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Managing Constitutional Boundaries In Speech-Tort Jurisprudence

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MANAGING CONSTITUTIONAL BOUNDARIES IN SPEECH-TORT JURISPRUDENCE

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Speech-tort cases—those in which tort liability attaches based on the expressive elements of speech—are an unwieldy amalgam of two divergent legal contexts: the public law context of First Amendment law and the private law context of tort law. Yet the Supreme Court has largely conceptualized such cases as, in essence, no different from any other run-of-the-mill First Amendment case. The Court's decision in Snyder v. Phelps*—its most recent foray into speech torts—highlights its continued adherence to a highly First Amendment-inflected approach to doctrine-building in this area, one that favors broad, categorical rules over more complex, open-ended, and flexible approaches.*

This Article argues that the Court's approach evinces a broad failure to recognize the idiosyncratic nature of the speech-tort context. Specifically, the Court has broadly presumed that the risk of impermissible chilling effects and the potential for government abuse—the fundamental reasons for extending First Amendment protections to tort law—are effectively identical in the speech-tort context as compared to traditional First Amendment cases dealing with direct government regulation. This error has led the Court to adopt a blunt, excessively prophylactic approach to speech-tort cases that threatens to overprotect speech interests at the expense of tort interests.

Just as light is both particle and wave, speech-tort cases are both public law and private law; both regulatory and compensatory in nature; and the product of both state action and private initiative. This unique context should temper the broad assumptions that courts typically take in analyzing traditional First Amendment cases. While the operation of tort law can chill protected speech, these chilling effects straddle the line between the constitutionally permissible chilling effects produced by private action and the constitutionally problematic chilling effects produced by direct state regulation. And any concern with potential government abuse is similarly muted in most speech-tort contexts, since the judicial resolution of private tort suits generally represents a much more indirect and attenuated form of state action than direct regulation.

The Article therefore argues for a more pragmatic, open-ended, and contextualized approach to speech-tort cases, with an incrementally greater tolerance for more tailored, balancing-oriented tests—the sort of approach that the Court has generally avoided in evaluating content-based restrictions on speech. If the risks of impermissible chilling effects and government abuse are comparatively muted in the speech-tort context, then the Court should be comparatively more comfortable in undertaking more modest, contextualized approaches—approaches that would be particularly valuable within this highly eclectic and complex body of doctrine.

Introduction

Ever since its seminal decision in *New York Times v. Sullivan*,[1] the Supreme Court has consistently recognized that the First Amendment imposes limitations on how states design their tort law. And this recognition extends beyond the defamation context: The Court has articulated First Amendment boundaries in cases dealing with privacy[2] and intentional infliction of emotional distress,[3] while lower courts have recognized First Amendment limitations in areas of tort law such as negligence,[4] intentional interference with contract and prospective economic relations,[5] right of publicity,[6] and products liability.[7] In all of these contexts, the courts' recognition of First Amendment boundaries was rooted in the fact that tort liability was premised on the expressive elements of speech as opposed to non-speech conduct.

Speech-tort jurisprudence—as I refer to this body of doctrine—is, at its root, an amalgam of diametrically opposed theoretical and practical considerations. On a theoretical level, both tort law and the First Amendment's protection of free speech are undergirded by an indeterminate mix of various theoretical justifications, both deontological and instrumental in nature. In a given speech-tort case, the varied justifications on each side of the equation come into direct conflict, effectively forcing courts to choose which set of principles and interests should prevail over the other.

And on a practical level, speech-tort jurisprudence represents a collision of widely divergent cultures and approaches. The paradigmatic First Amendment case involves the government's direct imposition of some sort of sanction, usually based on a discrete regulatory standard and involving direct litigation between government and individual. By contrast, tort law is usually the product of common law development rather than direct legislative action. Furthermore, tort suits are initiated by private parties, and the government is not usually a party in

1. 376 U.S. 254 (1964).

2. *See* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

3. *See* Snyder v. Phelps, 562 U.S. 443, 458–59 (2011); Hustler v. Falwell, 485 U.S. 46, 56, 58 (1988).

4. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 196–98 (Cal. Ct. App. 1988); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 890–93 (Cal. Ct. App. 1981).

5. *See, e.g.*, Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., 175 F.3d 848, 856–58 (10th Cir. 1999); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990).

6. *See, e.g.*, Winter v. DC Comics, 69 P.3d 473, 477–79 (Cal. 2003).

7. *See, e.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034–36 (9th Cir. 1991) (rejecting a claim that strict products liability applies to erroneous information found in "The Encyclopedia of Mushrooms").

the suit; state action therefore comes only in the form of the court's application of state rules of law.

But the Supreme Court's speech-tort decisions, including its most recent decision in *Snyder v. Phelps*, indicate that the Court has largely conceptualized speech-tort cases as, in essence, no different than any other run-of-the-mill First Amendment case. *Snyder* appeared to build upon and extend the highly First Amendment-inflected approach to doctrine-building that the Court had undertaken starting in *Sullivan*: a preference for broad, categorical rules that value simplicity, relative administrability, and predictability over complexity, open-endedness, and flexible tailoring.

In this Article, I argue that this approach evinces a broad failure to fully appreciate the idiosyncratic nature of the speech-tort context as compared to cases dealing with direct speech regulations. Specifically, the Court has broadly presumed that the risk of impermissible chilling effects and the potential for government abuse—the fundamental reasons for extending First Amendment protection to tort liability—are effectively identical in the speech-tort context as compared to the direct-regulation context. This error, in turn, has caused the Court to adopt a highly blunt, excessively prophylactic approach to speech-tort cases that threatens to overprotect speech interests at the expense of tort interests.

This broad parallelism between speech-tort cases and cases dealing with direct government regulation is misguided. Just as light is both particle and wave, speech-tort jurisprudence is both public law and private law; both regulatory and compensatory in nature; and the product of both state action and private initiative. This unique context should temper the broad assumptions that courts typically take in analyzing traditional First Amendment cases. While the operation of tort law can certainly operate to chill protected speech, these chilling effects straddle the line between the sorts of constitutionally permissible chilling effects produced by private action and the constitutionally problematic chilling effects produced by direct state regulation. And any concern with the potential for government abuse is similarly muted in most speech-tort contexts, since the judicial resolution of private tort suits generally represents a much more indirect and attenuated form of state action than direct regulation.

I therefore argue that the Court should approach speech-tort cases in a more pragmatic, open-ended, and contextualized manner, with an incrementally greater tolerance for more tailored, balancing-oriented approaches—the sorts of approaches that the Court has generally

avoided in evaluating content-based restrictions on speech.[8] If the risks of impermissible chilling effects and government abuse are comparatively muted in the speech-tort context, then the Court should be comparatively more comfortable in undertaking more modest, contextualized approaches in such cases.

These sorts of approaches are particularly valuable within this body of doctrine, given the unique nature and complexity of speech-tort cases. Speech-tort cases cover a wide variety of distinct doctrinal, factual, and theoretical contexts. If the core constitutional concern underlying such cases is the fear of government abuse through the manipulation or restriction of public discourse, it is decidedly difficult to distill this concern into a categorical, easy-to-apply, one- or two-factor inquiry. A wide range of factors—such as the nature of the tort claim in question, the type of speech in question, the extent of government involvement in the litigation, and any particularized indicia of animus on the part of the judge or jury—influence this determination, and the degree of First Amendment concern from case to case can vary widely. As such, more contextualized and open-ended analyses—rather than the blunt, skeleton-key solutions that are generally favored in traditional First Amendment contexts—are particularly suited for the speech-tort context, and the unique posture of such cases provides the Court with greater flexibility to adopt them.

This Article proceeds as follows. In Part I, I walk through the idiosyncratic qualities of speech-tort jurisprudence, which represents the collision of two radically different legal cultures. In Part II, I discuss the problems with the Court's current approach to speech-tort cases, which are ultimately rooted in its broad failure to recognize the unique posture and complexities presented by indirect regulation of speech via private tort actions as opposed to direct state regulation of speech. Finally, in Part III, I argue that the Court should adopt more contextualized and open-ended approaches in speech-tort cases, which—although problematic in run-of-the-mill speech cases—are well suited to the unique posture of speech-tort cases.

I. The Inherently Conflicted Nature of Speech-Tort Jurisprudence

At its essence, speech-tort jurisprudence[9] represents the collision of two diametrically opposed legal contexts: the public law context of

8. *See infra* Part III.

9. I am here using the same definition of this term that I have used in previous work: It refers to "all circumstances in which tort law extends liability to speech as opposed to non-speech conduct; specifically, . . . situations in which tort liability attaches based on the *expressive ele-*

First Amendment jurisprudence and the private law context of tort law. Tort law, of course, is traditionally the product of state common law, "and states generally have free rein to identify social wrongs and regulate conduct however they please."[10] But starting with *New York Times v. Sullivan*,[11] the Supreme Court has made clear that to the extent tort liability rests on the expressive elements of speech, the First Amendment requires that state tort law be crafted in a manner that does not infringe on this constitutional right. This clash plays out on the levels of both theory and practice, and in this Part, I walk through the various oppositions that create the broad tension that underlies the entirety of speech-tort doctrine.

A. The Intersection Between Tort Law and Freedom of Speech

Before the Supreme Court's decision in *Sullivan*, any tensions between tort law and the freedom of speech were navigated internally through the development of state tort law.[12] The highly permissive standards governing common law defamation claims,[13] for example, were tempered by doctrines such as the fair comment privilege[14] and the fair report privilege,[15] which were designed to provide special protection to speakers in contexts where the deleterious effects of tort liability on free speech principles would be most acute.[16] So at the time of *Sullivan*, the underlying tension between tort law and the free-

ments of speech rather than, for instance, its volume or physical form." David S. Han, *Rethinking Speech Tort Remedies*, 2014 WIS. L. REV. 1135, 1142 (2014).

10. *Id.*

11. 376 U.S. 254 (1964).

12. *See, e.g.*, William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422 (1960) (describing the "jealous safeguards thrown about the freedom of speech and of the press," developed "as a result of some centuries of conflict," within common law defamation doctrine).

13. *See infra* Section III.A.1.

14. *See* RESTATEMENT OF TORTS § 606 (1938) (delineating the conditions under which "[c]riticism of so much of another's activities as are matters of public concern . . . is privileged").

15. *See id.* § 611 (describing a conditional privilege for "[t]he publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty").

16. *See id.* § 606 cmt. c (observing, with respect to the fair comment privilege, that "[i]f the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged"); Sciandra v. Lynett, 187 A.2d 586, 600 (Pa. 1963) ("Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government."); Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 362 (2019) (observing that "the common law of defamation had developed privileges, such as fair comment on matters of public concern and the fair and accurate reporting of official proceedings, which were designed to prevent actions in slander and libel from unduly restricting the freedoms of speech and the press").

dom of speech was not a novel issue—it had long been recognized, debated, and accommodated in various ways by common law courts.[17]

Sullivan, however, inaugurated the Supreme Court's constitutional foray into the realm of speech-tort jurisprudence. In that case, which was decided during the height of the civil rights movement in 1964, Sullivan—the police commissioner of Montgomery, Alabama—sued the *New York Times* for libel based on the *Times*' publication of a full-page advertisement entitled "Heed Their Rising Voices."[18] The ad described the persecution of civil rights protestors throughout the South, including Martin Luther King, Jr., as part of an appeal for financial contributions to aid the civil rights movement.[19]

Although there were some clear factual inaccuracies in the ad, many of these inaccuracies were relatively minor in nature.[20] Furthermore, the ad never referred to Sullivan by name or position; it merely described actions allegedly taken by the Montgomery police in response to a number of student protests and criticized, in broad terms, the campaign of "intimidation and violence" against Martin Luther King, Jr. undertaken by "Southern violators."[21] But the Alabama courts—applying the state's highly permissive libel standards in a highly permissive manner—awarded $500,000 in damages against the newspaper.[22]

The Supreme Court reversed, holding that Alabama's application of its libel law violated the First Amendment.[23] And in holding, for the first time, that the First Amendment sets limitations on how states may design their tort law, the Court emphasized two primary dangers to free speech that may arise in the speech-tort context. First, it highlighted the chilling effects on protected speech that could arise from the application of tort law, famously observing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if

17. *See, e.g.*, James Maxwell Koffer, *The Pre-*Sullivan *Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153, 196–207 (2018) (describing pre-*Sullivan* debates regarding the fair comment privilege); Jeffrey Steven Gordon, *Silencing State Courts*, 27 WM. & MARY BILL RTS. J. 1, 24–27 (2018) (describing pre-*Sullivan* debate as to "whether a member of the public was conditionally privileged to make false and defamatory statements of fact about public officers and candidates for office").

18. New York Times v. Sullivan, 376 U.S. 254, 256–57 (1964).

19. *Id.* at 256–58.

20. For example, the demonstrating students "sang the National Anthem and not 'My Country, 'Tis of Thee'"; the police did not "ring" the Alabama State College campus as alleged, although they "were deployed . . . in large numbers"; and "Dr. King had not been arrested seven times, but only four." *Id.* at 258–59.

21. *Id.* at 257–58.

22. *Id.* at 256, 262–64.

23. *Id.* at 292.

the freedoms of expression are to have the 'breathing space' that they need to survive."[24] Later on, in *Gertz v. Robert Welch*, the Court stated that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection," sanctioning such speech "may lead to intolerable self-censorship," such that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[25]

Second, the Court emphasized the risk of government abuse associated with allowing these sorts of libel judgments against public officials. The Court drew a direct comparison between the case at hand and the Sedition Act of 1798, which criminalized defamation against the government and, as the Court noted, has since been broadly presumed to be unconstitutional.[26] As the Court observed, "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[27] In other words, just as the government cannot seek to silence its critics by direct criminal prosecution, it cannot do so by upholding large liability judgments in defamation cases against public officials. To hold otherwise would be tantamount to resurrecting seditious libel, raising "the possibility that a good-faith critic of government will be penalized for his criticism."[28]

Linked together, these two concerns—the fear of chilling effects on protected speech and the fear of government abuse—represent the core rationale for establishing First Amendment boundaries to tort law. And *Sullivan*, in many ways, represented a perfect storm of these concerns at their very apex.[29] The case involved a particularly heated and polarizing issue of public concern. Given the damages awarded, the chilling effects were clear: $500,000 was a substantial sum of money (even to the *New York Times*), and paying out such a judgment would likely sway them (and others) from ever criticizing official actions in Alabama. And given the plaintiff's status as a public official—combined with the Alabama courts' generous application of state tort law that allowed him to recover regarding statements that never directly identified him[30]—the high risk of government abuse

24. *Sullivan*, 376 U.S. at 271–72.

25. 418 U.S. 323, 340–41 (1974).

26. New York Times v. Sullivan, 376 U.S. 254, 273–77 (1964).

27. *Id.* at 277.

28. *Id.* at 277–78, 292.

29. *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1112 (2013) (observing that "*Sullivan* was a uniquely appropriate vehicle" for applying the First Amendment to a state common-law tort action).

30. *See Sullivan*, 376 U.S. at 288–92.

was apparent, with relatively little to distinguish the case at hand from seditious libel. One could conceptualize the case as, in effect, a suit brought directly by the government against a private party for statements critical of official actions.[31]

In later cases, the Court extended constitutional protection beyond cases involving public officials. In *Curtis Publishing Co. v. Butts*,[32] a splintered majority extended the *Sullivan* standard to libel claims raised by public figures,[33] and in *Gertz*, the Court extended lesser constitutional protections to libel claims raised by private figures.[34] In these contexts, no direct analogies to seditious libel could be drawn,[35] and the Court's rhetoric focused on the risk of undue chilling effects on public discourse rather than the risk of government abuse.[36]

But despite this rhetorical shift, these two concerns remain fundamentally intertwined. Of course, chilling effects on protected speech raise First Amendment concerns only when they are produced by state action (rather than purely private action).[37] And although *Sullivan* itself involved a tort claim brought by a public official, the *Sullivan* Court broadly held that a court's mere application of state rules of law represents state action triggering First Amendment protections.[38] So the Court has, in effect, adopted an incredibly expansive conception of constitutionally problematic government abuse (and, in turn,

31. *See id.* at 291–92 ("For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence. The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed." (citation omitted)).

32. 388 U.S. 130 (1967).

33. Although Justice John Marshall Harlan's plurality opinion adopted a less stringent constitutional standard in the public figure context, five Justices agreed with Chief Justice Earl Warren's extension of the *Sullivan* rule to public figures as set forth in his concurring opinion. *See id.* at 164 (Warren, C.J., concurring in the judgment); *id.* at 170 (Black, J., concurring in part and dissenting in part); *id.* at 172 (Brennan, J., concurring in part and dissenting in part); *see also* Gertz v. Robert Welch, 418 U.S. 323, 336 (1974).

34. *Gertz*, 418 U.S. at 347.

35. *See Butts*, 388 U.S. at 154 (plurality opinion) (observing that "[t]hese actions cannot be analogized to prosecutions for seditious libel"); *id.* at 163 (Warren, C.J., concurring in the judgment) ("To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy.").

36. *See id.* at 164 (Warren, C.J., concurring in the judgment) ("Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'"); *Gertz*, 418 U.S. at 340 ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

37. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (observing that "the First Amendment has no bearing" on a case absent state action).

38. New York Times v. Sullivan, 376 U.S. 254, 265 (1964).

an incredibly expansive conception of constitutionally problematic chilling effects)—one that encompasses a broad range of private tort actions[39] in which the government plays a far less direct role than it did in *Sullivan*.[40]

B. Theoretical Conflicts[41]

When, as in *Sullivan*, First Amendment considerations are introduced into the realm of tort law, a number of theoretical, practical, and cultural oppositions emerge. On the theoretical side, speech-tort cases represent a fundamental conflict between two distinct sets of interests. On the one hand, they implicate the foundational rationales underlying the First Amendment's protection of speech—the various reasons why speech is deemed special such that it is entitled to greater protection than non-speech conduct. On the other hand, they implicate society's interests in imposing tort liability. Conceptually speaking, speech-tort jurisprudence represents courts' attempt to craft the appropriate balance between these two opposing sets of interests.

Let's look first at the speech side of the equation. Although the Supreme Court has never adopted a single, unified theory of free expression,[42] four particular rationales have tended to dominate both the academic and judicial discourse. The first is the idea that unfettered speech has special value as a means of uncovering truth,[43] an

39. This might rest on an expansive view of who effectively constitutes the "government" in a private tort action. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) ("'[P]ublic figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."). Or it might rest on suspicions regarding judges and juries in resolving the tort claim in question. *See* Hustler v. Falwell, 485 U.S. 46, 55 (1988) (highlighting the risk that a jury in an IIED case would "impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression").

40. As I argue below, this lack of nuance in distinguishing between the high potential for government abuse in a case like *Sullivan* as compared to more run-of-the-mill speech-tort cases like *Snyder v. Phelps* represents a central problem in the Court's current approach to speech-tort cases. *See infra* Section II.B.

41. My discussion in this Section draws from my previous work. *See* Han, *supra* note 9, at 1144–47.

42. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) ("There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression."); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 560 (2011) ("No theory has dominated the Court's complex accommodations.").

43. Probably the most notable expositor of this theory was John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (arguing that the free exchange of ideas provides society with "the opportunity of exchanging error for truth").

idea famously encapsulated by Justice Oliver Wendell Holmes's statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[44] The second is the idea that unfettered speech is necessary for democratic self-governance; if the citizens in a democracy are the ultimate sovereigns, they must have the freedom to openly debate and discuss matters of public concern to govern themselves effectively.[45]

Apart from these instrumental justifications, a third rationale for protecting speech is deontological in nature: the idea that free speech is an essential aspect of individual autonomy and personhood, and thus represents a good in itself.[46] Under this view, "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[47] And a final theoretical rationale for protecting speech is to check government abuse in managing public discourse.[48] That is, the reason to protect speech might have less to do with the value produced by such speech and more to do with the significant harm potentially caused by government intervention in the marketplace of ideas.[49]

On the other side of the equation, speech-tort cases also implicate society's interests in imposing tort liability. The imposition of tort law might be premised on corrective justice principles—the "simple and elegant" idea that "when one person has been wrongfully injured by another, the injurer must make the injured party whole."[50] Similarly,

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44. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

45. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (1948); *id.* at 26 (observing that for democratic self-governance to function effectively, "unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American").

46. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

47. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

48. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that "First Amendment . . . law has as its primary, though unstated, object the discovery of improper governmental motives"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529.

49. *See* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 782 (1986) (describing "negative" theories of free speech that "stress[ ] the harmful consequences of regulating speech rather than its intrinsic value").

50. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003). Under this view, tort law represents "a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible." *Id. See generally* JULES COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

tort law might be premised on a concept of civil recourse—"the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them."[51]

Tort liability can also be imposed for purely instrumental purposes.[52] It may be used as a means of incentivizing actors to behave in socially optimal ways—by, for example, encouraging them to take precautions against accidents when they can do so more efficiently than others; deterring them from acting when those actions are excessively risky; or allocating liability to those actors most capable of distributing such losses amongst others.[53] Under this view, tort law is a mechanism for state regulation—a way for the state to shape behavior to meet certain social goals, such as minimizing the costs associated with accidents.

There is no academic or judicial consensus as to what singular set of theoretical rationales drives (or ought to drive) First Amendment law or tort law.[54] On both sides, different courts, in different contexts, have been driven by both moral and instrumental considerations in crafting doctrine. As such, every speech-tort case can best be conceptualized as a conflict between two loose collections of varied theoretical rationales, with free speech interests on one side and tort interests on the other. And this theoretical conflict is fundamental to speech-tort jurisprudence, since it is effectively a zero-sum game: When the reasons for protecting speech collide with the reasons for establishing tort liability, the elevation of one set of interests necessarily comes at the expense of the other.

C. Cultural and Practical Oppositions

Beyond the theoretical realm, speech-tort cases represent the collision of diametrically opposed sets of legal assumptions and practices. On the most fundamental level, tort law is geared towards resolving private disputes between individuals. The substance of tort doctrine is often established judicially, through common law development rather than by statute. And the government usually is not a party in a tort action; typically, the only state actor in tort suits is the court deciding

51. Zipursky, *supra* note 50, at 699.

52. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

53. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 18–20 (4th ed. 2012).

54. *See supra* note 42; Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997) (describing this conflict amongst tort theorists).

the case.[55] First Amendment law, by contrast, is public law concerned with the relationship between individuals and the government. Thus, in paradigmatic First Amendment cases, courts are reviewing the government's direct enforcement of a speech regulation against an individual subject to some sort of direct sanction. And this regulation is generally the product of a clear, discrete, and direct government act.[56]

As David Anderson has observed, tort law and First Amendment law make for "uneasy bedfellows" such that speech-tort jurisprudence represents a "clash of divergent legal cultures":[57] the circumstances, intuitions, and approaches surrounding a paradigmatic First Amendment case stand in stark contrast to those surrounding a paradigmatic tort case. Anderson has chronicled these cultural and practical oppositions with considerable depth and insight, and in this Section, I summarize them briefly, drawing substantially on Anderson's work.

1. The Nature of First Amendment Law Versus Tort Law

The goal of First Amendment law is to protect individuals against government action that oversteps the constitutional boundary.[58] As such, it is counter-majoritarian in nature: A fundamental aspect of First Amendment doctrine is an extreme suspicion of all government regulation within the realm of speech, with the presumption that all such regulation is inherently suspect, even if it appears to be well-intentioned in nature.[59]

First Amendment law thus tends to regard the jury with deep suspicion, as it is a majoritarian institution that might seek to stamp out unpopular views through biased decision making.[60] This deep suspi-

55. *See* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 755–56 (2004).

56. *See id.* at 755.

57. *Id.* at 759.

58. *See id.* at 765.

59. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (stating that the government should assume that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); Dale Carpenter, *The Anti-paternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 586 (2004) ("The Court had long been a guardian against letting the state assume the role of guardian over the minds of the people.").

60. *See* Anderson, *supra* note 55, at 764 (observing that "a central tenet of First Amendment law is distrust of juries").

cion of the government also translates to a searching inquiry into all possible applications of the regulation in question[61]—a forward-looking concern that fits the regulation-focused paradigm of public law doctrine.[62] And First Amendment law generally demands extreme narrowness and precision with respect to government regulations of speech, as reflected in the tailoring requirements of the intermediate and strict scrutiny standards.[63]

Furthermore—and of particular significance for present purposes—First Amendment law strongly favors formulating doctrine around clear, relatively administrable, and highly speech-protective rules, at least when speech is regulated based on its content.[64] This posture is encapsulated in the cornerstone rule that content-based restrictions on all speech—save a few discrete low-value speech exceptions—are subject to strict scrutiny, which almost invariably means that the regulation will be struck down.[65] This rule—blunt and highly overinclusive, but relatively clear and administrable—is rooted in the broad presumption that open-ended discretion will invariably invite government abuse and bias. As Geoffrey Stone has described it, "[T]he Court has appropriately embraced a 'fortress model' of jurisprudence that gives judges little room to maneuver and that intentionally overprotects speech, in order to minimize the potential harm from legislative and administrative abuse and judicial miscalculation."[66] In the typical First Amendment context, any benefits produced from the flexibility of more open-ended and discretionary approaches are broadly deemed to be outweighed by the high risk of government abuse.

This strong preference for rule-like, one-size-fits-all approaches has been reinforced by the Court's recent efforts to limit the degree of segmentation and categorization within First Amendment doctrine. In a series of cases starting with *United States v. Stevens*, the Court rejected the argument that new low-value speech categories can be es-

61. *See id.* at 771 (stating that "the generic strict scrutiny model of First Amendment law . . . require[s] the court to look beyond the case at hand to the effects that liability *might have on other speakers*").

62. *See* Oman & Solomon, *supra* note 29, at 1112.

63. Anderson, *supra* note 55, at 759–60.

64. *See* David S. Han, *Middle-Value Speech*, 91 S. CALIF. L. REV. 65, 79–83 (2017); Anderson, *supra* note 55, at 759–60 ("The culture of First Amendment jurisprudence seeks precision and predictability . . . .").

65. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.").

66. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 73–74 (1987).

tablished by categorically balancing the speech's costs and benefits,[67] despite numerous past statements to the contrary.[68] Rather, it held that new categories can only be recognized if there is "persuasive evidence" that the speech in question "is part of a long (if heretofore unrecognized) tradition of proscription."[69]

Tort law, by contrast, is majoritarian in nature. It seeks to establish and enforce community values and norms,[70] and the focal point of this pursuit is the jury—the ultimate expositor of such values and norms.[71] Although, as noted above, tort law can be conceptualized instrumentally as a regulatory tool, it can also be conceptualized in deontological terms, with a backward-looking focus on effecting corrective justice and providing civil recourse with respect to the particular incident in question.[72]

Tort law therefore tends to be far more comfortable with imprecision, open-endedness, and contextual inquiries, encapsulated most clearly in the "reasonable person" standard at the heart of negligence doctrine.[73] As such, it often embraces categorization and doctrinal segmentation—the creation of discrete contextual categories to which distinct rules apply.[74] And far from viewing the adjudication and en-

67. 559 U.S. 460, 470 (2010).

68. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and 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."); New York v. Ferber, 458 U.S. 747, 754–64 (1982) (classifying child pornography as low-value speech based on the categorical balancing outlined in *Chaplinsky*).

69. Brown v. Entm't Merch. Ass'n, 546 U.S. 786, 792 (2011).

70. *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1325 (2017) ("Tort has historically served as a means of determining community norms, encouraging observance of those norms to enhance private cooperation, and stigmatizing those who deviate.").

71. *See* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 380–81 (1996) ("Jury adjudication is intended to bring the moral sense of the community to bear on controversial disputes. Thus, it draws authority from its claim to articulate the sense of justice shared by a particular community."); Anderson, *supra* note 55, at 765 (observing that tort law "assumes that lay people are at least as likely as judges to make good decisions on many of the questions that ultimately determine tort liability").

72. Anderson, *supra* note 55, at 765 ("In tort law, telling people what they should do is a secondary enterprise; whatever effect tort law has in guiding conduct arises from what it does post facto in the course of adjusting losses.").

73. *Id.* at 762. *See also* Benjamin C. Zipursky, Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 495–99 (2011) (observing that "tort law is chock full of standards and is as open textured as any area," and defending this "open texture" of tort law as an important means of "protecting[ing] a plaintiff's individual right to redress").

74. Negligence law is replete with this sort of doctrinal segmentation: distinct duty standards apply, for example, to those acting in an emergency situation, to landowners or occupiers of

forcement of tort judgments with suspicion, tort law embraces this as a means of preserving and ratifying the sorts of broad value judgments—reflected by jury determinations—used to identify social wrongs warranting compensation.[75]

2. State Action

As noted above, the *Sullivan* Court made clear that the imposition of tort liability constitutes state action that may be subject to the strictures of the First Amendment.[76] The state action involved in speech-tort cases, however, is fundamentally different from that of typical First Amendment cases. In the typical First Amendment case, the legislature or executive crafts a speech regulation, and the government enforces it directly against an individual in the form of some sort of sanction. If the restriction on speech is content-based, the court applies some sort of scrutiny standard—typically strict scrutiny—which requires the government to articulate both the significance of the regulatory interest in question and the extent to which the regulation is sufficiently tailored to survive such scrutiny.[77] And this justification process occurs directly, since the government—as the direct regulator of the conduct in question—is one of the litigants in the suit.[78]

By contrast, tort suits are generally initiated by private parties, rather than the government, and the government is not usually a party in the suit. The substance of tort doctrine is often derived from judicially crafted common law rather than discrete acts of legislation or administrative rulemaking. As such, the requisite state action comes

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land, to those with physical disabilities, to professionals, to children, and so on. *See* 1 DAN B. DOBBS, THE LAW OF TORTS §§ 118–131, at 280–309 (2001).

75. *See* Keating, *supra* note 71, at 381 (observing that because jury adjudication "draws authority from its claim to articulate the sense of justice shared by a particular community," it "legitimizes controversial outcomes even in the face of persistent disagreement").

76. *See* New York Times v. Sullivan, 376 U.S. 254, 265 (1964). Whether this accords with the historical understanding of the First Amendment is subject to some debate. In a recent opinion concurring in the denial of certiorari, Justice Thomas argued, "Before our decision in *New York Times*, we consistently recognized that the First Amendment did not displace the common law of libel." McKee v. Cosby, 139 S. Ct. 675, 680 (2019). On the other hand, Eugene Volokh has argued that "constitutional constraints on speech-based civil liability have deep roots, stretching back to the Framing era," marshalling evidence that "[m]any cases and commentators from that time took for granted that civil liability was subject to constitutional constraints . . . ." Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250, 259 (2010).

77. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

78. *See* Anderson, *supra* note 55, at 766–68.

only in the form of the court's application of a state rule of law,[79] rather than from a direct act of enforcement by the government upon an individual.[80]

This posture makes for an odd fit between tort cases and the prototypical scrutiny-based approach to evaluating First Amendment cases. If the government is required to articulate the important or compelling interests served by the regulation and to defend the fit between the regulation and the interests in question, it is unclear who represents the state in doing so within the speech-tort context. It is, to a certain extent, the plaintiff, since "only the plaintiff has a specific stake that will be lost if the state's interest is not successfully defended."[81] But it is also, to a certain extent, the court, given that it is both the sole state actor in the suit and (in the traditional common law context) the ultimate originator of the law in question.[82] This, of course, puts the court in the awkward position of acting as both arbiter of the dispute in question and defender of the state's interests in preserving the common law rule in question.[83]

3. Regulation versus Individual Justice

Finally, as Nathan Oman and Jason Solomon have discussed in detail, a fundamental tension exists between the clearly regulatory nature of typical First Amendment cases and the more complex nature of tort law.[84] First Amendment law is public law concerned with the relationship between individuals and the government; in the prototypical First Amendment case—like, for example, a statute criminalizing speech—the government's action is clearly regulatory in nature, with the forward-looking goal of discouraging the speech in question.

Tort law, however, is more complex. If conceptualized in purely instrumental terms, it is similarly regulatory in nature, with the goal of

79. *See Sullivan*, 376 U.S. at 265 ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only . . . .").

80. *See* Anderson, *supra* note 55, at 767–78.

81. *Id.* at 771. As Anderson observed, this places plaintiffs in an awkward position. Unlike the government acting in its regulatory capacity, a plaintiff's sole concern is usually to seek relief in her own particular case. In the quasi-regulatory speech-tort context, however, plaintiffs are expected to broadly justify the rule as applied in a wide range of cases well beyond the scope of the plaintiff's own case. *See id.* at 772–73.

82. *See id.* at 767–78.

83. *Id.* at 769–70.

84. Oman & Solomon, *supra* note 29, at 1137–43.

incentivizing individuals to act in a socially optimal manner.[85] This is how the Court has generally framed the tort actions in its speech-tort cases: The state is using private tort actions as a means to accomplish its regulatory goals—such as the suppression of harmful speech—in a manner that is essentially indistinguishable from a direct criminal prohibition.[86]

As discussed above, however, this is only one particular conception of tort law. The core purpose of tort law may also be conceptualized as deontological in nature, with the goal of effecting individual justice within the specific case at hand.[87] As Benjamin Zipursky described it, "Tort law, unlike criminal law or regulation, is not a series of general prohibitions or restrictions promulgated and then enforced by the state. It is a system for empowering private parties to use the courts to redress wrongful injuries done to them by others."[88] If viewed in this manner, private tort actions do not resemble the sort of state action that ought to be subject to intense scrutiny under the First Amendment.[89]

II. Conceptualizing Speech-Tort Cases

A. The Court's Approach to Speech-Tort Jurisprudence

The foundational theoretical, cultural, and practical conflicts outlined above create an inherent tension within speech-tort cases. If one views such cases purely through the First Amendment lens, the application of tort law—through judicial determinations of tort liability—is ultimately no different than other, more direct means of government regulation. This would therefore justify the same sorts of blunt, categorical, and highly prophylactic approaches that are inherently tied to First Amendment doctrine's deep suspicion of government abuse. On the other hand, if viewed purely through the private law lens, speech-tort cases are primarily about individual justice, with the goal of providing compensation and recourse in cases where private parties wrongfully inflict social harms on others. This might therefore favor

85. *See id.* at 1112 (critiquing "the Supreme Court's theory of private law—one that follows the dominant view of private law as a species of government regulation . . . .").

86. *See id.* at 1140.

87. As discussed above, this may be premised on a corrective justice or civil recourse conception of tort law. *See supra* Section I.B; Oman & Solomon, *supra* note 29, at 1119–25 (describing the alternate conception of private law as individual justice).

88. Zipursky, *supra* note 73, at 478.

89. *See* Oman & Solomon, *supra* note 29, at 1145 (observing that "in providing recourse through the private law, the state is not primarily regulating or punishing speech").

the backward-looking, highly contextual, and open-ended approaches typically adopted in the tort context.

In *Sullivan*, the Court quite explicitly adopted the former approach. It conflated the private libel suit in question with the Sedition Act, observing that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[90] In the Court's eyes, awarding libel damages in a suit brought by a public official for criticism of official conduct was no different from directly criminalizing seditious libel. The Court's approach therefore reflected the same basic intuitions and values that are emblematic of traditional First Amendment contexts: a strong emphasis on avoiding chilling effects and an intense suspicion of the state's motives. And this strong First Amendment bent was directly reflected in the doctrinal approach the Court ultimately adopted: the establishment of a relatively simple, highly prophylactic,[91] and categorical "actual malice" rule in defamation cases brought by public officials.[92]

In its post-*Sullivan* defamation cases, the Court introduced some nuance into this approach. In *Gertz*, it held that when private figures are suing regarding defamatory statements on issues of public concern, the state could constitutionally allow plaintiffs to recover actual damages based merely on a showing of negligence.[93] Later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court suggested that in cases dealing with private figures suing for defamatory statements regarding issues of *private* concern, the permissive standards of common law defamation can constitutionally be applied without any modifications,[94] indicating that within at least some subsets of speech-tort

90. New York Times v. Sullivan, 376 U.S. 254, 277 (1964).

91. *See id.* at 271–72 (observing that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive"). The *Sullivan* test is prophylactic because it protects some speech that is, as a technical matter, constitutionally worthless—false statements of fact that cause reputational damage—in order to ensure that risk-averse speakers are not chilled from engaging in constitutionally protected speech. Such speakers may be chilled due to the risk of judicial error or concerns about their ability to marshal proof regarding their speech's proper classification, among other reasons. *See generally* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978).

92. *Sullivan*, 376 U.S. at 279–80.

93. Gertz v. Robert Welch, 418 U.S. 323, 347 (1974).

94. 472 U.S. 749, 761 (1985) (plurality opinion) (holding that in plaintiffs in such cases may recover presumed and punitive damages without a showing of actual malice). Although only four Justices joined the plurality opinion in *Dun & Bradstreet*, both Chief Justice Warren Burger and Justice Byron White, in separate opinions concurring in the judgment, appeared to agree with the basic rationale of the plurality opinion, though both would have overruled *Gertz*. *Id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

jurisprudence, states still have free rein to craft tort doctrine with no (or only minimal) constitutional constraints. In neither of these cases, however, was the Court's holding explicitly driven by any overarching sense that the speech-tort context was exceptional in some fundamental way; rather, it undertook the same sort of interest-balancing between speech and regulatory interests typical of traditional First Amendment jurisprudence, albeit at a more generalized level.[95]

In the decades following *Sullivan*, the Court largely adhered to the defamation framework in speech-tort cases falling outside of the defamation context. In *Time, Inc. v. Hill*, the Court applied the same actual malice standard to a claim for false light invasion of privacy.[96] And in *Hustler v. Falwell*, the Court held that public figures and public officials could not recover for intentional infliction of emotional distress (IIED) on the basis of a work of parody "without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'"[97] Neither case represented much of a departure from the defamation context of *Sullivan* and its progeny. Although false light claims are technically distinct from defamation claims, their overlap with defamation is substantial—so much so that some states have declined to recognize false light as a separate claim.[98] And *Falwell* was, in effect, a defamation case in disguise—an attempt on the part of a public figure plaintiff to plead IIED in order to circumvent the stringent constitutional requirements he would have to meet for a defamation claim.[99] Some lower courts, however, started to apply the Court's defamation approach to a wider variety of tort contexts, including right of publicity[100] and intentional interference with contractual relations and prospective economic relations.[101]

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95. *See Gertz*, 418 U.S. at 348 (premising its loosening of the stringent *Sullivan* standard in private figure defamation cases on "the strong and legitimate state interest in compensating private individuals for injury to reputation"); *Dun & Bradstreet*, 472 U.S. at 760 (plurality opinion) (observing that while speech on a matter of private concern "is not totally unprotected by the First Amendment, . . . its protections are less stringent").

96. 385 U.S. 374, 390–91 (1967).

97. 485 U.S. 46, 56 (1988).

98. *See, e.g.*, Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994) (rejecting false light tort because "it largely duplicates other rights of recovery, particularly defamation"); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (declining to recognize false light due to concerns that "claims under false light are similar to claims of defamation").

99. *See, e.g.*, David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 169 (1997) ("Read for all it's worth, *Falwell* sounded the death knell for efforts to circumvent *New York Times* by the artful pleading of alternative tort theories, at least when the focus is on the content of the article.").

100. *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001).

101. *See* Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., 175 F.3d 848, 856–58 (10th Cir. 1999); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990).

In the 2011 case of *Snyder v. Phelps*, the Court confronted a traditional speech-tort case completely divorced from the defamation context.[102] In *Snyder*, the Westboro Baptist Church picketed at the funeral of Matthew Snyder, a marine who had been killed in Iraq. As the funeral procession passed, church members held up signs that stated, among other things, "Thank God for IEDs," "Thank God for Dead Soldiers," "God Hates Fags," and "You're Going to Hell."[103] Snyder's father sued Westboro for IIED, among other claims.[104]

At trial, the jury found that the church's actions met all of the common law elements of the tort and awarded Snyder's father $2.9 million in compensatory damages, along with punitive damages.[105] Nevertheless, the Supreme Court held that the First Amendment exempted the church from all tort liability. The Court's holding turned largely on its determination that the speech in question constituted speech regarding issues of public concern—the sort of speech that is "at the heart of the First Amendment's protection."[106] As such, the Court observed that while such speech "can . . . inflict great pain[,] . . . we cannot react to that pain by punishing the speaker."[107]

Snyder dealt with a speech-tort claim falling well outside of the defamation context. The nub of the claim in *Snyder* was not that the statements in question were false or that they damaged the plaintiff's reputation. Rather, *Snyder* involved a straightforward IIED claim,

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102. 562 U.S. 443, 450 (2011). Although Snyder's suit against the Westboro defendants included a defamation claim, the district court granted summary judgment for the defendants on that claim, and the case as analyzed by the Supreme Court was far afield from the typical defamation context. *See id.*; *see also infra* text accompanying notes 107-109.

103. *Snyder*, 562 U.S. at 448.

104. *Id.* at 450. *Snyder* raises an interesting question with respect to the Supreme Court's doctrine regarding low-value speech—that is, those established categories of speech, such as obscenity, defamation, incitement, and fighting words, that are broadly deemed to be unprotected such that the government has significant freedom to regulate them based on content. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010). One might argue that under the *Stevens* test for low-value speech, the imposition of tort liability in speech-tort cases—which is almost invariably premised on the content of the speech—is constitutional only insofar as it applies to one of the historically recognized categories of low-value speech, which (at the moment) does not include speech causing IIED. *Id.* at 471–72 (holding that a discrete subset of speech may be classified as low-value only if it "ha[s] been historically unprotected"). I do not focus on this question here for two reasons. First, as I have previously argued, the Court's "historical" analysis in the *Stevens* context is so open-ended as to be largely illusory, giving the Court ample freedom to classify such speech as low-value if it so chooses. Second, all of the Justices in *Snyder* recognized the possibility of upholding speech-based IIED liability under an appropriate set of facts, despite the fact that such speech does not obviously fall into any of the presently recognized categories of low-value speech. For a more detailed discussion of this issue, see Han, *supra* note 9, at 1147–50.

105. *Snyder*, 562 U.S. at 450.

106. *Id.* at 451–52.

107. *Id.* at 460–61.

which under Maryland law required the plaintiff to prove "that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress."[108] And although these elements are generally deemed to be highly stringent in nature, there appeared to be no dispute throughout the appeal regarding the jury's finding that the elements were met under Maryland tort law.[109]

In analyzing the case, however, the Court continued to adhere to a purely public-law-based approach. It presumed the broad conceptual equivalence between speech-tort cases and run-of-the-mill First Amendment cases, frequently drawing direct comparisons between the case at hand and traditional First Amendment cases outside of the tort context.[110] It characterized the application of tort law as no different than direct government regulation, stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the *government* may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[111] It therefore viewed the jury as simply a vehicle of the government—one that must be viewed with suspicion when operating within the realm of speech.[112]

Consistent with the Court's framing of the case, its analytical focus was not on the special complications presented by the tort context, but rather entirely on traditional First Amendment concerns regarding the nature of the regulation in question and the value of the regulated speech. Given that the protestors "had the right to be where they were," the Court effectively premised the result entirely on its judgment that their speech was on a matter of public concern,[113] which "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[114] And it focused on the content-based nature of the IIED inquiry, highlighting the malleable nature of the "outrageousness" standard and contrasting the case at

108. *Id.* at 451.

109. *See id.* at 464 (Alito, J., dissenting) ("Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here.").

110. *See, e.g.*, *id.* at 453–54 (citing cases dealing with direct regulation of government employees' speech); *id.* at 457 (citing cases dealing with direct government restrictions on picketing activities).

111. *Snyder*, 562 U.S. at 458 (emphasis added).

112. *Id*.

113. *Id.* at 457–58.

114. *Id.* at 450; *see also* Gordon, *supra* note 17, at 46 (characterizing *Snyder* as "absolutist," with a "conception of the First Amendment [that] precludes state common-law tort liability attaching to speech whose content is of public concern").

hand to far less problematic content-neutral restrictions on funeral protests.[115]

The *Snyder* Court's analytical approach reflected its continued adherence to the culture and practices of First Amendment law rather than tort law in its speech-tort cases. It viewed the application of tort law as no different than direct state regulation, and it therefore approached the case with the counter-majoritarian posture characteristic of First Amendment law—one marked by a deep suspicion of government abuse through the instrument of the jury in a private tort suit. It emphasized the dangers of chilling effects on protected speech, observing that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[116]

The *Snyder* Court therefore followed *Sullivan*'s general approach of articulating broad, categorical rules to overprotect speech given the broad potential for chilling effects and government abuse. Despite the Court's half-hearted attempt, at the end of its opinion, to narrow the scope of its holding to the facts of the present case,[117] the Court's blunt approach indicated that the question of First Amendment protection rested entirely on whether the speech in question was on a matter of public concern (as long as it took place at a location where the speaker had a right to be).[118]

To be sure, the Court's speech-tort jurisprudence has been relatively sparse, and it may be difficult to draw any clear conclusions as to how it might approach future speech-tort cases based solely on *Snyder*. But as Jeffrey Steven Gordon has chronicled in detail, post-*Snyder* cases in state courts have generally ignored the Court's limiting language, construing *Snyder* as setting forth a broad principle categorically prohibiting tort liability when the allegedly tortious act in question is speech on a matter of public concern.[119] And these courts have applied this principle not only in the IIED context, but also in cases

115. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

116. *Id.* at 461.

117. *See id.* at 460 ("Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us.").

118. *Id.* at 458 ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."). *Cf.* Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2174–75 (2018) (stating that in speech-tort cases, "the government cannot regulate speech, even to promote more speech, if that speech touches on a matter of public concern or is newsworthy").

119. *See* Gordon, *supra* note 17, at 32–45.

raising other tort claims, such as intentional interference with contractual relations.[120]

All of this, of course, stands in stark contrast to the culture and practices of tort law. As discussed above, deontological theories of tort law conceptualize it as a means of effecting individual justice between private parties rather than as an instrument of government regulation.[121] Tort law embraces communitarian values as articulated by a jury of one's peers, and the judgment of the jury is valued—rather than feared—as the best means of elucidating community norms in determining what ought to constitute social wrongs warranting civil redress. It views deterrence—the chilling of socially harmful actions—as a benefit rather than a problem.[122] And it does so under a broad posture that invites flexible, open-ended, and tailored analyses that focus specifically on the case at hand while remaining anchored to a longstanding body of common law.[123]

B. The Problem with the Court's Approach

The fundamental problem with the Court's present approach to speech-tort cases is its failure to grapple with the distinctive features of the speech-tort context—features that meaningfully distinguish such cases from run-of-the-mill First Amendment cases. The unique nature, posture, and context of most speech-tort cases do not merit the same sort of extreme suspicion of government abuse and fear of impermissible chilling effects that are characteristic of traditional First Amendment contexts. The Court therefore need not adhere to the sort of blunt, categorical, and highly prophylactic approaches broadly associated with traditional First Amendment doctrine—approaches that are particularly ill-suited for the wide variety of different speech-tort contexts that resist simple categorization.

As discussed above, the Court, starting in *Sullivan*, has broadly conceptualized speech-tort cases as effectively no different from run-of-the-mill First Amendment cases, posing the same risks of chilling effects and government abuse as, say, the direct enforcement of a criminal prohibition on speech. *Sullivan*, however, represented a perfect storm of these concerns at their very apex. Sullivan was a public official—a police commissioner—who was suing a newspaper regarding allegedly defamatory statements regarding his official actions. Furthermore, Alabama libel law made it particularly easy for him to re-

120. *Id.* at 32–35, 37–38.
121. *See supra* Section I.B.
122. *See* Anderson, *supra* note 55, at 775.
123. *See* Zipursky, *supra* note 73, at 495–99.

cover a substantial amount of damages on only a limited showing; given that the statements in question were deemed libelous per se, all that Sullivan had to prove was that the defendant published the statement and that the publication referred generally to police actions (even if it never referred to him directly by name or position).[124]

It therefore made sense for the *Sullivan* Court to elide any distinction between the tort suit in question and direct government regulation. Sullivan—a public official—was directly seeking to silence criticism of his official actions, raising the same deep-seated concerns with government abuse associated with seditious libel. And if Sullivan's lawsuit effectively represented direct government regulation, then the $500,000 damages judgment created a clear, direct, and substantial chilling effect on protected speech; such a massive judgment would surely dissuade anyone from criticizing official actions in Alabama. As John Goldberg and Benjamin Zipursky observed, "*Sullivan* presented such a strong case for recognition of First Amendment limits on 'tort' liability because it was a criminal prosecution dressed up as a civil defamation action."[125]

But the Court's wholesale conflation of speech-tort cases with traditional First Amendment cases does not typically hold true outside of the idiosyncratic context of that case. In a more run-of-the-mill tort case like *Snyder*, which involved a common law tort claim between two private parties, the degree to which the operation of tort law raises First Amendment concerns is a far more complicated question.

Let's start with the issue of government abuse. In the paradigmatic First Amendment context, the risk of systematic government abuse is clear. Take, for example, a criminal prohibition on dangerous advocacy. The speech restriction arises under a discrete act of legislation that is purely regulatory in nature: its goal is to influence people's behavior in ways the government deems to be beneficial. Furthermore, the government directly decides, through the exercise of its prosecutorial discretion, when exactly it will enforce the law—it is the government itself that initiates any proceedings against speakers. As such, the government has complete and direct control over the sort of speech that will be targeted, the particular parties that will be subject to the regulation, and when (and how often) the regulation will be enforced. And this sort of substantial, systematic risk of government abuse was largely present in *Sullivan*: in effect, the government—

124. New York Times v. Sullivan, 376 U.S. 254, 262–63 (1964).

125. John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 438 (2016).

through a private tort action directly initiated by one of its officials—sought to silence speech critical of its actions.

This potential for systematic abuse, however, is far more attenuated in run-of-the-mill common law tort cases between two private parties. Most obviously, the government plays no direct role in initiating private tort actions—it is private parties that initiate such suits. The government therefore lacks the capacity to control the frequency and manage the contexts in which such tort claims will be invoked.[126] Thus, if one of the core concerns underlying First Amendment protection is the fear that the political branches of the government—those most directly beholden to majoritarian preferences—will manipulate the marketplace of ideas, then most common law tort claims are a particularly ineffective means of doing so: the legislature and executive are merely spectators observing the outcomes of tort suits, governed by judicially crafted common law, that happen to be filed by private party plaintiffs.

Of course, as stated above, the state action in speech-tort cases comes not from the political branches, but from courts' application of state rules of law. But despite the Court's recognition that the risk of government abuse generally extends to courts as well as the political branches,[127] there are many reasons to regard this sort of state action with incrementally less of a knee-jerk fear of government abuse than direct regulation. Courts cannot set their own agendas: They have little control over the lawsuits that private litigants file, and unlike the legislature, they are constrained by the particular parties, disputes, and factual circumstances presented to them. So even if, say, a particular judge were dead-set on suppressing unpopular speech, whether the judge ever has the opportunity to do so is largely a matter of happenstance. And even when such a case is before a judge, liability determinations are largely in the hands of the jury, which further dilutes the potential for abuse rooted in judges' actions.

Furthermore, as an institutional matter, courts are situated differently from the political branches. The legislature and the executive are majoritarian institutions, popularly elected with the goal of serving their constituents. In the First Amendment context, however, courts are institutionally tasked with checking the excesses of majoritarian rule and protecting unpopular speakers and viewpoints—they are ultimately the counter-majoritarian protector of free speech values. In

126. *See* Oman & Solomon, *supra* note 29, at 1141, 1148 ("One of the core features of the law of private wrongs is that nothing happens unless a wronged plaintiff chooses to sue.").

127. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (extending the broad prohibition on prior restraints under the First Amendment to injunctions).

line with this institutional role, federal judges are shielded from the political process through lifetime tenure.[128]

In addition—unlike in direct-regulation speech cases where the government is an active litigant—courts in speech-tort cases are not positioned as partisan defenders of a particular rule. Indeed, they are often operating in a common-law context, in which there is no discrete legislative or executive act to be defended, but rather an amorphous and wide-ranging body of common law with which the presiding judge may have had little to no connection in developing.[129] In the common law context, the court operates with the clear understanding that the law is not static, but rather is meant to evolve organically as varying circumstances arise. The court is—at least formally—the impartial arbiter of the dispute, working within a doctrinal context that gives it some flexibility to clarify and modify the doctrine in question.[130] Thus, at least as a matter of institutional role, one might have lesser reasons to suspect impermissible government abuse on the part of courts in adjudicating speech-tort cases.

Finally, as a theoretical matter, classifying the nature of courts' actions in speech-tort cases is a far more complex endeavor than classifying legislative action. As discussed above, the political branches' actions in creating and enforcing direct speech restrictions are clearly regulatory in nature—they are designed primarily to influence people's behavior. But tort law is not simply—and, to many, not primarily—a means of regulation; rather, it is also driven by the state's strong interest in providing compensation and recourse to the individual plaintiff in question, who has suffered harm as a result of the defendant's socially wrongful actions.[131] As Zipursky observed, "The state's role is one of referee and enforcer when one individual demands to have another held responsible to her; that is very different from the role of prosecutor and punisher."[132] Viewed in this manner,

128. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Gold Parachute"*, 83 WASH. U. L.Q. 1397, 1424 (2005) (describing life tenure's "power to shield judges from interference by the political branches and the people, leaving them free to fairly and correctly interpret the counter-majoritarian Constitution").

129. *See* Anderson, *supra* note 55, at 755 (observing that in speech-tort cases, the First Amendment threat exists "in the operation of the common law, the articulation of which is scattered, incomplete, possibly changing, and sometimes contradictory"); Gordon, *supra* note 17, at 31 (contrasting the "fixed, canonical" nature of legislation with the organic, continuously revisable nature of the common law).

130. *See* Zipursky, *supra* note 73, at 497–98.

131. *See* Oman & Solomon, *supra* note 29, at 1119–25.

132. Zipursky, *supra* note 73, at 497–98; *see also* Oman & Solomon, *supra* note 29, at 1145 (arguing that "the concerns underlying the First Amendment are not necessarily as salient in

tort law is backward-looking rather than forward-looking: The primary rationale for imposing liability in a given speech-tort case may not be to deter similar speech in the future (although that might be the effect), but to effect individual justice.[133]

To be clear, I am not arguing here that there is no potential for government abuse in the speech-tort context or that any such potential abuse cannot be the basis for First Amendment protection. If judges (and juries) are viewed as state actors, the potential for abuse is clear: If they are biased against certain unpopular viewpoints (either consciously or subconsciously), then the speech-tort context gives them ample opportunities to operationalize these biases in deciding individual speech-tort cases and crafting speech-tort doctrine through common-law development. But such concerns should not be conceived as the equivalent of those raised by direct state action, given the extent to which courts' power is circumscribed by the case-driven, private-party-initiated context of speech-tort cases; courts' very different institutional roles as compared to the political branches; and the strong, non-regulatory theoretical bases upon which traditional tort law largely rests.

All of these complexities paint a clearer picture of how speech-tort doctrine should be conceptualized. It is inaccurate to say, as a categorical matter, that speech-tort cases are just the same as run-of-the-mill First Amendment cases (as the Court has appeared to presume), or that they are simply private law cases to which the First Amendment has little relevance. As noted above, just as light is both particle and wave, speech-tort jurisprudence is First Amendment law and tort law at the same time: both public law and private law; both regulatory and compensatory; and the product of both state action and private initiative.

This unique, dual nature of speech-tort cases is captured in the complex role of the jury in such cases. On the one hand, the jury is composed of private citizens who play a vital role as the ultimate expositors of social values in the tort context—it is up to the jury to determine when one's actions may be deemed sufficiently wrongful as to justify recompense. At the same time, the jury's institutional role in reaching a verdict may be conceptualized as state action, and in this context, its actions carry the same risk of government abuse—specifi-

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cases in which a private party brings a lawsuit" because "in providing recourse through the private law, the state is not primarily regulating or punishing speech").

133. *See* Anderson, *supra* note 55, at 765 ("In tort law, telling people what they should do is a secondary enterprise; whatever effect tort law has in guiding conduct arises from what it does post facto in the course of adjusting losses.").

cally, a majoritarian institution stamping out unpopular minority viewpoints—as more traditional state action. It is therefore difficult to classify the jury in purely one manner or the other within the speech-tort context. Jurors are both private individuals and state actors; they are both valuable expositors of social values and engines for majoritarian attacks on unpopular viewpoints; and they are both *ex post* arbiters of past disputes and *ex ante* regulators of future speakers.

Thus, in practical terms, speech-tort cases are perhaps best conceptualized as a joint venture between private parties and the government.[134] A liability judgment in a speech-tort case is ultimately the product of a private actor electing to initiate a lawsuit against another private actor—a suit for which liability will often rest, to a significant extent, on the judgment of a jury composed of private individuals. It is also the product of state machinery in the form of the courts applying judicially developed common law rules, yielding liability judgments that rest upon state enforcement power, which may well be influenced by the same sorts of conscious or subconscious biases that lie at the heart of our suspicion of any government action limiting speech. It is driven by both instrumental, regulatory considerations and deontological concerns regarding individual justice. It emerges from a context in which the court is both impartial arbiter in a private dispute and sole state actor wielding the power to suppress unpopular speech.

In short, speech-tort jurisprudence is a distinctive, hybrid private/public context in which the extreme suspicion of illicit motives associated with direct state action need not apply as categorically as in the traditional First Amendment context. And this dual nature of speech-tort cases has important implications as to how any associated chilling effects should be conceptualized. As noted above, one of the primary concerns driving the Court's decision in *Sullivan* was the potential for chilling effects on protected speech—the possibility that risk-averse speakers, fearing tort liability, would steer clear of engaging in protected speech given the risk that courts may erroneously impose tort liability on such speech. And given that these chilling effects ultimately arise from the court's adjudication of a tort suit—even if that suit is between private parties—it is natural to think of them as the product of state action.

But unlike in the direct regulation context, courts cannot simply establish speech-chilling tort doctrines by fiat. The state action in question is ultimately beholden to private action—it requires a private

134. *Cf.* Oman & Solomon, *supra* note 29, at 1141 (observing that in cases like *Snyder*, "'the state' is at once everywhere and nowhere").

party not only to initiate the lawsuit, but to proceed with the suit to the point where the court can make some substantive determination regarding the merits of the case. And private parties do not make these decisions in a vacuum; they (presumably) do so based not only on the current state of the law, but also on their perceptions of the sorts of social judgments that drive the application of the relevant law (for example, the extent to which the average person would exclaim, "Outrageous!" upon hearing the facts of the case in question).[135] Private parties (and the lawyers that represent them) usually will not undertake the time and expense of filing a lawsuit unless there is some reasonable prospect of success, and in the open-textured realm of tort law, this calculation will often rest to a significant extent on their own sense of shared social norms—for example, when the defendant's actions so exceed the bounds of proper social behavior that compensation is warranted.

As such—at least in the context of a traditional common-law tort claim arising between two private parties—any chilling effects on speech produced by the court's actions are, practically speaking, the product of both state and private action. And to illustrate how this should influence our perception of these chilling effects, imagine three distinct scenarios, each of which produces chilling effects of equal magnitude on protected speech. In the first scenario, the chilling is produced by a criminal statute; in the second, it is produced by knowledge that the community will publicly shame the speaker; and in the third, it is produced by the specter of a private tort action.

The chilling in the first scenario is constitutionally problematic to the fullest extent, since it is produced by direct fear of government prosecution. The second scenario, by contrast, poses no constitutional issues, since the chilling is produced by fear that private parties will impose social sanctions on the speaker. If the public at large is hostile to a particular minority viewpoint, then private individuals are of course free to express their displeasure through, for example, ostracizing the speaker, subjecting the speaker to withering criticism, or ridiculing the speaker, even though these actions would clearly produce a chilling effect on unpopular speech. We may not deem some of these actions to be consistent with broader free speech values, but the chilling effects produced by them do not raise any technical First Amendment problems.

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135. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (describing "extreme and outrageous" conduct as conduct for 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!'").

The third scenario occupies a middle ground. The chilling produced by the specter of traditional tort liability is constitutionally problematic—but to a lesser extent than that produced in the direct regulation context—because the speech-tort context represents an amalgam of the two other scenarios: The chilling is produced by fear that private parties will impose sanctions on the speaker, but through the use of government machinery in the form of state common law courts.

So the chilling effects produced in a case like *Snyder* certainly have constitutional import: Anytime protected speech is chilled by the imposition of common law tort liability, state action is technically present and First Amendment limitations on tort law may be justified. And one can imagine discrete situations—like in the *Sullivan* context—where it might make sense to fully equate the chilling effects produced by the operation of state tort law with those produced in the typical direct regulation context. But because these chilling effects are *also* the product of private action, they should generally raise lesser constitutional concerns than in the direct regulation context, where the government has the freedom to chill speech directly in the manner of its own choosing without any reliance on private action.

Thus, given the categorically lower risk of government abuse posed in the speech-tort context, courts need not adhere to the same extreme suspicion of all state action that is central to traditional First Amendment doctrine. They therefore have some freedom to loosen, at least incrementally, the strong First Amendment preference for categorical, highly prophylactic, and relatively administrable rule-like approaches in favor of more open-ended, contextualized, standard-like approaches that can be tailored to better fit the complex nature of speech-tort cases. If most speech-tort cases can be conceptualized as a joint venture driven in part by private action and in part by the state, then the Court can reasonably lower its guard (if only by a few inches) in crafting speech-tort doctrine.

III. Adopting More Flexible Approaches in Speech-Tort Cases

A. The Factual and Doctrinal Eclecticism of Speech-Tort Cases

To say that courts should be incrementally more comfortable in adopting open-ended, standard-like approaches in speech-tort cases does not mean that they *should* adopt such approaches in all circumstances. Under the basic rules-versus-standards framework, rule-like approaches provide clarity, predictability, and administrability; they cabin judicial discretion and produce consistent outcomes that allow

people to conform their behavior accordingly.[136] This comes, however, at the cost of rigidity: they are by nature over- or under-inclusive, leading to anomalous outcomes in certain cases.[137]

Standard-like approaches, on the other hand, allow for greater flexibility, permitting decisionmakers to exercise discretion and make judgments tailored around a wider variety of contextual factors.[138] They also render the doctrine less clear, predictable, and administrable, which may chill risk-averse people from undertaking socially useful activities.[139] Given this dynamic, an incremental shift towards the standards side of the spectrum makes sense only when the incremental gains associated with adopting more flexible, tailored approaches outweigh the incremental losses associated with reduced clarity and administrability.

As discussed above, the unique nature of the speech-tort context should produce a comparatively lesser fear of government abuse and impermissible chilling effects than in the traditional First Amendment context, which translates to a comparatively greater comfort with the exercise of judicial discretion. And on the other side of the equation, standard-like approaches that allow courts to incorporate more contextualized inquiries will often carry substantial value given the significant complexity and eclecticism of speech-tort cases.

But even if speech-tort cases can be broadly conceptualized as joint ventures involving both private initiative and state action, not all speech-tort joint ventures are the same. Practically speaking, the degree of constitutional concern raised by a particular speech-tort context varies based on a broad intuitional judgment regarding the likelihood and potential risk of government mischief—the purposeful manipulation of the marketplace of ideas—within that context. And this judgment rests on two closely linked inquiries.

The first is the extent to which the government, as opposed to a private party, is driving the tort action in question: The more that the government rather than a private party drives the tort action, the more it resembles the sort of direct regulation justifying the extreme suspicion of government abuse typical of First Amendment jurispru-

136. *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–85 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–63 (1992).

137. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976) ("The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules.").

138. *See, e.g.*, Schlag, *supra* note 136, at 385; Sullivan, *supra* note 136, at 58–62.

139. *See, e.g.*, Sullivan, *supra* note 136, at 62 ("Standards produce uncertainty, thereby chilling socially productive behavior.").

dence. To be clear, this inquiry is distinct from the purely binary state action question; as *Sullivan* made clear, state action technically exists anytime a court imposes tort liability based on the application of state law.[140] Rather, it poses a more pragmatic question: To what extent should tort liability in the given context be characterized as government regulation of speech versus individual recourse driven by private initiative?[141]

The second inquiry is the extent to which the particular factual and doctrinal circumstances in question are either suggestive of, or highly conducive to, the broad suppression of valuable speech, either directly or through chilling effects. Of course, the greater the likelihood that valuable speech will be suppressed by the imposition of tort liability, and the broader the scope of speech subject to direct or indirect suppression, the greater the degree of constitutional concern.

These two closely linked inquiries[142] form the basis for a broad intuitional judgment regarding the likelihood and potential risk of government mischief—the purposeful manipulation of the marketplace of ideas—within each particular speech-tort context. The more that we suspect that some sort of actual or potential government mischief is involved—either within the adjudication of the particular case at hand or in the potential future ramifications of the ruling—the more willing we are to find a First Amendment violation calling for the establishment of constitutional boundaries. And this broad intuitional judgment is ultimately the product of a wide and eclectic range of factual and doctrinal factors, a number of which I discuss in detail below.

Before turning to these factors, however, it is worth clarifying the exact contours of my argument here. I am not arguing that rule-like approaches should never be adopted in speech-tort cases or that the Court should always adopt completely open-ended, case-by-case bal-

140. *See* Oman & Solomon, *supra* note 29, at 1145 ("The state-action doctrine is unitary; either something is state action, or it is not."). As Oman and Solomon note, the binary nature of the state action doctrine cannot adequately account for the different degrees of formal state involvement in speech-tort cases. *See id.*; *see also infra* Section III.A.3.

141. This judgment may be a messy one, as it extends beyond cut-and-dry factors like the government's technical involvement in the case. For example, as discussed above, the jury can be characterized either as private individuals acting as *ex post* arbiters of past disputes or as government actors acting as engines for majoritarian attacks on unpopular viewpoints. *See supra* Section II.B. How exactly the jury is best characterized in a given case will ultimately rest on one's intuitional judgments regarding the particular circumstances and context of that case.

142. The inquiries will often overlap in practice. For example, the greater the risk that valuable speech will be suppressed by the imposition of tort liability, the more likely we may be to characterize the imposition of such liability as effectively regulatory and government-driven in nature rather than private. On the other hand, when it appears that the government rather than a private party is driving the tort action, we are more likely to suspect that broad suppression of valuable speech is afoot.

ancing approaches. Rather, I merely argue that the Court should recognize—and take full advantage of—the comparative flexibility it has in crafting speech-tort doctrine as compared to traditional speech doctrine.

As I hope the discussion below makes clear, speech-tort cases are complex, raising varying degrees of constitutional concern based on a wide range of circumstances. But the unique nature of the speech-tort context allows for a more meaningful degree of segmentation, categorization, and contextualization within the doctrine—an approach that runs directly counter to both the Court's recent efforts to limit such segmentation in traditional First Amendment doctrine[143] and its broad approach in *Snyder*.[144] In some of these discrete circumstances, rule-like approaches may make sense; in others, more open-ended tests may be a better fit. But my core argument here is that the Court should embrace the full range of doctrinal tools it has at its disposal to account for the complexity and variety of speech-tort cases, rather than adopt the broad, rigid, one-size-fits-all posture emblematic of its approach to traditional First Amendment cases.

1. Stringency of Established Doctrinal Standards

The realm of tort law covers a wide range of claims, each of which implicates a distinct legally protected interest, and each of which is constructed with varying degrees of stringency to establish liability. A defamation claim is vastly different from an IIED claim, a products liability claim, a right of publicity claim, or a claim for intentional interference with prospective economic relations, and each potentially encroaches upon First Amendment principles in a distinct manner.

As discussed above, although the Court's speech-tort jurisprudence is relatively sparse, it has evinced a tendency—shared by the lower courts—to simply extend aspects of its defamation framework to other tort contexts. It extended the *Sullivan* approach to false light privacy claims in *Hill* and to certain types of IIED claims in *Falwell*, while lower courts extended it to right of publicity and tortious interference claims.[145] And in *Snyder*—an IIED case that, unlike *Falwell*, fell well outside of the defamation context—the Court continued to adhere to the same broad assumptions it had adopted in the defamation context: It characterized the application of tort law as direct government regulation to be evaluated in the typical First Amendment

143. *See supra* text accompanying notes 67–69.
144. *See supra* Section II.A.
145. *See id*.

posture of deep suspicion of government abuse.[146] It therefore adopted the same broad, categorical approach in the IIED context, strongly implying that IIED liability simply cannot lie when the allegedly tortious act in question is speech on a matter of public concern.[147]

Different tort claims, however, vary substantially as to the ease by which they may be established under prevailing doctrine, raising distinct risks that may call for distinct doctrinal treatment. Under the common law, the bar for establishing a libel claim was very low: in many jurisdictions (like Alabama), the plaintiff need only prove a defamatory statement, that the statement was of and concerning the plaintiff, and that it was communicated to at least one person besides the defamed party.[148] Furthermore, "the plaintiff could recover without proof of any fault by the defendant, without any proof that the publication was false, and without any proof of actual damages."[149] As such, the Court's aggressively categorical and highly prophylactic approach in crafting a constitutional corrective in *Sullivan* made sense, given the significant risk of substantial chilling effects and government abuse associated with the highly permissive common law standards.

But as Justice Samuel Alito highlighted in his *Snyder* dissent, IIED is fundamentally different—it is "a narrow tort with requirements that 'are rigorous, and difficult to satisfy.'"[150] Unlike common law defamation, IIED requires either intent to inflict severe emotional distress or recklessness on the part of the defendant.[151] The conduct must be "extreme and outrageous"—an element that has been strictly construed, as indicated by the oft-quoted Restatement characterization of it as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[152] And the

146. *See id*.

147. *See* Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

148. *See* New York Times v. Sullivan, 376 U.S. 254, 262 (1964); DOBBS, *supra* note 74, § 401, at 1120 (listing the traditional common law elements of libel).

149. DOBBS, *supra* note 74, at 1120.

150. *Snyder*, 562 U.S. at 464 (Alito, J., dissenting).

151. Zipursky, *supra* note 73, at 504–05 ("Those who wish to avoid liability have complete control over that decision; the intentionality requirement helps to ensure that we do not have accidental liability here, but only liability where someone has deliberately chosen to behave in a way that they know will inflict serious injury upon others.").

152. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

plaintiff must suffer *severe* emotional distress, a standard that has similarly been construed strictly by courts.[153]

As Zipursky has observed, the apparently open-textured nature of the outrageousness requirement belies its actual role and development through common law decision-making. The outrageousness determination "is, in effect, a decision narrowing [IIED] liability in a special way: by insulating defendants from liability except in the case where the most basic familiarity with social norms and conventions would lead everyone to recognize that the conduct was well beyond the bounds of decency."[154] And as Zipursky notes, IIED, as it has developed under the common law, can be described as "a family of torts" coalescing around certain discrete factual contexts[155] that are "loosely captured through the notion of outrageous conduct . . . ."[156]

As such, the comparatively rigorous standards of IIED—as compared to the low bar set by common law libel—ought to temper, at least to some extent, any associated fears of government abuse. If only few, truly exceptional cases will meet the requisite IIED standards, the concern that IIED liability can be used as an effective instrument for government suppression of speech is correspondingly diminished.

This observation, however, comes with an important caveat. Even if one accepts the premise that IIED doctrine is currently construed in a narrow manner that limits the risk of government abuse, there is no guarantee that this construction will necessarily persist. While the common law nature of tort doctrine can provide some degree of structure and constraint to standards that might seem indeterminate on their face, it also provides the flexibility and open-endedness that allows courts to depart—sometimes rapidly—from their previous path. And this sort of discretion is of special concern in the speech context, where, as Vincent Blasi has noted, courts often face intense majoritarian pressures, particularly in those "pathological" times, like wartime, "when intolerance of unorthodox ideas is most prevalent and

153. *See, e.g.*, Russo v. White, 400 S.E.2d 160, 161, 163 (Va. 1991) (finding no severe emotional distress where plaintiff, as a result of receiving 340 "hang up" calls from defendant over a two month span, "alleged that she was nervous, could not sleep, experienced stress and 'its physical symptoms,' withdrew from activities, and was unable to concentrate at work").

154. Zipursky, *supra* note 73, at 504.

155. As Zipursky notes, these "clusters of cases" include "striking effrontery in dealing with passengers or guests, vicious practical jokes, gross sexual misconduct and/or stalking, and mishandling of the deaths, funerals, or corpses of family members." *Id.* at 502.

156. *Id.* at 503; *see also* Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695, 711–12 (2011) (observing that "[g]iven the internal policing of the [IIED] tort" through the institution of "sharp restrictions" limiting the "subjective, open-ended standard for liability," "the need for external limitations imposed by the U.S. Supreme Court may be correspondingly limited").

when governments are most able and most likely to stifle dissent systematically."[157]

To say that the common law has construed outrageousness in the IIED context to be a highly stringent standard thus doesn't necessarily guarantee that courts—particularly in times of pathological stress—will adhere to such a standard. But the inertia rooted in the broad body of preexisting common law limitations nevertheless tempers the risk of undue chilling effects on speech and the likelihood of government abuse, as it generally reflects a tort context where—as compared to the defamation context—speech values have been less often and less substantially endangered given the stringency of the standards imposed.

2. Variety of Different Tort Contexts

The extent to which we might suspect government mischief in a speech-tort case also rests upon the nature of the particular tort claim in question. Some torts focus on dignitary harms, such as defamation or IIED; some on physical harms, such as negligence; and still others on economic harms, such as intentional interference with contractual relations or right of publicity. And the allegedly tortious speech in question might produce harm through the communication of facts (whether true or false),[158] through the appropriation of another person's name or likeness,[159] or by encouraging the listener to commit a harmful act.[160] The exact degree to which each of these differences should matter in crafting speech-tort doctrine is beyond the scope of this Article, but it is clear that at least *some* of these differences should matter, and that speech-tort jurisprudence cannot be viewed as a largely apples-to-apples endeavor across tort contexts.

Indeed, in *Zacchini v. Scripps-Howard*,[161] the Court explicitly recognized the importance of distinguishing between fundamentally different speech-tort contexts. In *Zacchini*, the Court confronted a case in which a television station recorded the entirety of Hugo Zacchini's

157. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

158. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (1977) (public disclosure of private facts).

159. *See id.* § 652C.

160. *See, e.g.*, Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975) (affirming finding of negligence liability against defendant radio station for a fatal accident caused by the station's promotion awarding money to listeners who were the first to physically locate the station's vehicle, the location of which was continuously teased by the station's DJ).

161. 433 U.S. 562.

"human cannonball" act and aired it in on the local news.[162] Zacchini sued the TV station, arguing that it violated his "right to the publicity value of his performance."[163] The Ohio Supreme Court—relying heavily on the Supreme Court's decision in *Hill*, a false light case—held that the TV station's actions were protected under the First Amendment because it was broadcasting "matters of public interest."[164]

The Supreme Court, however, observed that a right of publicity claim is "entirely different" from the false light claim in *Hill*.[165] It noted that "[t]he interest protected in permitting recovery" in a false light case "is clearly that of reputation, with the same overtones of mental distress as in defamation"; by contrast, "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."[166] It also noted that "[i]n 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing."[167] The nub of a right of publicity claim isn't the fact that the material was published widely, thereby inflicting dignitary harm on the plaintiff; rather, it's that the plaintiff did not receive the commercial benefits of the publication.[168] The Court therefore held that the imposition of tort liability would not violate the First Amendment, despite the fact that the broadcast speech was clearly of public interest.[169] And this makes sense: There is less of a concern with government abuse if the core of the claim is "I didn't get paid" as opposed to "That speech inflicted dignitary harm."

Although the *Zacchini* Court clearly recognized that a distinct tort context required the establishment of distinct constitutional boundaries, *Snyder* suggests that the current Court may not be particularly sensitive to these sorts of distinctions, at least in less extreme cases.[170] Rather, as discussed above, it suggests that the Court's approach to speech-tort cases outside of the defamation context will be strongly influenced by the gravitational pull of its defamation jurisprudence.

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162. *Id.* at 563–64.

163. *Id.* at 565.

164. *Id.*

165. *Id.* at 571.

166. *Id.* at 573.

167. *Zacchini*, 433 U.S. at 573.

168. *Id.* at 573–74; *see also id.* at 578 ("Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.").

169. *Id.* at 578–79.

170. *See supra* Section II.A.

3. The Role of the Government

As Oman and Solomon observed, the degree of direct and discrete government involvement also clearly influences the extent to which we ought to suspect government mischief in a speech-tort case.[171] As *Sullivan* made clear, greater constitutional concerns arise in cases where the government or a public official is the plaintiff in the suit. When the government—or someone closely associated with the government—initiates the suit in a speech-tort case, it starts to resemble a traditional First Amendment context involving direct regulation. And when the government has this sort of direct control over litigating the civil action in question, the potential for abuse is greatly multiplied and more aggressive constitutional intervention may be justified.[172]

Similarly, more concerns might be present when the source of the substantive law is a targeted statute rather than an application of broad common law standards. A targeted statute ties liability directly to legislative action, which, as discussed above, raises greater concerns regarding government abuse than purely judicial action.[173] It also evinces the sort of clear regulatory intent that is absent in a run-of-the-mill common law case. Finally, it indicates an increased degree of government control over private actions, as the legislature is affirmatively acting to encourage private parties to bring lawsuits against particular types of speech or particular parties.[174]

4. The Nature of the Speech

As discussed above, the *Snyder* Court's analysis seemed to broadly preclude tort liability in cases where the speech in question is on a matter of public concern.[175] Although I disagree with the categorical nature of the Court's approach, whether the speech in question is on a public or private concern is certainly relevant in evaluating the likelihood of government abuse and the severity of any associated chilling

171. *See* Oman & Solomon, *supra* note 29, at 1165 (arguing that "the extent to which the state is involved in the litigation has implications for the extent to which constitutional rights are at stake").

172. *See id.* ("If the state involvement consists of making available a common-law action and enforcing a jury verdict, then the constitutional concerns should be less significant than those raised in litigation involving a state statute, agency action, or direct action by government officials.").

173. *See id.* (observing that because a statute "comes from legislators who have to face voters every few years, we ought to be suspicious of the governmental motive or purpose . . . , more so than we need to be in the . . . posture of *Snyder*").

174. For similar reasons, greater concern might also be present when the government is otherwise formally involved in the litigation as an advocate (for example, in cases where it has filed an amicus brief in support of tort liability). *See id.* at 1164.

175. *See supra* Section II.A.

effects, as the Court recognized in both *Snyder* and its defamation jurisprudence.[176] Speech on matters of public concern—such as political speech and other ideological speech—resides at the very core of First Amendment protection, and it is, by its very nature, the type of speech most likely to be targeted by a government seeking to manipulate the marketplace of ideas for its own ends.[177] Premising tort liability on this category of speech therefore poses comparatively greater risks of government abuse.

5. Case-Specific Indicia of Animus or Bias

Finally, on a more granular, case-specific level, certain qualities of the facts or the way in which the case was decided might raise a heightened suspicion of mischief on the part of the judge or jury in a particular speech-tort case. That is, certain circumstantial factors might suggest that the imposition of tort liability in the case was motivated primarily by a desire to suppress the viewpoint of the speech in question, which may influence the reviewing court's decision to intervene on constitutional grounds.

This suspicion of animus or bias in the present case—whether or not it is explicitly recognized in the reviewing court's analysis—might highlight the broad risk of abuse inherent to the doctrinal structure and approach adopted by the state court, leading reviewing courts to be more aggressive in instituting constitutional boundaries. Of course, divining the motives of judges or the jury in a particular speech-tort case is a fraught endeavor (as it is highly unlikely that any animus or bias would be directly expressed), and perhaps reviewing courts should be cautious in presuming bad motives on the part of judicial actors. Nevertheless, circumstances may arise that provide some basis for a heightened suspicion of abuse, particularly in cases where multiple factors converge.

One indicia may be the extent to which the liability judgment seems to represent a substantial stretch or departure from preexisting common law boundaries and principles. This may not be an easy judgment to make in practice—after all, tort law evolves through common law development, and it is squarely in the prerogative of state courts to adjust and modify the doctrine as novel factual circumstances arise. Nevertheless, significant departures from existing doctrine might re-

176. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61 (1985) (plurality opinion).

177. *See id. Cf.* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 298–99 (2004) ("[P]roscribing false political speech is constitutionally problematic because it empowers the government to decide what is true and false in politics.").

present a basis for doubting the court's motives. If, for example, the application of the "outrageousness" standard appears to be unusually watered down in an IIED case, or an unusually relaxed standard of proximate cause is applied in a speech-related negligence case, or speech that appears to be particularly harmless is deemed "improper" in an intentional interference with contractual relations case, then this might create suspicion that animus—rather than the neutral application of established tort principles—is driving the result.

Other indicia may include the extent to which the speech in question involves a heated and controversial issue of public concern and the extent to which the damages award appears to be grossly disproportionate to the harm suffered. None of these factors, standing alone, may be sufficient to suspect any sort of impermissible bias or animus on the part of the judge or jury. But if they all were to converge in a *Sullivan*-like case[178]—if, for example, a grossly disproportionate liability judgment is awarded in a case dealing with a heated issue of public concern, in a manner that represents a substantial stretch from existing common law doctrine—a heightened suspicion of government abuse based on presumed animus may well be justified.[179]

B. Revisiting Snyder

The wide range of different factual and doctrinal factors that influence speech-tort analyses, as described above, illustrate the broad value of adopting more contextualized, segmented, and open-ended approaches to such cases. The rigid, rule-like, one-size-fits-all approach typically favored in the First Amendment context is a poor fit for the sprawling and complex domain of speech-tort doctrine, where the decision of where to draw First Amendment boundaries—and what sorts of boundaries should be drawn—is effectively rooted in a broad intuitional judgment, premised on a wide range of factors, regarding the risk of government mischief in each particular case and speech-tort context.

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178. *See* Oman & Solomon, *supra* note 29, at 1131 (observing that "[g]iven the context of *Sullivan*, it is unsurprising that the Court saw the libel action at issue in the case primarily in terms of the state's effort to suppress critical speech"). Oman and Solomon note that "the case arose in the context of the largely unsuccessful attempt by the federal courts to force southern states to desegregate"; the "tenuous" connection between the advertisement and Sullivan; and the fact that the criticism from the *New York Times* ad "likely enhanced—rather than libeled—Sullivan's political reputation." *Id.*

179. New York Times v. Sullivan, 376 U.S. 254, 294 (1964) (Black, J., concurring) (describing the "widespread hostility to de-segregation" manifested in Montgomery—particularly against "outside agitators"—and observing that the facts of the case "suggest[ ] that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages").

And as discussed above, the unique posture of the speech-tort context gives the Court more flexibility to undertake these sorts of approaches. Although the chilling effects and risks of government abuse that arise in speech-tort cases raise constitutional concerns, there are strong reasons to regard these concerns as comparatively less severe than those arising from a direct regulation context. There is therefore less of a need to adopt the same uncompromising posture of extreme suspicion of all government action that is emblematic of First Amendment doctrine, and thus less of a need to adhere strictly to simple, rigid, and categorical rules.

Again, this is not to say that the Court should therefore institute highly discretionary First Amendment standards across the board. It is to say, however, that the Court should embrace greater contextualization in its approaches. In particular factual and doctrinal contexts—like those involved in *Sullivan*—concerns regarding government abuse may be at their apex, such that adopting rigid and highly prophylactic approaches makes eminent sense. But many other contexts—where such concerns are comparatively muted—are better suited for more modest, open-ended approaches that can more closely track the wide range of factual and doctrinal factors that drive the analysis.

To illustrate what this all might look like in practice, let's revisit *Snyder v. Phelps*. As discussed above, the Court's analysis rested entirely on its determination that the speech in question was speech on a matter of public concern (and thus carried significant constitutional value) and that the protestors were located at a place they were legally allowed to be.[180] And although the Court half-heartedly attempted to narrow its holding to the specific facts of the case, lower courts have reasonably read the Court's broad language as establishing a broad rule that tort liability cannot be imposed with respect to speech on a matter of public concern.[181]

The *Snyder* Court adhered to a highly speech-inflected approach.[182] Most notably, it leaned heavily on the content-based nature of the IIED claim.[183] As the Court observed, "A group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability."[184] The fact that IIED liability in *Snyder* "turned on the content and viewpoint of the message conveyed, rather than

180. *See supra* Section II.A.
181. *Id.*
182. *Id.*
183. *Id.*
184. Snyder v. Phelps, 562 U.S. 443, 457 (2011).

any interference with the funeral itself," played a significant role in the Court's analysis.[185] This is of course a direct reflection of traditional First Amendment doctrine, in which all content-based regulations of speech—save a few narrow exceptions—are evaluated under an onerous strict scrutiny standard, and viewpoint-based distinctions are singled out as particularly problematic.

This cornerstone First Amendment rule, however, is the product of the extreme suspicion of government abuse that is fundamental to First Amendment doctrine. As then-Professor Elena Kagan noted, the rule works to "ferret[ ] out impermissible governmental motives" in speech cases; as she observed, "[w]e presume that content-based regulation will exacerbate rather than minimize existing bias because we believe that such regulation is disproportionately linked to suspect motives."[186] As such, the Court crafted a blunt, highly prophylactic rule, which reflected the strong First Amendment presumption that the administrability and predictability benefits of such a rigid approach outweigh the costs associated with the rule's lack of precision and flexibility within the wide range of different speech contexts.[187]

The application of IIED to the speech in *Snyder* was certainly content-based (and viewpoint-based). Indeed, this is an integral aspect of *any* speech-based IIED claim: We cannot know if speech is "outrageous"—that is, "atrocious" and "utterly intolerable in a civilized society"—without knowing exactly what is said. To be sure, the essence of an IIED claim is not that the speech communicates a viewpoint that is unpopular or despicable (although this might be true in particular cases)—rather, it is that the speech, in the particular context in which it was made, fell outside of the broadest possible reaches of acceptable public behavior.[188] But if viewed purely through the First Amendment lens, this is irrelevant—given that outrageousness "is a highly mallea-

185. *Id.*

186. *See* Kagan, *supra* note 48, at 414, 450; *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 200 (1989) ("A content-based measure is viewed with suspicion because it is too likely to have been influenced by the legislature's hostility to the speech in question.").

187. *See* Strauss, *supra* note 186, at 200 ("[I]f a court is permitted to balance the benefits of a content-based measure against its costs, it is too likely that the court will be influenced by its own reaction to the point of view expressed; that is why the Supreme Court uses relatively rigid categories instead of balancing in each case.").

188. As Zipursky put it, IIED covers those cases "where the most basic familiarity with social norms and conventions would lead everyone to recognize that the conduct was well beyond the bounds of decency." Zipursky, *supra* note 73, at 504. *Cf.* Richard A. Epstein, *A Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 1, 39 (2018) ("If there had been some direct abusive conduct [in *Snyder*], I am hard pressed to think that the conduct should be protected from tort liability because the abuse related to the war in Iraq as opposed to the decedent's bad posture.").

ble standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views,"[189] we presume that IIED liability will be leveraged by the government (represented by majoritarian juries) to silence unpopular speech.

But for the reasons stated above, this presumption should not apply with equal force in all speech-tort cases, and the Court erred in suggesting that the content-based nature of IIED categorically dooms its application to any speech on a matter of public concern. In a common-law IIED case between completely private parties, the fact that the speech was on a matter of public concern alone should not have been fatal, given the lack of direct government control over the initiation and management of the case, the institutional role of the court as sole state actor, and the hybrid state/private nature of any chilling effects raised in the case. Whether the speech in question was on a matter of public concern is certainly relevant to the ultimate determination, as this would heighten the concerns with chilling effects and the risk of government abuse associated with the speech-tort context. But in a case like *Snyder*, these concerns are not so severe as to dictate that the analysis ought to categorically end there.

Rather, the Court should have undertaken a more open-ended and contextualized analysis, focusing on whether—under all of the circumstances surrounding the particular claim in question—there is strong reason to be wary of actual or potential government mischief. On this basis, one could certainly argue that the Court erred in striking down the liability judgment in *Snyder*. As an initial matter, *Snyder* was a common-law tort suit initiated by a purely private party, in which the only state action was the court's adjudication of the case. Furthermore, as Zipursky noted, the facts of the case fell neatly into one of the long-established factual contexts in which IIED liability had traditionally arisen—the "mishandling of the deaths, funerals, or corpses of family members."[190] There is therefore no strong indication that the unpopular viewpoint of the speech in some way stretched or distorted the court's application of IIED doctrine. Given the facts and posture of the case and the doctrinal backdrop, there is no strong indication that Maryland courts would have treated, for example, funeral protesters holding signs reading "God Hates Nazis" at a white supremacist's funeral any differently than the defendants in *Snyder*. Thus, accepting the Court's categorization of the speech as that on a matter of public

189. *Snyder*, 562 U.S. at 458.
190. Zipursky, *supra* note 73, at 502.

concern, the Court could nevertheless conclude, under this more open-ended analysis, that the risks of government abuse and impermissible chilling effects in the case do not outweigh the state's interests in imposing tort liability.

My ultimate quarrel here, however, is not with the result that the *Snyder* Court reached, but rather with the manner by which the Court reached it. As Justice Stephen Breyer noted in his concurrence, the Court could have reasonably reached the same result by undertaking a more modest, contextual approach.[191]

An oft-overlooked fact of the case is that the protest was located 1,000 feet from the church and "could not be seen or heard from the funeral ceremony itself";[192] Snyder himself only "saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night."[193] These facts might suggest that the finding of outrageousness was more of a stretch than might otherwise be expected.[194] Furthermore, the jury awarded Snyder $2.9 million in compensatory damages—an incredibly high and perhaps excessive amount, even with respect to the significant anguish Snyder undoubtedly felt.[195] As Eugene Volokh observed, an award of this magnitude might "reflect the jury's contempt for the Phelpsians' viewpoint."[196] All of these facts—viewed in combination with the nature and location of the speech—might indicate the significant potential for government abuse through the targeting of unpopular speech. Or perhaps—to use Justice Breyer's purely instrumental framing of the issue—"[t]o uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm."[197]

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191. Snyder v. Phelps, 562 U.S. 443, 462 (2011) (Breyer, J., concurring).

192. *Id.*

193. *Id*. at 449.

194. *See* Epstein, *supra* note 188, at 38 (arguing that "so long as there is no direct interaction between the defendant and plaintiff [the IIED] claim would fail, for the supposed impact is no greater than if the demonstration were done 100 miles away").

195. *See* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 308 ("[E]ven a grieving father likely wouldn't be damaged to the tune of $2.9 million by speech (1) that he saw once (albeit on a very emotionally significant day), not before or during the funeral but later in the day, on television, (2) that he knew was not remotely reflective of the views of his community, and (3) that he knew was said by people who are held in contempt by the community.").

196. *Id.* at 309.

197. Snyder v. Phelps, 562 U.S. 443, 462–63 (2011) (Breyer, J., concurring).

Either way, Justice Breyer's broad conceptualization of this particular speech-tort context—as one requiring a more open-ended, contextualized review of "the underlying facts in detail," beyond the nature of the speech in question[198]—strikes me as correct. A lawsuit between two purely private parties for IIED—a tort with far more stringent requirements than defamation—is not the sort of situation that automatically justifies the extreme suspicion of government abuse typical of a traditional First Amendment case, even if it involves speech on a matter of public concern. To reflexively deem IIED liability unconstitutional under these circumstances is to adopt an approach that is excessively prophylactic given the unique, hybrid nature of speech-tort cases. The speech-tort context gives the Court more precise tools to manage this sort of case, and the Court should use them.

Conclusion

Courts should evince a greater willingness to embrace more open-ended, contextualized approaches in speech-tort jurisprudence. They provide courts with greater flexibility to tailor constitutional boundaries to a wide range of different factual and doctrinal contexts, and the idiosyncratic nature of speech-tort cases gives courts greater latitude to adopt such approaches while according sufficient deference to fundamental First Amendment values. As such, they fit the complex and unique characteristics of speech-tort jurisprudence—an unruly collision of two diametrically opposed legal cultures that covers a wide, intricate, and eclectic range of civil liability.

These sorts of approaches would also be beneficial in promoting the thoughtful crafting of speech-tort doctrine through common-law processes. They yield decisions that will generally be more modest in scope, as they will be premised not on far-reaching categorical rules, but on more case- and context-specific, multi-factored analyses. This sort of incremental approach to crafting doctrine gives courts the space and time to account for the particular challenges raised in discrete speech-tort contexts. Courts need not feel the pressure—characteristic of the First Amendment context—to develop clear, categorical, and administrable rules that account for a broad range of cases and establish clear guidance to potential litigants. Rather, they can proceed more modestly and cautiously; and as they confront more and more speech-tort cases, they might, over time, be able to concretize, organize, and unify speech-tort doctrine in a more systematic manner. This more incremental, contextualized approach thus gives

198. *Id.* at 462.

courts a greater capacity to develop both constitutional doctrine and tort doctrine in a more deliberate and thoughtful manner, rather than adopt categorical approaches that may prove to be unwise with the benefit of hindsight.

Furthermore, as an institutional matter, adopting these sorts of open-ended and incremental approaches gives more freedom to state courts to experiment with different ways to doctrinally balance speech interests and tort interests.[199] State courts have, in many different contexts, taken it upon themselves to balance these interests in crafting the contours of state tort law:[200] for example, declining to recognize products liability claims based on the contents of reference books[201] or declining to recognize the tort of public disclosure of private facts.[202] Indeed, the common law tort of fraud is broadly understood to raise no constitutional issues—not because imposing liability for false speech can never pose First Amendment problems,[203] but rather because common law courts have designed it in a manner that is sufficiently protective of First Amendment interests.[204]

Thus, embracing more contextualized and open-ended approaches to speech-tort cases produces an iterative process of cooperative common law decision-making between federal and state courts and between constitutional doctrine and state tort doctrine.[205] While state courts shape the internal boundaries of state tort law to account for free speech principles, both federal and state courts are shaping the First Amendment boundaries of tort doctrine. On both fronts, the

199. *See* Anderson, *supra* note 55, at 811 ("Ideally the Court should *not* decide how tort law should be modified to achieve the right level of protection. That should be left to the state courts. It is a question to which there is unlikely to be a single right answer, and which therefore is likely to benefit from the experimentalism of the common law and federalism.").

200. *See supra* text accompanying notes 12–17 (describing state courts' balancing of speech and tort interests within common law defamation doctrine pre-*Sullivan*). *But see* Anderson, *supra* note 55, at 818 ("The Court's perceived hegemony in free speech matters seems to have a paralyzing effect on state courts. . . . Even when the Court implicitly invites alternative solutions, the state courts have not responded vigorously.").

201. *See, e.g.*, Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70 (Haw. 1992); Alm v. Van Nostrand Reinhold Co., Inc., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) ("Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.").

202. *See, e.g.*, Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988).

203. *See* United States v. Alvarez, 567 U.S. 709, 716–22 (2012) (plurality opinion) (holding that some false statements of fact are constitutionally protected).

204. *See* Han, *supra* note 9, at 1143–44 ("One could imagine a different design of the fraud tort that might infringe on First Amendment interests such that doctrinal modification would be necessary (if, for example, falsity of the statement were presumed based on a mere showing of reliance and damages).").

205. For a more detailed account of this interaction within the speech-tort context, see Gordon, *supra* note 17, at 49–51 (describing the benefits of "cooperative judicial federalism").

courts proceed cautiously and incrementally, through the organic process of common law development. They therefore not only have the time and space to thoughtfully consider the varied complexities of different speech-tort contexts as they arise, but they also have the opportunity to communicate, react, and respond to each other, creating the sort of trans-substantive dialogue and dialectical give-and-take that is particularly valuable in crafting sound doctrine. As Gordon observed, speech-tort cases "present real opportunities for state and federal courts to engage in productive dialogue, to respond to each other's opinions, and to shape the contours of their own (and each other's) law, ensuring state law compliance with federal commands."[206]

As detailed above, speech-tort jurisprudence is idiosyncratic, complicated, and potentially wide-ranging in its reach. Thus, in crafting speech-tort doctrine, courts should embrace an approach that forthrightly accounts for this complexity and eclecticism and leverages the collective capacities of both common law courts and constitutional courts to locate—through dialogue, debate, and incremental doctrine-building—the most sensible boundaries between tort liability and the First Amendment's protection of free speech.

206. *Id.* at 50.