturbing content and potentially causes the same psychological injury. The importance of this distinction and the necessity for a robust intent element in the reformulation cannot be understated. Without this element, even under an IIED standard, communities and judges could continue to restrict speech based on their distaste for the message or the propriety of its expression.

Accordingly, the proposed reformulation would recognize a compelling state interest in restricting speech that amounts to an objective and intentional assault on children’s psychological well-being. And though potential restrictions would nevertheless need to be narrowly tailored according to their particular circumstances, the contours of the new state interest would curtail how far those

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

124. *Snyder v. Phelps*, 562 U.S. 443, 459 (2010).

125. *Id.* at 1216.

126. This approach is not substantially different from Justice Breyer’s concurrence in *Snyder v. Phelps*. *Id.* at 461–63 (Breyer, J. concurring). Indeed, it is merely an example of Court’s “approach in recent decades [of] treat[ing] content-based permanent injunctions much the same as content-based liability.” Volokh, *supra* note 14, at 918 n.92.

proscriptions could stretch. The reformulation would thus achieve a satisfactory, and currently lacking, balance between protecting children and ensuring broad First Amendment protection.

B. Addressing Potential Obstacles Facing the Reformulation

There are three potential obstacles that may limit the viability of using intentional infliction of emotional distress (IIED) as a model for shaping the state's interest in regulating disturbing speech. First, the psychological harm resulting from disturbing speech may be different from that resulting from garden-variety IIED. Second, even if it is taken for granted that IIED provides the most theoretically sound model, the Supreme Court's recent decision in *Snyder v. Phelps*¹²⁷ might foreclose its applicability in cases involving speech on matters of public concern. Third, because of the heightened requirements under this proposal, the reformulation may not go far enough in protecting children.

The first obstacle facing the proposed reformulation is that the psychological harm associated with disturbing speech may be different from the emotional distress associated with IIED. To be sure, there is some support for this position found in the case law. For example, in *Olmer v. City of Lincoln*, the Eighth Circuit referred specifically to speech that is not simply distressing, but psychologically "damaging" to children.¹²⁸ Likewise, in *St. John's II*, the Colorado Court of Appeals distinguished its holding from *Brown* by emphasizing the "different psychological harm" resulting from disturbing images as compared to the supposed desensitizing effects flowing from violent video games.¹²⁹ Furthermore, the fact that none of the disturbing speech opinions independently draw similarities between the children's psychological injuries and IIED might further suggest that there is something unstated yet distinct about the harm.

These arguments are not persuasive. Even if disturbing speech results in somehow unique harms, it does not follow that an IIED model is unsuitable. There is nothing in the conceptualization of IIED that limits its applicability to temporary emotional harm or a specific manifestation of harm. The only limit is the severity of the

127. 562 U.S. 443 (2010).

128. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999).

129. *Saint John's Church in the Wilderness v. Scott (Saint John's II)*, 296 P.3d 273, 278–79 (Colo. App. 2012). For lengthy critique of this aspect of the *Saint John's II* opinion, see Calvert et al., *supra* note 15, at 133.

injury, which as discussed above is necessary to ensure the earnestness of the claim. Furthermore, it is unsurprising that courts have not already drawn upon the theoretical foundation of IIED since none of the plaintiffs brought such a claim. In fact, it was only in *St. John's II* that the court even mentioned the tort, and that was only in response to appellee's claim that the injunction was unconstitutional under *Snyder v. Phelps*.¹³⁰ And distinguishing the cases, the Colorado court focused on the context and form of the pro-life speakers; it did not distinguish on the type of psychological injury. For these reasons, the notion that an IIED model is unsuitable because the harms resulting from disturbing speech are unique is unconvincing.

The second obstacle facing the proposed reformulation is the Supreme Court's decision in *Snyder v. Phelps*. In that case, the Court addressed a grieving father's IIED claim after members of the Westboro Baptist Church gathered at his son's funeral to protest the United States' general acceptance of homosexuality.¹³¹ The protesters argued that they were not liable because the First Amendment protected their expression.¹³² In resolving the case, the Court identified the key question as whether the church's speech dealt with a matter of public or private concern. It determined that although the funeral was a private matter, the content of the Church's protest was of public concern.¹³³ The Court concluded by reemphasizing several points from *Hustler*—notably that the “outrageous” standard of IIED is impermissibly malleable and that in making the determination “a jury is unlikely to remain neutral with respect to the content of the speech, posing a real danger of becoming an instrument [of] suppression”¹³⁴ The Westboro Baptist Church was therefore constitutionally protected from tort liability.

The precise holding in *Snyder* is not clear. Professor Erwin Chemerinsky argues that the opinion simply reaffirms the nation's longstanding commitment to the idea that “speech cannot be punished, or speakers held liable, just because the speech is offensive.”¹³⁵ Others, such as Professor Elizabeth Jaffe, assert that

130. *Saint John's II*, 296 P.3d at 277–78.

131. *Id.* at 448.

132. *Id.* at 451–52.

133. *Id.*

134. *Id.* at 458 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510 (1984)) (internal quotations omitted).

135. See Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 72, 723–24 (2011). See also Alan Brownstein & Vikram David Amar, *Afterthoughts on Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 43, 43 (2011) (“From a scholarly and professional perspective, the United

Snyder renders IIED “all but obsolete” when it comes to public matters.¹³⁶ If these latter scholars are correct and the Court is stating that speech on matters of public concern can never be subject to civil liability, then the proposed reformulated compelling state interest would be unconstitutional—at least as applied to quintessentially disturbing speech like that on abortion. The state would be effectively claiming a compelling interest in restricting the same speech on which the Supreme Court held it cannot impose civil liability. The reformulation would be rightly dismissed. Because of this, the viability of the proposal turns on the breadth of the holding in *Snyder v. Phelps*.

It is unlikely that *Snyder* stands for the broad proposition that liability can never be imposed when the underlying speech involves a matter of public concern. Courts have repeatedly acknowledged the heightened protection political speech deserves under the First Amendment, but it has never been interpreted to give speakers complete immunity.¹³⁷ It would be surprising then for the Supreme Court to reverse this approach and establish complete protection for political speakers. Put simply, public concern cannot be a blank check for assault. Both Justice Breyer and Justice Alito in their respective *Snyder* concurrence and dissent stressed this point.¹³⁸ Justice Breyer also provided a helpful, exemplary reading of the majority opinion:

While I agree with the Court’s conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. . . . Suppose that A were physically to assault B, knowing that the assault

States Supreme Court’s decision in *Snyder v. Phelps* added little to the development of free speech doctrine.”).

136. Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 WAYNE L. REV. 473, 475 (2011); see also Joseph Russomanno, “Freedom for the Thought that We Hate”: Why Westboro Had to Win, 17 COMM. L. & POL’Y 133, 171 (2012) (“After *Snyder*, intentional infliction of emotional distress is weaker—and perhaps disabled—in claims stemming from speech.”).

137. For example, a public agency can fire a person for engaging in speech touching on matters of public concern if representing his employer’s opinions is in his job description (*Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006)) or if it is disruptive of the agency’s public mission (*McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985)). Likewise, a higher evidentiary showing for defamation is required when the speech involves a matter of public concern, but it is also not a complete bar to liability (*New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964)). Finally, the court has held that even speech on a matter of public concern in a traditional public forum can be restricted when it implicates certain privacy interests (*Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

138. *Snyder v. Phelps*, 562 U.S. 461–63 (2010) (Breyer, J. concurring); *id.* at 463–66 (Alito, J. dissenting).

(being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means.¹³⁹

Indeed, the majority opinion considered the importance of a speaker's intent, recognizing that Westboro's picketing "re-present[ed] its 'honestly believed' views on public issues."¹⁴⁰ Therefore, by sufficiently considering the assaultive intent of the speaker, as well as the "content, form, and context"¹⁴¹ of the disturbing speech, the proposed reformulation of the state's compelling interest could be reconciled with *Snyder*.

The final obstacle facing the proposed reformulation is that it may not sufficiently protect children. Because the reformulation places more exacting boundaries on those psychological harms that states can claim a compelling interest in preventing, some instances of disturbing speech will go unaddressed. It is admittedly unlikely that demonstrators will use grotesque images for the primary purpose of psychologically assaulting children: it is more probable that they would be motivated by their sincere beliefs on a contentious issue. Because the proposed reformulation would not recognize a valid state interest in restricting such earnest speech, some children would still be exposed to disturbing images and may still experience emotional harm. Indeed, Palm Sunday services would remain vulnerable to disruption.¹⁴²

But although the state's hurdle under the reformulation is higher, it is not insurmountable. For example, the injunction in *Bering v. SHARE* would likely be upheld under the reformulated standard.¹⁴³ Recall that in that case, the court enjoined pro-life protestors from referring to "children or babies as being 'killed' or 'murdered' by anyone in the Medical building."¹⁴⁴ Because the children were unable to understand the rhetorical effect of the

139. *Id.* at 471 (Breyer, J. concurring).

140. *Id.* at 455; *see also* *Frisby v. Schultz*, 487 U.S. 474, 499 (1988) (Stevens, J. dissenting) ("Picketing for the sole purpose of imposing psychological harm on a family" is not constitutionally protected.).

141. *Snyder*, 562 U.S. at 444.

142. The court in *Saint John's II* noted that "[t]he posters' gruesome images were highly disturbing to children in the congregation apart from any message they intended to convey." 296 P.3d at 276. While it is impossible to know how the court reached this conclusion, it must be stressed that under the reformulation there would be no need to attempt the impossible calculus of whether speech was more disturbing or more political. The analysis would focus on the speaker's assaultive intent, and not the content of the speech.

143. *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986).

144. *Id.* at 933.

demonstrators' admittedly political speech, they heard only that they were in immediate, physical danger. Though the Washington court did not scrutinize the contours of the injury—and did not mention IIED at all—they recognized that there was “compelling state interest in avoiding subjection of children to the physical and psychological abuse inflicted.”¹⁴⁵ Under the proposed reformulation the result would likely be similar. The factfinder would determine whether the demonstrators knowingly and intentionally assaulted the children by using words and phrases calculated to put young minds in a psychologically arresting position. If so, as perhaps made clear by the demonstrators' knowledge that the children were incapable of comprehending their message, the state would maintain a compelling interest in enjoining further abusive demonstrations under the reformulation.¹⁴⁶ Therefore, by adopting an IIED model courts may still secure the state's interest in preventing psychological assault of children while simultaneously guaranteeing speakers' right to vigorously communicate their political messages.

CONCLUSION

While a compelling state interest in protecting children's psychological well-being from disturbing speech may exist in the constitutional ether, it is not founded in precedent. And constitutional principles counsel against creating new categories of disfavored speech. But this is not to suggest that the interest should be ignored. Children are impressionable and their psychological health should not be undervalued. Yet if courts choose to restrict disturbing speech, they must carefully formulate the interest they are vindicating. This Note has proposed using intentional infliction of emotional distress as a model. It argues that this model would allow for greater scrutiny of the emotional harms claimed and allow states to restrict those who intentionally cause psychological harm to children. This theoretically rigorous approach would also ensure that speech was not restricted merely because of distaste for its content or propriety of its expression. Most importantly, it ensures a constitutional balance between protecting speakers and protecting audiences.

145. *Id.*

146. For an argument that even this kind of verbal assault is of political importance, see Volokh, *supra* note 14, at 945.