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SNYDER V. PHELPS, OUTRAGEOUSNESS, AND THE OPEN TEXTURE OF TORT LAW

Benjamin C. Zipursky*

INTRODUCTION

On March 8, 2010, the U.S. Supreme Court granted Albert Snyder’s certiorari petition in his lawsuit against Frederick Phelps, Rebekah Phelps-Davis, Shirley Phelps-Roper, and the Westboro Baptist Church. The Phelps trio and their children and grandchildren travelled from Topeka, Kansas, to Westminster, Maryland, in order to picket the funeral that Albert Snyder had arranged for his son, Matthew Snyder, who was killed in the line of duty in Iraq. Carrying signs with statements such as “God hates the USA,” “God hates you,” “Fag troops,” and “Thank God for dead soldiers,” the Phelpses staged a public protest that was covered by the media. Although not contending that Snyder was gay, their message was that the killing of American soldiers in general and Snyder in particular was the just consequence of America’s increasing moral turpitude, heinously illustrated by its tolerance of gays in society, its widespread adultery, and many other allegedly vile aspects of contemporary American life.

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1. Snyder v. Phelps (Snyder II), 580 F.3d 206 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (2010). Snyder’s petition for certiorari stated three issues for review:
   1. Does Hustler Magazine, Inc. v. Falwell apply to a private person versus another private person concerning a private matter? 2. Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly? 3. Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Petition for Writ of Certiorari, Snyder, 130 S. Ct. 1737 (No. 09-751). In granting the petition, the Supreme Court only stated, “Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted.” Snyder, 130 S. Ct. at 1737.

2. In the words of U.S. District Judge Richard D. Bennett, “The facts of this case as presented at trial were largely undisputed.” Snyder v. Phelps (Snyder I), 533 F. Supp. 2d 567, 571 (D. Md. 2008).

3. Id. at 572.

4. See id. at 571–72.
Driving home this point was an "Epic" posted on their website entitled "The Burden of Marine Lance Cpl. Matthew Snyder." 5

Albert Snyder was allegedly saddened, sickened, and overwhelmed by this turn of events—by the conversion of a funeral for his fallen-soldier son into a publicity circus for an out-of-state religious extremist group. 6 He therefore sued the Phelps contingent for intrusion on seclusion and intentional infliction of emotional distress, publicity given to private life, civil conspiracy, and defamation. 7 A jury in federal court in the District of Maryland returned a verdict of $2.9 million in compensatory damages and $8 million in punitive damages, which the district judge reduced to $2.1 million in punitive damages. 8 However, in September of 2009, a panel of the United States Court of Appeals for the Fourth Circuit held that Snyder's claims failed as a matter of First Amendment law because the defendants were expressing views on matters of public concern and did not seriously assert anything provably false about Snyder or his son. 9

The U.S. Supreme Court heard oral arguments in Snyder v. Phelps in October of 2010. 10 While the manuscript for this Article was in final pages, the Supreme Court issued an 8–1 decision affirming the decision of the Fourth Circuit. 11 Chief Justice Roberts wrote an opinion for the Court, and Justice Alito was the sole dissenting Justice; Justice Breyer wrote a short concurring opinion, while joining the majority opinion. Because this Article was virtually complete prior to the issuance of the Court's opinion, the bulk of the Article relates to the Fourth Circuit's opinion and to the arguments that were before the Supreme Court rather than to Chief Justice Roberts's opinion. However, a Postscript addressing the Court's opinion was hastily appended after the Court's opinion was released. 12 As indicated in the Postscript and previewed below, the analysis in the central portions of the Article speaks to one of Chief Justice Roberts's critical arguments for the funeral picketers.

5. Id. at 572.
6. Id.
7. Id.
8. Id. at 573, 595.
10. Transcript of Oral Argument at 1, Snyder v. Phelps (No. 09-751).
12. The Postscript turns briefly to the Supreme Court's March 2, 2011 opinion in Snyder. Section A of the Postscript analyzes Chief Justice Roberts's and Justice Alito's separate opinions, utilizing the background of this Article to shed light on which issues were avoided and which emphasized by the Court; Section B offers a critique of Chief Justice Roberts's opinion drawn from the work completed in the earlier parts of this Article.
I suggest in what follows that the Fourth Circuit's analysis of First Amendment precedent and its application to Snyder was deeply flawed. The critique of the Fourth Circuit's analysis is merely a prelude to the larger questions of this Article, however. The principal issue is whether the tort of intentional infliction of emotional distress may be used to support a claim by a grieving family member against those who engage in a peaceful demonstration vigorously expressing extremist political and religious views at the funeral of a private individual. The issue has a constitutional aspect (which is why it is at the Court) and a tort aspect. The constitutional question is whether the imposition of tort liability would be a violation of the First Amendment as applied through the Fourteenth Amendment. The tort issue is whether tort liability is justifiable under such circumstances and, if so, on what theory or theories.

While some of the discussion of Snyder will be framed by the First Amendment issues that have taken it to the Supreme Court, the constitutional dimensions of the case are linked to our underlying theoretical inquiry in several important ways. For at the heart of the most promising constitutional argument against Snyder, I shall argue, is a form of what is in essence a jurisprudential critique: that the vagueness of the tort of intentional infliction of emotional distress (IIED) creates so much uncertainty and pliability that it should be struck down. The "outrageousness" idea at the heart of the IIED claim is plainly a morally charged concept. Whether a standards-driven tort law like this is inconsistent with constitutional values is, in effect, the overarching issue faced by the Court. It is also the central question faced in this Article. I argue that Snyder's claim should remain alive because the open-textured quality of the torts and the imposition of liability upon the Phelps are entirely consistent with the Constitution.

Part II of this Article describes the facts of Albert Snyder's lawsuit and its journey from federal district court in Maryland through the Fourth Circuit to the United States Supreme Court. Its primary focus is the majority opinion of the Fourth Circuit's reversal of the plaintiff's judgment and, in particular, the First Amendment analysis underlying that opinion. Part III is a critique of the Fourth Circuit's opinion. A critical premise of that opinion was that plaintiffs do not avoid the Supreme Court's defamation law precedent merely by asserting nominally different causes of action. While there is some

13. See infra notes 24–71 and accompanying text.
14. See infra notes 72–96 and accompanying text.
truth in that premise, the Fourth Circuit overinflated its significance and extended libel precedents far beyond their breaking point. Snyder is therefore indefensible in the terms proposed by the Fourth Circuit.

Part IV focuses on the wider free speech issues presented by the Snyder case and articulates a stronger and more candid rationale for the Fourth Circuit's opinion. The rationale is that public political protests are protected by the First Amendment and that neither of the torts asserted by the plaintiff protects interests clear enough to circumvent the First Amendment shield. More particularly, some scholars have suggested that the IIED cause of action—with its focus on outrageousness—is inherently malleable in ways that are intolerable to First Amendment values. The vagueness, moral content, and uncertainty of the tort norms in outrage and intrusion present a particularly sharp challenge to the First Amendment right of peaceful political speech. Or so the argument goes.

In Part V, I take a break from Snyder to make a more general point: tort law's open texture and heavy reliance upon standards rather than rules are not features that can be judged purely in abstraction. The law-like qualities of some domains of putative law will depend on how the courts applying this law conceive of the state's political role, the court's institutional role, the role of the jury, and the place within tort doctrine of precedent, custom, tradition, and a paradigm-based conception of tort causes of action. The common law of torts utilizes several tools to control and counterbalance the risks of depending too heavily upon open-ended standards and moral principles. A jurisprudential or constitutional critique of a tort must remain attentive to the reasons that tort law proceeds in terms of standards, to the benefits of

16. See infra notes 97–125 and accompanying text.


18. See infra notes 126–33 and accompanying text.
doing so, and to the adjudicative norms that safeguard our system against the perils of uncertainty.

Parts VI and VII utilize the framework set forth in Part V to examine the general, vagueness-based critique of the tort of IIED\textsuperscript{19} and its application to the facts of Snyder,\textsuperscript{20} respectively. We should look to see whether the putative tort or torts in this case are fairly understood as an application of a body of principles and concepts with some integrity within the common law, or as a slap-dash pasting of facts about politically odd, unconventional, and provocative speech onto a newfangled, random torts framework. To the extent that it is the latter, the application of the First Amendment to undercut this tort claim arguably reflects judicial review doing its work, albeit aggressively. To the extent that it is the former, a novel First Amendment argument for slapping it down reflects simply a superficial jurisprudential critique masking a strong and unwarranted bias against the rights, principles, and dignitary values that state tort law aspires to embody.

Snyder’s IIED claim in the district court represented a wholly legitimate application of substantive tort law in Maryland, even as it also represented an instance in which open-ended moral principles are applied by the jury against unpopular protesters and speakers. For the outrageousness of the Phelps’ behavior in this case does not lie predominantly in the sentiments or ideas expressed, but in the life experience with which they intentionally interfered: Albert Snyder’s effort to hold a funeral for his son. The tort of intentional infliction of emotional distress through outrageous conduct has a substantial history within a certain category of conduct: interference with funerals in general and with a family’s grieving process more particularly. As scores of state courts have recognized in the context of outrage and the U.S. Supreme Court itself recognized in its unanimous 2003 decision, \textit{National Archives & Records Administration v. Favish,}\textsuperscript{21} the law does acknowledge that “[f]amily members have a personal stake in honoring and mourning their dead” and does not protect the activity of one who, “by intruding upon [the family members’] grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”\textsuperscript{22}

Those who complain that the concept of outrageousness is too vague and subjective to withstand First Amendment scrutiny are ignoring the structure of the common law of torts, in general, and oper-

\begin{itemize}
\item[19.] See infra notes 134–55 and accompanying text.
\item[20.] See infra notes 156–95 and accompanying text.
\item[22.] Id. at 168.
\end{itemize}
ating without an adequate understanding of the tort of IIED, in particular. 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. This does not mean due process disappears and vagueness does not matter, but it does mean that the rule-of-law norms that the Due Process Clause is understood to entail, particularly within our federalist system, cannot be evaluated in quite the way that one would evaluate a criminal statute. What is critical—apart from jurisdictional concerns—is that the plaintiff’s claim be anchored as an injury to him; that the law’s treatment of his conduct as a wrongful injuring of the plaintiff be adequately rooted in precedent and social understanding regarding the wrongs and rights of community members; that the precedent and social understanding reflect a legitimate conceptualization of correlative rights and duties; and that the individual upon whom liability is imposed can, in some sense, be expected to be aware that the community regards the kind of injuring he did to the plaintiff as a wrongful injuring. Looked at from this point of view, the tort of intentional infliction of emotional distress through outrageous conduct is almost tailor-made to respect community members’ rights to be free of tort liability for emotional harm in all but the rarest case. The conduct of the Phelpses in Westminster, Maryland, fell squarely within the domain in which a private right of action for imposition of severe emotional distress is actionable.

Finally, the Postscript to this Article considers the Supreme Court’s March 3, 2011 decision in Snyder, offering a condensed critique of Chief Justice Roberts’s majority opinion that proceeds from the broader arguments laid out in the body of the Article.23

II. Snyder v. Phelps

A. Facts

The events in March of 2006 that gave rise to the litigation in Snyder v. Phelps occurred in the town of Westminster, Maryland, where Marine Lance Corporal Matthew A. Snyder had lived and attended high school.24 Lance Corporal Snyder died in Iraq on March 3, 2006.25 His father, Albert Snyder (Snyder), arranged a funeral at St. John’s

23. See infra notes 196–216 and accompanying text.
25. Id.
Catholic Church in Westminster for March 10, 2006.26 The funeral was picketed by the defendants, Fred W. Phelps, Sr. (Phelps) and two of his adult daughters, Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis, as well as four of Phelps’s grandchildren, all of whom had traveled from Topeka, Kansas, for the purpose of engaging in this funeral picketing.27

The defendants “traveled to Matthew Snyder’s funeral in order to publicize their message of God’s hatred of America for its tolerance of homosexuality.”28 The Westboro Baptist Church, of which the protesters were members, was also a defendant in the case.29 The Church was founded by Fred Phelps, and fifty of its sixty or seventy members are progeny or in-laws of Phelps.30 They realized that they could generate publicity for their message by protesting America’s tolerance of homosexuality at the funerals of soldiers killed in the war.31 They have protested at funerals all around the country, and their protests have garnered substantial public attention.32 Indeed, the Fourth Circuit stated that “[t]he Defendants have also been involved in litigation throughout the country relating to their protests” and that “[a]s a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing”; there has, moreover, been substantial litigation over these statutes.33

The protest at Matthew Snyder’s funeral garnered substantial attention in Westminster.34 In order to comply with legal ordinances, Phelps and his family members notified public authorities in Maryland before their arrival, and, according to Snyder, the Phelpses thereby managed to turn the “funeral for his son into a ‘media circus for their benefit.’”35 Subsequent to the events in Westminster, Rebeka Phelps-Roper wrote an “Epic” about the Snyder family, entitled “The Burden of Marine Lance Cpl. Matthew Snyder,” which she posted on www.godhatesfags.com, the Church’s website.36 As the Fourth Circuit described it, “Phelps-Roper stated that Albert Snyder and his ex-wife

26. Id.
27. See id.
28. Id. at 571–72.
29. Id. at 572.
30. See id.
31. See id.
32. See id. at 571–72.
34. Snyder I, 533 F. Supp. 2d at 572.
35. Id.
36. Id.
‘taught Matthew to defy his creator,’ ‘raised him for the devil,’ and ‘taught him that God was a liar.’”

Snyder’s arrival at St. John’s Catholic Church for the funeral circumvented the protestors, whom he did not see picketing until watching television that night. Nevertheless, the knowledge that his son’s funeral had been turned into a “media circus” by the picketing of the Phelps’s, the awareness of his other family members’ reactions to it, and his own transformed experience of the funeral allegedly generated severe emotional injury. Snyder testified to the serious physical and emotional effect the Phelps’s conduct had upon him and presented expert testimony at trial as objective evidence of the physical and emotional harm he suffered.

Approximately three months after the funeral, Snyder sued Phelps and the Westboro Baptist Church in the United States District Court for the District of Maryland; Phelps-Roper and Phelps-Davis were subsequently added to the suit. The complaint asserted two counts of invasion of privacy—intrusion on seclusion and publicity given to private life—as well as defamation and intentional infliction of emotional distress; a fifth count of civil conspiracy linked each defendant to the alleged tortious conduct of the others, much as criminal conspiracy claims do. On October 15, 2007, Judge Richard D. Bennett granted summary judgment to the defendants on one of the invasion of privacy claims—publicity given to private life—and on the defamation claim. The remaining three claims were tried to a jury. The jury returned a verdict in favor of Snyder on all three counts as to each of the four defendants: $2.9 million in compensatory damages and a total of $8 million in punitive damages. Judge Bennett denied the defendants’ motions for judgment notwithstanding the verdict and judgment as a matter of law on all claims, but remitted the $8 million in punitive damage awards to $2.1 million.

The defendants appealed the denial of their post-trial motions on liability, arguing to the Fourth Circuit that the plaintiff’s claims were legally insufficient to withstand a judgment as a matter of law under

37. Snyder II, 580 F.3d at 212.
38. See Snyder I, 533 F. Supp. 2d at 572.
39. Id.
40. Id. at 572–73, 588–89.
41. Id. at 572.
42. Id.
43. Id.
44. Id.
45. Id. at 573.
46. Id. at 595, 597.
substantive Maryland tort law and were, in any case, barred by the First Amendment. In a thoughtful opinion for Judge Duncan and himself, Judge King vacated the judgment and reversed the denial of the motion for judgment as a matter of law, all on First Amendment grounds. The Fourth Circuit opinion held that, because the defendants’ statements “[could not] reasonably be interpreted as stating actual facts about any individual,” the complaint was barred by the First Amendment as interpreted by the United States Supreme Court in Milkovich v. Lorain Journal Co. In April of 2010, the United States Supreme Court granted Snyder’s petition for certiorari.

B. Fourth Circuit Opinion

The Fourth Circuit’s opinion is best understood in the context of examining three quite decisive steps taken by the district court in dealing with the defendants’ First Amendment challenge. First, the district court held that the extent of First Amendment protection the defendants were entitled to would depend on whether the plaintiff Snyder was a public figure, in effect deciding that judgment as a matter of law on First Amendment grounds would not be appropriate unless Snyder was a public figure. Second, the district court determined that Snyder was not a public figure. Third, it instructed the members of the jury that it was up to them to “balance the Defendants’ expression of religious belief with another citizen’s right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress” and also that it was up to the members of the jury to determine whether the defendants’ actions were “so offensive and shocking as to not be entitled to First Amendment protection.”

Proceeding in reverse order, the Fourth Circuit quite justifiably bridled at the district court’s entrustment of First Amendment balancing to the jury. “[T]he district court,” Judge King wrote, “fatally erred by allowing the jury to decide relevant legal issues.” He concluded that, at a minimum, the judgment for the plaintiff must be vacated and a new trial granted. However, reasoning that “a new trial is unnec-

47. Snyder v. Phelps, 580 F.3d 206, 211, 216 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (2010).
48. Id. at 226.
49. Id. at 224, 226; see Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
51. Snyder I, 533 F. Supp. 2d at 577.
52. Snyder II, 580 F.3d at 215 (quoting jury instruction No. 21).
53. Id. at 221.
54. Id.
necessary if the Defendants can prevail as a matter of law after our independent examination of the whole record,” the Fourth Circuit turned to the other potentially dispositive arguments put forward by the defendants.55

The Fourth Circuit did not address the second question of whether Snyder was a public figure. Instead, it criticized the district court’s decision that judgment as a matter of law was warranted only if Snyder were a public figure—that the case turned on whether Snyder was a public figure or a private figure under Gertz v. Robert Welch, Inc.56 The district court erred by failing to consider the possibility that the defendants would be entitled to a judgment as a matter of law on First Amendment grounds regardless of whether the plaintiff was a public figure.57 District Judge Bennett overlooked this possibility because he failed to recognize that “[t]he Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain types of speech, and that does not depend upon the public or private status of the speech’s target.”58 Under Milkovich v. Lorain Journal Co.,59 the Fourth Circuit reasoned, a claim is not actionable under the First Amendment unless “the pertinent statements could reasonably be interpreted as asserting ‘actual facts’ about an individual.”60

The key question not even asked by the district court, according to the Fourth Circuit, was whether the Phelpses’ statements could reasonably be interpreted as asserting actual facts about an individual, “or whether they instead merely contained rhetorical hyperbole.”61 The Fourth Circuit panel took it upon itself to address this question, examining both the statements on the picket signs at the funeral and the statements within the “Epic” posted on the defendants’ website.62 The panel found that “no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son”; that the signs “do not assert provable facts about an individual”; and that “they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.”63 “Whether ‘God hates’ the United

55. Id. at 221–22.
56. Id. at 222; see also Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
57. See Snyder II, 580 F.3d at 222.
58. Id.
60. Snyder II, 580 F.3d at 222 (citing Milkovich, 497 U.S. at 20).
61. Id. (citing Milkovich, 497 U.S. at 20).
62. See id. at 222–26.
63. Id. at 223.
States or a particular group, or whether America is 'doomed,' are matters of purely subjective opinion that cannot be put to objective verification," reasoned the Fourth Circuit.\textsuperscript{64} Insofar as Snyder's action was based on the funeral picketing, it was properly subject to judgment as a matter of law under \textit{Milkovich}, regardless of whether Snyder was a public or private figure.\textsuperscript{65}

The court then applied the same analysis to the "Epic," which was "patterned after the hyperbolic and figurative language used on the various signs."\textsuperscript{66} Similarly, when the Epic asserted "that the Snyders raised their son 'for the devil,' and taught him to 'defy his Creator, to divorce, and to commit adultery,'"\textsuperscript{67} the reasonable reader would understand these assertions as "simply 'loose, figurative, or hyperbolic language' not connoting actual facts about Matthew or his parents. . . . Thus, a reasonable reader would not understand the Epic to assert actual facts about either Snyder or his son."\textsuperscript{68}

In light of this analysis of the language on the signs and in the Epic, the Fourth Circuit concluded that judgment as a matter of law should have been granted under the authority of \textit{Milkovich}.\textsuperscript{69} In a concurring opinion, Judge Shedd reasoned that judgment as a matter of law for the defendants ought to have been granted on non-constitutional grounds under a doctrine of constitutional avoidance, if there were sufficient grounds for so ruling.\textsuperscript{70} He then determined that the evidence on all of Snyder's claims was, under substantive Maryland tort law, too weak to withstand the defendants' motion for judgment as a matter of law.\textsuperscript{71} Judge King, who wrote the majority opinion for the panel, and Judge Duncan, who concurred, declined to reach the question of whether the denial of judgment as a matter of law should have been granted below because defendants waived the point by declining to appeal it.

\textbf{III. A Critique of the Fourth Circuit's Opinion}

The Fourth Circuit was plainly correct in criticizing Judge Bennett's jury instruction and in concluding that, at a minimum, the judgment must be vacated and the case retried. The more controversial aspect of the opinion is the determination that judgment as a matter of law

\begin{itemize}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 222.
\item \textsuperscript{66} \textit{Id.} at 225.
\item \textsuperscript{67} \textit{Id.} at 226 (quoting the Epic).
\item \textsuperscript{68} \textit{Id.} (quoting \textit{Milkovich v. Lorain Journal Co.}, 497 U.S. 1, 21 (1990)).
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{See id.} at 227 (Shedd, J., concurring).
\item \textsuperscript{71} \textit{Id.} at 228.
\end{itemize}
was warranted for the defendants under *Milkovich* regardless of whether Snyder was a private figure. In this Part, I argue that the Fourth Circuit's *Milkovich* analysis was weak in application and fundamentally flawed in principle. In so concluding, I do not reach the larger question of whether judgment as a matter of law was warranted on First Amendment grounds; that question is raised in subsequent parts. The only question here concerns the soundness of the Fourth Circuit's analysis.

The principal flaw in the Fourth Circuit's analysis is its failure to recognize that the tortious wrongdoings for which Snyder was seeking recovery were not reputational attacks. *Milkovich v. Lorain Journal Co.*, *Hustler Magazine Inc. v. Falwell*, and the rhetorical hyperbole case law leading up to *Milkovich* all confronted the following question: If a speaker makes fiery, critical statements about the plaintiff and does so in the context of staking out a very strong opinion, can the plaintiff sue for the injury inflicted by those statements?\(^7\)\(^2\) Chief Justice Rehnquist wrote for the Court that the key issue is not whether the defendant is staking out a strong opinion; statements of opinion may well be actionable under the First Amendment.\(^7\)\(^3\) The issue is whether what the defendant has said about the plaintiff amounts to asserting something that may be provably false. If the language on its face asserts something provably false, it is still possible that it is not actionable, because the context may be such that a reasonable reader would not understand it to be meant literally. For example, in *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, the defendant newspaper quoted citizens using the word “blackmail” to criticize the conduct of the plaintiff, a real estate developer who was pressuring a city council to approve a project; the Court thought a reasonable reader would not understand the defendant as actually asserting that the crime of blackmail had occurred, but rather as criticizing the plaintiff for his use of financial prominence and power in lobbying for himself.\(^7\)\(^4\) In *Falwell*, the defendant had published an “interview” in which the Reverend Falwell allegedly described himself as losing his virginity to his mother in an outhouse; read in hindsight through the lens of *Milkovich*, Chief Justice Rehnquist explained that the defen-

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73. *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (“No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.”).
74. *Id.* at 13–14.
dant plainly had not put forward these statements as genuinely true—Falwell was being attacked for what the defendant regarded as hypocrisy.\textsuperscript{75}

The problem with this framework as applied to \textit{Snyder} is that Snyder’s principal claim is \textit{not} that he was emotionally injured by a reputational attack. To be sure, there were defamation claims, but these were thrown out;\textsuperscript{76} moreover, it can be conceded that the IIED claim as applied to the Epic was arguably about the injuriousness of a reputational attack. The core of the claim against the Phelpses was instead that they seriously interfered with Snyder’s ability to grieve properly for his son by staging a media circus at his funeral and that, in so doing, they caused him severe emotional distress and interfered with his privacy.\textsuperscript{77} The picketing-based claim was not about attacking the plaintiff’s reputation or about attacking his son’s reputation.

The Fourth Circuit was aware of this slippage at least to some extent, but it addressed it only briefly. “Although the Supreme Court in New York Times specifically addressed the common law tort of defamation, the Court explained that its reasoning did not turn on the precise ‘form in which state power has been applied.’”\textsuperscript{78}

Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, and we have applied the Court’s controlling principles to other state law torts. Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant’s speech.\textsuperscript{79}

The Fourth Circuit’s extension of defamation principles is given a boundary by reference to \textit{Cohen v. Cowles Media Co.}\textsuperscript{80} in footnote 11: “The Supreme Court has deemed the First Amendment defense inapplicable to a state law tort claim only when the plaintiff seeks damages for actual pecuniary loss, as opposed to injury to reputation or state of mind.”\textsuperscript{81}

To the extent that the Fourth Circuit’s extension of \textit{Milkovich} beyond the torts of libel and slander is based on the idea that the Su-

\textsuperscript{75} \textit{Falwell}, 485 U.S. at 48.
\textsuperscript{77} Id. at 572.
\textsuperscript{79} Id. at 218 (citations omitted).
\textsuperscript{81} \textit{Snyder II}, 580 F.3d at 218 n.11 (citing \textit{Cohen}, 501 U.S. at 671).
The Supreme Court’s First Amendment jurisprudence is anti-formalistic, the Fourth Circuit is surely correct. More particularly, it is clear that the Court will not permit the technicality of which legal claims have been pled in the complaint to determine whether the First Amendment is applicable. Most relevantly, invasion of privacy claims plainly receive significant First Amendment protection, and the Court expressly struck down an IIED verdict in Falwell on New York Times v. Sullivan-related principles. Finally, the Fourth Circuit’s own much-heralded opinion in Food Lion, Inc. v. Capital Cities/ABC, Inc. showed that, while a tort claim itself might stand up to First Amendment scrutiny, if the damages sought were essentially the same as they would be in a defamation claim and so the claim appeared to be something of an end run around the protections of Sullivan and its progeny, then tough-minded First Amendment scrutiny would be applied to such a case notwithstanding the different torts involved.

Yet the Fourth Circuit went far beyond any of the principles just articulated because Snyder presents an entirely different fact pattern from those above. Food Lion involved a claim by a national supermarket chain whose alleged grossly unsanitary practices were the subject of a nationally broadcast ABC investigative report, which included videotape by undercover ABC reporters who had obtained clerical jobs at one or two of the stores. Food Lion’s stock plummeted after the ABC broadcast, and it sued ABC, seeking damages for the harm ABC had inflicted through its tortious conduct. However, aware of the difficulties of proving a libel case, Food Lion argued that the investigative reporters trespassed on their land, defrauded Food Lion into offering them jobs, and breached a duty of loyalty to Food Lion once they had become employees. The jury found for Food Lion on these tort claims and awarded large compensatory damages because of the stock plunge Food Lion suffered after these broadcasts. The Fourth Circuit accepted the finding of liability on these torts and nominal damages associated with them, but it did not permit the stock plummet damages because it regarded these as reputational damages for which Food Lion had found a back door.

83. Id. at 51–53.
85. Id. at 510–11.
86. See id. at 511.
87. See id.
88. Id.
89. See id. at 523–24.
Snyder’s case is quite unlike Food Lion’s. The injury for which Snyder sought a remedy had nothing to do with a reduction of Snyder in the eyes of his community. Indeed, it had nothing to do with the community coming to think of Snyder as a bad person in any way. Like a nuisance claimant, Snyder alleged that there was activity in his own private life that he was entitled to experience without unreasonable interference, and that the Phelpses intentionally—or at least knowingly and recklessly—interfered with that experience.90 The Fourth Circuit was correct in noting that the picket signs were not about Snyder, with the possible exception of two that used the second person pronoun “You’re Going to Hell” and “God Hates You.”91 Yet it inferred from this that the claim would fail the Milkovich test.92 In so doing, the Fourth Circuit was getting things exactly backwards. The fact that Snyder was not being targeted for a reputational attack shows that the wrong for which Snyder was suing was not some form of reputational attack and that therefore even a broadened version of Milkovich cannot dispose of the claim.

An exaggerated hypothetical might clarify the fallacy of the Fourth Circuit. Suppose that the signs held by the Phelpses were used as weapons in a physical thrashing and beating of persons on the sidewalk in Westminster, Maryland. No one would say that, given the nonverifiability or nonfalsifiability of the contents of the signs, there could be no battery claim. Or suppose that a loud rap group has a band practice in the house next door to me every night from 1 a.m. until 5 a.m. for six months straight. If I were to sue for nuisance, it would not be necessary for me to prove that some of the lyrics of the rap songs were verifiable or falsifiable statements about me. The wrong alleged in Snyder was the interference with the solemnity and privacy of a funeral for a beloved family member by an extremist political demonstration, not any reputational attack. It is neither here nor there whether the signs contained verifiable statements, for the right to say what was said is not what is being contested. The right to interfere with the family’s mourning is what is contested, and the legal status of the alleged right does not turn on whether the contents of the signs were verifiable.

The Milkovich critique is more plausible as to the aspects of the claim that emerge from consideration of the Epic. The Epic actually did contain many statements about the plaintiff and was, in some sense, a reputational attack. The Fourth Circuit’s analysis of some of

91. Id. at 224.
92. Id. at 219.
the language in the Epic was quite justifiable. For example, when the defendants stated that "God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth," the language would seem to be beyond the realm of the verifiable. Other parts of the Fourth Circuit's analysis are less plausible. The defendants named Matthew Snyder's parents and asserted certain statements about how they raised Matthew: "Albert and Julie... taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity... They also, in supporting satanic Catholicism, taught Matthew to be an idolater." It is hard to understand the Fourth Circuit's determination that these are not the sorts of statements that could be proved false. The court simply appears to be saying that a reasonable reader would understand the defendants to be engaged in a sort of hysterical venting that was not founded on genuine information as to how Matthew's parents in fact reared him and what they in fact taught him. Perhaps that is so, but that is quite different from statements that contain rhetorical or figurative language. Alternatively, the Fourth Circuit might have believed that a reasonable reader would understand the defendants to mean that the uncontroverted facts of Matthew's upbringing—being raised Catholic by parents who themselves went on to divorce—was equivalent to a "teaching" of the form they decry, and that assertion of an equivalence was itself not verifiable or falsifiable. While such a broad reading of Milkovich is consistent with the Fourth Circuit's precedent, there is ample reason to think that Chief Justice Rehnquist was aiming for a far less defendant-indulgent conception of protection for opinion in that case; indeed, it is widely recognized that the fact pattern before the Court in Milkovich itself would have been categorized as non-actionable by many courts in light of the fiery rhetorical context in which it appeared, but the Court insisted that since the content of the assertion was itself factual, the First Amendment protection did not cover it.

Let us put aside the Epic and assume arguendo for the remainder of this Article that the Fourth Circuit's disposal of Snyder's claims insofar as they were based on the Epic was justifiable. Nonetheless, the court's analysis of Snyder's claims concerning the funeral picketing

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93. Id. at 225.
94. Id. (alterations in original) (quoting the Epic).
95. See id.
was clearly unsound. Snyder was not seeking redress for a reputational attack but for an interference with the privacy of his grieving and the infliction of emotional distress precipitated by the interference. Pointing out that the words on the signs were nonfalsifiable is utterly nonresponsive to these claims. Were the invasion of privacy and IIED claims simply tactics for avoiding the U.S. Supreme Court’s defendant-protective defamation precedents, as the fraud and trespass claims in Food Lion were, that would be a different matter. There is no reason, however, to believe that was the case. The tactical avoidance in Snyder is the Fourth Circuit’s, not the plaintiff’s; the Fourth Circuit understandably wanted to avoid the difficult question of whether Falwell-level protection applies to a claim brought by a private figure and therefore tried to resolve the case with Milkovich, which applies to public figures and private figures alike. For better or worse, Milkovich does not suffice to resolve Snyder.

**IV. Outrageousness and the First Amendment Critique of IIED**

The Phelpses themselves have understandably supported the Fourth Circuit’s Milkovich analysis in arguing to the Supreme Court that the Fourth Circuit’s decision should be affirmed, despite the weaknesses of that opinion.97 They have also argued that Albert Snyder was a limited purpose public figure—a remarkably implausible position, given that the conduct upon which they premise Snyder’s limited-purpose public figure status occurred after the defendants’ allegedly tortious conduct.98 Ironically, the strongest argument for the Phelpses is one suggested by the petitioners’ framing of the issue: it is the proposition that Falwell’s requirement of actual malice in an IIED claim should apply to private figures and public figures alike, as long as the speech upon which the plaintiff’s claim is predicated relates to a matter of public concern.99 Although the Phelpses do not seem to have taken that position as a general matter, the Supreme Court of Arizona adopted a similar view in Citizens Publishing Co. v. Miller.100 Notably, Professor Eugene Volokh, a First Amendment scholar at UCLA School of Law, has written two articles and several blog posts taking

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98. See id. at *19.
99. Id. at *16.
100. Citizens Publ’g Co. v. Miller, 115 P.3d 107 (Ariz. 2005).
this position and, with the help of an education foundation and other First Amendment scholars, submitted an amicus brief advocating this position in Snyder.

Volokh’s argument seizes upon language in Falwell that appears to cast doubt on the legitimacy of the tort of intentional infliction of emotional distress through outrageous conduct.

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

This set of observations by the Falwell Court does not appear to depend at all on the status of the plaintiff as a public figure. Rather, argues Volokh, it relies on the vague and subjective nature of the concept of outrageousness in the tort of IIED. Vagueness is both a due process problem and a speech-chilling problem, since one cannot predict which statements will be deemed outrageous and this uncertainty would be more likely to generate self-censorship. Subjectivity is a problem for similar reasons; more generally, the law cannot be used as a tool for a community simply to punish speech that its members happen to find offensive. Both of these First Amendment vices exist regardless of whether the plaintiff is a public figure or a private figure. The logic of the argument implies that unless the speech in question is provably false—in which case it has no First Amendment value—the tort of outrage as applied to a case involving political speech is a violation of the First Amendment, whether the plaintiff is a public figure or a private figure. For the sake of completeness, Volokh adds that Snyder’s successful invasion of privacy claim under Maryland law was similarly untenable as a matter of First Amendment doctrine because the concept of “offensiveness” critical to that tort is vague and subjective in just the ways that “outrageousness” is in IIED.

This principled argument, allegedly rooted in the reasoning of Falwell, is buttressed by a classic First Amendment slippery slope argument. If this hysterical anti-gay speech at a peaceful funeral picket-

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103. Volokh, Intentional Infliction of Emotional Distress, supra note 17, at 303.
ing is deemed to be unprotected, then a huge array of potentially provocative speech may suddenly be subject to legal sanction or restriction, including political cartoons ridiculing Muslims, politically incorrect speech on college campuses regulated by college speech codes, threatening anti-immigration statements in the newspaper, and so on. So long as these kinds of speech might be found outrageous by a jury and a plaintiff is willing to say he was emotionally harmed, there is a possible claim. The chilling effect would be enormous.

Initially, there is a serious problem with this Falwell-based defense of the Phelps' position: it is not a tenable reading of what Chief Justice Rehnquist said in Falwell or of the Supreme Court’s fact/opinion jurisprudence more generally. The defense takes Chief Justice Rehnquist’s commentary about IIED in Falwell out of context. Falwell involved a reputational attack by Hustler in the context of a satirical critique of Falwell, who was plainly a public figure.104 The central question of the case was whether an infliction of emotional distress tort could proceed without proof that there was a statement seriously put forward by Hustler as true, which Hustler either knew was false or uttered indifferent to its truth or falsity.105 In short, the question was whether this emotional distress tort could sidestep the need for actual malice and falsity that exists in a defamation claim involving a public figure.106 The Court held that, in the context of a satirical critique of a public figure, the intentional infliction of emotional distress tort could not proceed without a showing of actual malice; Chief Justice Rehnquist ruled that this sort of political satire of public figures lay at the core of what the First Amendment protected.107 In constructing this argument, Chief Justice Rehnquist was clearly operating within the Gertz mindset, in which those who enter public life to the extent that Falwell did must be ready to withstand the blows of hard-hitting political speech.108

Having lost that battle as a general matter, Falwell argued further that because the conduct only generated liability under Virginia law if the jury deemed it outrageous, the First Amendment protection should give way; in short, Falwell ultimately argued for an exception from the general First Amendment holding based on the fact that an especially egregious sort of conduct was being targeted—that which a

105. See id. at 50.
106. See id. at 49.
107. See id. at 53–54.
108. See id. at 52.
jury found outrageous.\textsuperscript{109} The Rehnquist language quoted by Volokh is a rejection of that plea for an exception. Chief Justice Rehnquist expressed a lack of confidence in the capacity of the outrageousness concept to cabin the exception to the First Amendment protection for political satire of a public figure that the Court had already decided was critically important.\textsuperscript{110} The Court was \textit{not} expressing a view that there was a vagueness and subjectivity problem in the concept of outrageousness that prevented IIED from figuring as a defensible state tort.\textsuperscript{111}

There is an important dialectical response to this objection to Volokh’s argument; to be fair to Volokh, the more limited significance of Chief Justice Rehnquist’s language simply shows that \textit{Falwell} itself should not be interpreted as reaching out to make Volokh’s larger point about the tort of IIED. It leaves open the question of whether the Court should hold that any version of IIED utilizing the concept of outrage must fall under the First Amendment even in private-figure cases. As to that question, Volokh’s position is cogent: the vagueness and subjectivity of outrageousness demand rejection of IIED in cases involving political speech.\textsuperscript{112} A more detailed articulation of his view is presented on his well-known blog, The Volokh Conspiracy:

Yet, partly for the reasons that the Court gave in \textit{Hustler}, such speech is an important part of public debate. It should not be punished with multi-million-dollar liability, or even with college disciplinary sanctions. And it should not be deterred by the risk of such liability—a risk that is inevitable given the vagueness of the “outrageousness” standard: “[W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”

And such speech should also not be restricted using standards that leave jurors, university administrators, and other government decisionmakers free to impose liability based on the viewpoint of speech, under the vague and subjective “outrageousness” test. One defender of the \textit{Snyder} verdict views the subjectivity as a virtue: “The determination of when this behavior crosses the line into outrageous conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability.” “Civil action judgments ‘reflect social conven-

\textsuperscript{109} \textit{Id.} at 55. \\
\textsuperscript{110} \textit{See id.} at 56. \\
\textsuperscript{111} \textit{Id.} \\
tions and tend to reflect what the majority believes to be acceptable behavior." But the Supreme Court rightly said that such an approach is not permitted under the First Amendment:

[If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.\textsuperscript{113}]

Thus, even conceding that the \textit{Falwell} Court was criticizing the vagueness and subjectivity of the concept of outrageousness only in the context of political satire of public figures, \textit{Snyder} forces us to ask the broader question: Is the concept of outrageousness too vague and subjective to serve as a standard of liability, particularly in cases involving political speech?\textsuperscript{114} Once that question is asked, Volokh asserts, the answer is blindingly obvious: yes, the concept of outrageousness is too vague and subjective to serve as a standard of liability, especially when political speech is involved.\textsuperscript{115} Alert to the presence in Snyder's jury verdict of a privacy tort that does not expressly turn on outrageousness, Volokh cleverly suggests that the central place of the requirement that the privacy invasion be "offensive" in the intrusion tort is essentially a variation of the notion of "outrageousness" in IIED and suffers from all of its constitutional infirmities as well.\textsuperscript{116}

Before turning to a closer examination of the extent to which outrageousness and the IIED tort are vague, it is worth pausing to examine two questions. First, the tort of intentional infliction of emotional distress through outrageous conduct is just one of many areas in which nonspecific concepts and language are used in tort law; how can tort law be acceptable in a constitutional system that purports to take seriously concerns about vagueness and subjectivity? Second, why does the vagueness doctrine—which has its principal constitutional identity as a shield in criminal law cases challenging criminal law statutes—also arise in speech cases and sometimes see use as a shield against speech-restricting doctrines? The former question is the topic of the next Part of this Article. The latter merits at least a brief response.

\textsuperscript{113} Id. (alteration in original) (quoting without citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Chelsea Brown, Note, \textit{Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations}, 112 W. Va. L. Rev. 207, 232 & n.144 (2009)).

\textsuperscript{114} See id.

\textsuperscript{115} See id.

\textsuperscript{116} See Volokh, \textit{Intentional Infliction of Emotional Distress}, supra note 17, at 307–08.
The vagueness doctrine in constitutional law is rooted in the Due Process Clause.\textsuperscript{117} It was originally used to challenge criminal statutes that did not identify prohibited conduct with sufficient specificity to provide adequate notice and to constrain the conduct of legal decision makers, such as judges and prosecutors.\textsuperscript{118} Both in theory and in practice, vagueness arguments have been used to support due process critiques of regulations, ordinances, and regulatory enforcement actions beyond the criminal area.\textsuperscript{119} Vagueness arguments have also been used to support criticisms of the language of jury instructions, typically in connection with the authority of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{120} In the past twenty years, defendants attacking state punitive damage laws have persuaded several Justices to anchor their critiques in the Due Process Clause and to utilize vagueness arguments in supporting that critique.\textsuperscript{121} Vagueness has been used as a shield in several different strands of First Amendment case law.\textsuperscript{122} To a significant extent, however, the original First Amendment vagueness cases were also criminal law cases in which the criminal statutes in question targeted either speech or associations and sought to inflict criminal responsibility for expression of ideas or associations.\textsuperscript{123} Vagueness was viewed as a problem of constitutional moment in criminal cases and \textit{a fortiori} in criminalized speech cases.\textsuperscript{124}

To a great extent, the vagueness doctrine counteracts law that restricts two types of liberty: the liberty to do the proscribed acts, and the liberty to be free of the punishment imposed for doing the proscribed acts. In criminal free speech cases, the proscribed conduct is speech, making the liberty interest especially important in constitutional jurisprudence. Thus, to a great extent, vagueness critiques in free speech cases are simply a special application of the vagueness doctrine more generally, with special solicitude for the substantive liberty—freedom of speech—that is, in effect, restricted by overly vague law. Insofar as vagueness critiques are available where civil rather than criminal liability is in play, this is in part because the notice shortcomings that bedevil vague laws have a chilling effect, diminishing the

\textsuperscript{120} See, e.g., Giaccio v. Pennsylvania, 382 U.S. 399 (1966).
\textsuperscript{122} See generally Richard H. Fallon, Jr., \textit{Making Sense of Overbreadth}, 100 YALE L.J. 853 (1991) (setting forth and analyzing the role of vagueness in free speech cases and placing it in the context of the overbreadth doctrine).
public good that the Court has deemed part of the purpose of the First Amendment, and in part because freedom of speech is deemed of such constitutional moment. Finally, as Richard Fallon has explained, vagueness in free speech cases that is playing a role different from that which it plays in non-free speech cases is essentially a form of First Amendment overbreadth analysis. Because overbreadth analysis is essentially about whether a legislative text should be struck down facially and because Snyder is a common law case, Volokh’s vagueness is not properly interpreted as an overbreadth analysis.

Bringing all of these points together, the vagueness and subjectivity critique of Snyder shares the two major features of classic “due process” vagueness critiques: lack of clarity and objectivity (1) provides speakers with inadequate notice of what is proscribed, which is inconsistent with rule-of-law values, overly restrictive of an autonomy-based liberty of speech, and contrary to the ideal of a robust marketplace of ideas, and (2) creates the opportunity for pernicious selectivity in enforcement. With this in mind, the next Part turns to a discussion of whether the vagueness of tort law presents a sharp conflict with the due process values underlying the vagueness doctrine and, if not, why not.

V. INTERLUDE: THE OPEN TEXTURE OF TORT LAW

In his landmark book The Concept of Law, H.L.A. Hart recognized that legal terms and concepts operate with various levels of precision, crispness, and clarity. In many cases, lawmakers formulate a policy and then enact a piece of legislation with clean edges in order to ensure that the policy is implemented clearly and effectively. For example, one might wish to minimize the occurrence of injuries caused by intoxicated drivers and therefore enact a statute under which any person driving with a blood alcohol level of .08% thereby commits a felony. In other cases, however, one might want to provide guidance for the resolution of various disputes in a manner that accords with social norms and is deemed fair and balanced, and one might to this end entrench in the law a far less clear norm. For example, one might hold persons liable for accidental injuries they caused only if the person failed to exercise the care a reasonably prudent person would have exercised under the circumstances. Hart described the occurrence of such legal concepts as reasonableness as the “open texture” of the

125. See Fallon, supra note 122, at 905.
law.\textsuperscript{127} He rightly commented that in statutes—where language is used to articulate rules—the language is often not as sharp-edged as some would wish.\textsuperscript{128} The fuzziness of language around the edges is one of the ways in which law is open-textured.\textsuperscript{129} In common law systems where precedent rather than text serves the guiding role, the need to find the most pertinent dimension(s) of resemblance to precedent obviously serves to make the law quite open-textured.\textsuperscript{130} A rich vein of academic writing since Hart has used the term “standards” to refer to more relatively open-textured provisions of the law, and “rules” to refer to provisions with greater clarity. This literature has set forth with great sophistication the pros and cons of both.\textsuperscript{131} In any event, it was clear to Hart and should be equally clear to us today that tort law is chock full of standards and is as open textured as any area. To the extent that Volokh’s challenge is based upon what is essentially the open-textured nature of the concept of outrageousness in the tort of IIED, we must be ready to ask ourselves how much of tort law would survive the constitutional scrutiny that Volokh and the Phelpses are aiming to apply.

I intend to come at these questions from the opposite end, however: assuming, as we must, that tort law in general cannot be unconstitutional, how is it that tort law is consistent with due process, notwithstanding its heavy dependency on open-textured concepts? The short answer is that the nature of tort liability is very different from that of criminal liability or liability under a regulatory regime and that, in any event, tort law contains many features that cabin the potentially problematic aspects of open-textured predicates. Both parts of this answer require explanation.

Criminal statutes, criminal ordinances, civil ordinances, and civil regulations constitute rules of conduct announced by the state in order for the state to regulate citizens’ conduct. In setting down such statutes and ordinances, the state is, in effect, giving notice of rules that will be binding. The power to enact the rules at all carries with it the power to sanction individuals for non-compliance with those rules. It is part of our conception of due process that those who are expected to comply and will be punished for non-compliance must have been given notice of the rules. Each citizen’s vulnerability to sanction for

\begin{thebibliography}{99}
\bibitem{127} Id. at 128.
\bibitem{128} Id. at 128–29.
\bibitem{129} Id.
\bibitem{130} Id. at 132–33.
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non-compliance with a rule is conditioned on the rule's having been sufficiently published to constitute prior notice. Norms demanding some level of clarity—and concomitantly prohibiting certain levels of vagueness—are part-and-parcel of the criteria for sufficient ex ante publication of the enforceable rules of conduct.

Tort liability does not work this way. The imposition of liability is not the sovereign's carrying through on the threat of liability for non-compliance with an enforceable rule of conduct. Tort claims, unlike criminal prosecutions or regulatory enforcement actions, are claims by allegedly injured parties seeking redress for having been wrongfully injured. A tort plaintiff uses the court to seek this redress; he aims to exercise a right to exact damages from the one who wrongfully injured him. When a court imposes financial liability on a defendant, it accedes to the plaintiff's demand that liability be imposed on the defendant to pay damages to the plaintiff. Liability imposition is not a sanction for non-compliance but an empowerment of a wrongfully injured party. The reason a defendant is vulnerable to the plaintiff's claim as facilitated by the court lies in the defendant's having wrongfully injured the plaintiff, not the defendant's having broken a rule. To be sure, the defendant's vulnerability to a tort claim also depends on law, but it depends on the precedents for such acts of empowerment by courts. The precedents will, in turn, build upon various notions of wrongs—like battery, trespass to land, medical malpractice, negligent infliction of physical injury, libel, and fraud—but the common law has never been understood by our constitutional tradition to require any sort of crisp definition of those wrongs as a condition of the constitutional permissibility of tort judgments. Indeed, while we ought to remain vigilant of the importance of protecting a defendant's vulnerability to a private individual's tort claims, we also ought to remain vigilant of the importance of protecting a plaintiff's individual right to redress. Although there is an important sense in which tort law implicitly contains norms of conduct and duties of conduct as part of those norms, tort law's norms in the first instance are about which injuries of others will count as injurings for which another individual can be held accountable. The state's role is one of referee and enforcer when one individual demands to have another held responsible

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to her; that is very different from the role of prosecutor and punisher. The requirement for clear, advanced notice of the rules is, to at least some degree, a safeguard of individuals insofar as they face prosecution and punishment by the state.

Apart from the distinctive nature of tort liability, tort law actually contains numerous features that constrain its open texture. First, the liability is overwhelmingly make-whole damages anchored in an actual injury. The anchoring of the liability in the plaintiff’s injury is yet another reason why our system has tolerated the open texture of tort law. Deliberately vague standards become highly problematic when the focus shifts from redress to regulatory sanction or punishment, in part because one has lost the control provided by actual injury.

Secondly, the standards of tort law cut both ways in that defendants are much more likely to be able to articulate a workable defense if the domain of possible defenses is open textured, too. Indeed, as a distinguished tradition of American legal scholarship indicates, much of the force of the “reasonableness” standard of personal injury law may be understood as a remarkably broad range of exculpating factors.

In the third place, tort law’s standards do not come out of the blue; they are rooted in precedent that has accumulated and accreted over long periods of time, often drawing upon particular cases with a kind of judicial craft that is exacting in its own particular way. While potential defendants cannot really be expected to glean notice from precedent, one of the concerns about vague standards is that too much unbridled discretion is given to legal decision makers; in this context, the pressures of precedent, stare decisis, and judicial craft that we find in the common law are significant constraints.

With regard to judges, jurors, and citizens, the common law’s roots in social norms and social conventions provide another important constraint. The reasonably prudent person standard of negligence law, for example, is meant to be an elaboration of the notion of ordinary care. This standard is not aimed to draw attention to what economic rationality would demand or what unvarnished moral truth would require; it is instead aimed to draw attention to what we conventionally expect of one another by way of taking care and to place that inquiry in the hands of ordinary people. Many of the standards of tort law are thus aimed to be unambitious, undemanding, intuitive, and almost second nature. While this is hardly notice in the sense that we conceive the Constitution to require of the criminal law, it is a kind of law and a kind of responsibility where one does not need demanding notice.
A fifth sort of constraint relates to a large portion of tort law, that which involves accidents. To a significant extent, the liability in tort for accidents arrives with a sort of responsibility attribution that has been morally declawed; the social meaning of tort liability for a wide range of accident cases is a far cry from that of punishment and, while not fault-free, is plainly much less rooted in blame. At a concrete level, tortfeasors are able to insure for their tort liability, and for a wide range of legal actors, tort liability comes closer to being a cost of doing business than a form of legal culpability. Although I (along with Professor Goldberg) have cautioned against an overinterpretation of tort law as accident law and have insisted that even accidentally caused injuries are framed by our tort law as "wrongs," it is fair to observe that, in connection with accidental injuries, tort law plainly serves a compensatory and loss-shifting role in our legal system, even if it also plays other roles. The constitutional norm of advance notice for punishable wrongs is attenuated to the extent that our society's social understanding of tort law involves an understanding of wrongs in this attenuated sense.

Conversely, there remain numerous torts that are plainly conceived of as wrongs in a more full-blooded sense. Battery, conversion, and fraud are the most stark examples, but the general category of intentional torts is often considered to be quite different than accidental torts precisely because the wrongs are in some sense more robust, and the cost-shifting functionality of tort law does not seem to be a significant part of what is driving it. The cost-of-business mentality here and the phenomenon of liability insurance are often deemed wholly inapplicable, and so for these torts, one might think the notice problem is relatively more significant. Yet there are two special constraints that serve to alleviate due process concerns for just these sorts of torts. Most obviously, everyone knows that hitting, stealing, and lying are wrong, and these are torts that occur only when the defendant did this wrongful act intentionally. The patent wrongfulness of these torts and the intentionality built into their definitions counterbalance, to a significant degree, their open texture.

VI. THE PUTATIVE VAGUENESS OF "OUTRAGEOUSNESS" IN THE TORT OF IIED

I now turn from the open-textured nature of tort law generally to the open-textured, and in some ways subjective, nature of the tort of

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IIED, particularly in light of the central concept of “outrageousness.” When we understand just how IIED works and how outrageousness figures within it, and when we recognize the many tools that tort law uses to remain tolerable from a due process point of view, we will see why the imposition of liability for IIED is in principle far less problematic than it might first appear to be.

To the eyes of those who are unfamiliar with tort law in general or with IIED in particular, it might seem that a tort with the name “intentional infliction of emotional distress,” which turns on findings of “outrageousness,” is among the most untethered. This would be exactly backwards. In fact, because the kind of harm involved—emotional distress—has always generated concerns about fraudulent plaintiffs, IIED is among the most heavily guarded torts. This begins with the anchor in harm. Not only is it clear that the plaintiff must demonstrate harm and that the harm must be deemed “severe,” courts often engage in hard-nosed scrutiny of the evidence proffered in support of their severity claim. While most cases do not require proof of physical symptoms, some “have carried over the requirement of physical manifestation or symptoms from the law of negligent infliction of distress.” In any event, “[t]he case law is uniform that a person seeking to recover for this tort must show more than minor or modest distress, and instead must have suffered severe emotional disturbance.”

Similarly, the perception that the subjectivity of “emotional distress” and “outrageousness” creates a great degree of perilousness for the essentially innocent defendant inverts the legal reality, at least as a general matter. It would not be quite accurate to say that IIED is full of defenses; rather, the pliability of the standards themselves has generally permitted defendants to cast their conduct and the plaintiff’s reaction as conduct that, while admittedly inappropriate and hurtful, does not rise to the extraordinary level expected for the tort. Thus,

134. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 60–61 (5th ed. 1984) (“The requirements of the rule are rigorous, and difficult to satisfy.”).
137. Dobbs, supra note 135, at 832 (citing Vallinoto v. DiSandro, 688 A.2d 830 (R.I. 1997)).
139. Dobbs, supra note 135, at 832 (citing McQuay v. Guntharp, 963 S.W.2d 583 (Ark. 1998)).
140. KEETON ET AL., supra note 134, at 59 (“Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy in the form of tort damages for
for example, it is not surprising that the hurling of racist epithets does not usually generate liability or that the alleged sexually inappropriate behavior in Jones v. Clinton was not deemed sufficient to state a claim for IIED; regrettably, these sorts of behavior are not uncommon. Courts frequently reject IIED claims as a matter of law on the ground that the conduct was wrongful but not beyond the pale; the outrageousness requirement is aimed to ensure that “misconduct causing emotional harm alone is actionable only when it is utterly intolerable and goes beyond all bounds of civilized society,” all “bounds usually tolerated by decent society.” The open texture of the tort of IIED facilitates a remarkably supple means for defendants to craft arguments that succeed in extricating them from liability.

The law of IIED involves special sorts of judicial gatekeeping at both the procedural and the substantive levels. The tort is typically treated as having three or four elements (depending on whether, as in Maryland, causation is separated out). The conduct by the defendant must: (a) be outrageous and extreme, (b) be engaged in by the defendant with the intention of causing emotional distress, or with knowledge of or recklessness regarding the emotional distress it will inflict on others, and (c) cause severe emotional distress. Although each of these is a fact issue for the jury, the great majority of courts, including those of Maryland, take the view on element (a) that the court must make a preliminary determination on the issue of whether the conduct could be found by a jury to be outrageous. The Restatement (Third) of Torts explains this unusual feature:

The court, however, plays a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm . . . .

A finding of extreme and outrageous conduct is as much a normative judgment as it is a finding of historical fact (although that is often true of a finding of negligence).

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all intended mental disturbance. . . . There is no occasion for the law to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosed in an argument over a back fence.”.

141. Dobbs, supra note 135, at 830.
143. Dobbs, supra note 135 (citing the Restatement (Second)).
144. Keeton et al., supra note 134 (quoting Restatement (Second) of Torts § 46 cmt. g (1965)).
146. See Dobbs, supra note 135, at 832 (citing Restatement (Second), supra note 144, § 46 (laying out these three elements in different order)).
147. Restatement (Third), supra note 138, § 45 cmt. f; see also Harris v. Jones, 380 A.2d 611 (Md. 1977).
The institutional need to keep bounds on the drift of the tort and the liberty-based need to protect defendants against the whim of juries are the principal rationales for this widely accepted feature of the tort. As the quoted passage from the Restatement indicates, courts also are more vigilant in scrutinizing the third element—the severity of distress—than is the case with other torts for largely the same reasons as those just mentioned.

Most importantly, the judicial role in IIED is crucial at a substantive level. Indeed, it is quite misleading to think of IIED as a single tort whose principal conduct element is simply outrageous conduct. One must understand that part of what it is to articulate the contours of a tort—as Prosser famously did in his classic 1939 article on IIED— is to identify what is in common in various scenarios in which liability is imposed for a certain kind of injury. In doing so, however, a tort scholar could be saying that what makes the infliction of the injury constitute an actionable wrong is that this impermissible aspect of the conduct exists (outrageousness, along with intentionality and severe emotional distress, makes a sufficiently wrongful act to warrant the imposition of liability, all considered in each instance). But that is not, however, the only way to understand how it is that some attribute of conduct comes to count as an element in the structure of a tort. Sometimes what is happening is that courts have identified a variety of different kinds of injurious acts that they are willing to treat as wrongs, but theorists and courts—for a variety of systems-reasons—need to identify a differentia or differentiae in common among these in order to classify them as one tort. This is arguably the best way to understand even such a basic tort as negligence: medical malpractice and carelessly inflicted injuries in auto accidents both count as the tort of negligence, but the element of "negligence"—(or "breach" or falling below "due care") common to both is not so much the essence of the wrong as the differentia because of which they each count as instances of the same tort.

As a historical matter—and perhaps as a conceptual matter too—this is how outrageousness has functioned in the tort of IIED. Over decades and even centuries, courts recognized clusters of cases in the following areas: 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 mem-


149. See, e.g., KEETON ET AL., supra note 134, at 60 (aspiring to induce core of tort).
Prosser noted in all of these a level of intentional conduct that was beyond the pale of social decency, and in this sense outrageous, and used that concept to organize the set of sets, so to speak, in which liability for intentional conduct causing emotional distress could be found. It would be wrong to say that wherever there is intentional conduct that a jury could find outrageous and that resulted in severe emotional distress, there is liability. Judges and tort professors do not understand the law this way, even if some plaintiffs and their advocates are understandably drawn to using the tort in this fashion. It would be closer to the mark to say that there is a variety of scenarios that the law has developed in which inflicting emotional distress under such circumstances, if it is serious enough and the conduct is intentional, can count as an actionable tort, and we utilize the rubric of IIED to process these claims. That too would not be quite accurate, for part of what we do in the common law of torts is to remain open to the development of new kinds of scenarios that are best understood as constituting an actionable wrong, and the concept of outrageousness is there to guide courts in thinking about when a putative case should be said to belong to one or another kind of actionable scenario. In other words, the capacity of "outrageousness" to serve as a guide in fleshing out the open texture of tort law is part of its role, too. Additionally, even if we are within such a scenario—for example, a practical joke that in fact engenders severe psychiatric harm—courts are committed to the proposition that there should only be liability if the jury finds that the conduct in question lies beyond the outer edge of social decency.

It is therefore a serious understatement to say that there is substantial judicial gatekeeping as to juries' findings on outrageousness. For not only will courts make a preliminary determination as to whether juries could so find, they will also scrutinize the record after the fact to think about this as a matter on which courts carry power. Ascertaining whether there is outrageousness requires placing the fact pattern within the set of scenarios that do or should count as emotional tort wrongs at all. The tort is not "acting outrageously and thereby causing severe emotional distress." The tort is a family of torts loosely captured through the notion of outrageous conduct, and courts engage in precedent-based reasoning with only incremental movement forward in order to answer the question of whether the fact pattern warrants thinking that there is any tort there at all.

150. See id.
151. See Prosser, supra note 148, at 879–87.
152. Restatement (Second), supra note 144, § 46 cmt. d.
Two other aspects of our discussion of process protections in tort law are exemplified by IIED: conventionalism and the insurability/intentionality feature. It is often stated that conduct qualifies for the tort only if it is “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.”\textsuperscript{153} Likewise, in the much quoted words of the Restatement (Second), “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”\textsuperscript{154} These are highly conventionalistic statements. The first effectively states that the conduct will not qualify unless it clearly falls well outside of the periphery of basic standards of socially acceptable conduct. The second makes effectively the same point, utilizing the automatic subjective responses of the socialized ordinary person as a barometer of the degree to which the conduct deviated from socially acceptable conduct; the conduct must fly off the conventionalism chart if it is to count as inculpating the defendant for the tort.

Scholars naturally criticize the vagueness and apparent circularity of these principles, but this is really to miss what is happening. If one thinks of the tort itself as imposing liability for intentionally, knowingly, or recklessly causing severe emotional distress through intentional conduct done within certain kinds of scenarios—as cruel practical jokes or extortion, for example—then the tort would be quite cogent, but it would seem to carry quite a broad domain of liability. The requirement of conduct that everyone would call “outrageous” is, in effect, a decision narrowing this domain of 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. My point here is not that this built-in protection suddenly makes the tort irreproachable; it is simply that the conventionalism of the law’s understanding of outrageousness serves to diminish rather than exacerbate the notice problems others have attributed to the tort.

Finally, like many torts that provide redress for non-physical harm, the tort of IIED is by definition an intentional tort. There are many reasons for an intentionality requirement: one is that, as in New York Times v. Sullivan—where the Court permitted liability for knowing

\textsuperscript{153} Id.
\textsuperscript{154} Id.
defamation or its equivalent—the broad inclination toward a non-liability regime runs into a contrary instinct in which legal actors are willfully, maliciously, or recklessly inflicting injury upon others. Another reason, however, relates again to notice and, therefore, indirectly to due process. 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.

VII. Snyder v. Phelps Revisited

The analysis above allows us to think more carefully about the vagueness attack on IIED in the context of Snyder. Preliminarily, IIED claims are very much on the tort side of the tort/criminal division. No state has passed a statute condemning “outrageous” conduct or speech, nor has it laid down a recommendation to that effect. Curiously, many states did in fact enact statutes to protect those at funerals against picketers: the Phelps were the principal precipitators of state legislative action. Those statutes have been challenged in several courts around the country with mixed results. In any case, the plaintiff Snyder was not acting as a private attorney general of Maryland demanding that some criminal or regulatory fine be handed out; Snyder was suing for a wrong to himself. The question is not

156. See Snyder v. Phelps, 580 F.3d 206, 212 n.1 (4th Cir. 2009), cert. granted, 130 S. Ct. 1737 (2010) (“The Defendants have a substantial history of protesting at venues other than soldiers' funerals. For example, on the day of Matthew Snyder’s funeral, they also protested in Annapolis at the Maryland State House and at the Naval Academy. The Defendants have also been involved in litigation throughout the country relating to their protests. As a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing.” (citations omitted)).
158. Snyder sought and obtained a large punitive damage verdict ($8 million, on top of a compensatory damage verdict of $2.9 million), which the district court judge substantially reduced (from $8 million to $2.1 million) under the Maryland decision Bowden v. Caldor, Inc., 710 A.2d 267 (Md. 1998). Snyder v. Phelps, 533 F. Supp. 2d 567, 593–95 (D. Md. 2008). Bowden requires trial judges to ensure that punitive damage verdicts are commensurate with defendants’ abilities to pay, are not duplicative, and comply with several other factors including those that the Supreme Court has identified as critical. See 710 A.2d at 277. The district judge also ruled that the punitive damage verdict complied with BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and Philip Morris USA v. Williams, 549 U.S. 346 (2007). Snyder I, 533 F. Supp. 2d at 589–94. The verdict was, after all, below a 1:1 ratio of punitive to compensatory. The Fourth Circuit summarily rejected the Phelps’ appeal of the decision on constitutional due process,
whether Maryland may utilize the concept of outrageousness in a legal framework aimed at punishing the Phelps's for something they did wrong, in which ex ante warnings of the legal duty would be necessary. Similarly, we are not here dealing with a campus speech code. Such codes—concern over which supplied the driving force of the First Amendment scholars' amicus brief to the Supreme Court in Snyder—are campus-community analogues of criminal or regulatory prohibitions which come from on high as a set of conduct rules demanding compliance.159

The question in Snyder is whether Maryland may use the tort of IIED, with the concept of outrageousness that functions within it, to empower Snyder to redress the injury done to him by the Phelps.160 The fact that Snyder sought and received a substantial punitive damage verdict does merit analysis, however, even apart from the fact that the district court properly applied Maryland law to remit the damage award to an amount commensurate with a private law conception of punitive damages.161 Our analysis of IIED and Snyder must address, in the first instance, the right to obtain a judgment providing compensatory damages.

including it among several bases of appeal that the Fourth Circuit deemed to be "plainly without merit." Snyder II, 580 F.3d at 216. The Phelps did not petition for certiorari on any punitive damage issues.

Notwithstanding my view that the district court fairly ruled that the damage verdict was within the letter of Gore and Williams, under the rational reconstruction and extension of Williams I have proposed in another article, the punitive damage verdict in Snyder I might still be deemed constitutionally problematic. See Benjamin C. Zipursky, Punitive Damages After Philip Morris USA v. Williams, 44 Cr. Ruv. 134 (2007).

159. See generally Rights in Education Amicus Brief, supra note 102.

160. The United States Supreme Court's most important decision cutting into state tort law is probably New York Times Co. v. Sullivan, and it is no accident that this case conspicuously veered near criminal law in the eyes of the Justices. 376 U.S. 254 (1964). The plaintiff was not exactly a private party; he was a Commissioner of Montgomery, Alabama, suing in response to a statement that did not name him as a private person but criticized governmental "authorities." Id. at 256-57. There was no evidence of any actual injury or any reputational harm to him, and the Court understood the claim as virtually an equivalent of a criminal libel action brought through the instrument of state libel law. See id. at 277. Of course, First Amendment libel law has progressed enormously since Sullivan, and I am not suggesting a quasi-criminal aspect is necessary in a tort case for First Amendment scrutiny, in particular, or constitutional scrutiny, in general, to apply. The point is simply to note that our understanding of tort law as standing apart from the constitutional scrutiny of legislation is not inconsistent with the broad swath of cases flowing from Sullivan; rather, Sullivan's identity as the vehicle through which the Court entered state tort law into Fourteenth Amendment scrutiny is yet further evidence that the state-driven nature of the attack on a defendant is part of what renders constitutional scrutiny especially appropriate, and the privately driven nature is part of what has sustained a different and in some ways more deferential level of constitutional scrutiny.

161. See generally Zipursky, supra note 158, at 134 (discussing punitive damages in Snyder and explaining private law conception of punitive damages).
The principal argument of Part VI was that despite first appearances, the tort of IIED and the concept of outrageousness within it carry a range of attributes in light of which the tort quite easily complies with due process norms and the norms of lawfulness more generally. At the core of this argument was the recognition that it is not accurate to conceive of outrageousness as the trigger of liability. Rather, outrageousness normally serves two functions, each of which counts toward defendant protection rather than against it. In the first instance, the concept of outrageousness is utilized in precedent-based judicial reasoning and appellate review to bring together well established clusters of scenarios in which sensitivity to the emotional well-being of others is understood by our culture to be of paramount importance, and insensitivity is therefore regarded as utterly unacceptable. Secondly, outrageousness is used as a sort of extra check; even if the conduct itself falls squarely within a domain in which there is liability, the jury normally is required to find that the particular instance of conduct was indeed outrageous and beyond all possible bounds of decency. By requiring that the jury find the defendant's conduct to be beyond the periphery of what virtually everyone understands to be socially acceptable, the law is in effect securing a form of notice requirement. Let us look at these two aspects of outrageousness on the facts of Snyder.

First and foremost, the fact pattern in Snyder falls easily within one of the best established clusters of IIED cases: defendants who inflict emotional harm when dealing with the emotional sensitivities of those who are attempting to cope with the death of a loved one. Magruder's and Prosser's classic articles on emotional distress torts indicate that "[m]ishandling of corpses has given rise to another large group of cases where the courts have given redress for injured feelings." As Prosser noted, the law's willingness to recognize a right of action here is not rooted in the idea that the corpse is a piece of property that must not be damaged. Indeed, some of the oldest emotional distress torts involve imposition of liability on telegraph companies who wrongfully delay transmission of a telegraph informing of someone's death, thereby causing the plaintiff to miss the funeral of a close family member. The idea is that even if individuals do not generally

162. Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1064 (1936). See also Prosser, supra note 148, at 885–86 ("A number of decisions have involved the mishandling of dead bodies, whether by mutilation, disinterment, interference with burial, or other forms of intentional disturbance." (footnotes omitted)).
163. See Prosser, supra note 148, at 886.
164. See, e.g., Young v. W. Union Tel. Co., 11 S.E. 1044 (N.C. 1890).
have a special claim on others to be vigilant of their emotional well-being—or at least not a claim that rises to the level of salience and seriousness that warrants recognition as an actionable legal right—where the emotional well-being concerns efforts to endure the death or dying of a family member, individuals do have a claim upon others that they not act carelessly or recklessly to risk significantly interfering with that emotional sensitivity.

Emotional distress claims brought by grieving family members are no mere relic of the past. The intentional infliction of emotion distress tort continues to be utilized by plaintiffs in situations like those originally noted by Magruder and Prosser, as demonstrated by the 2009 Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm.\textsuperscript{165} Unsurprisingly, a broader range of fact patterns based on the same idea has emerged. All are rooted in the same principle: a person’s emotional sensitivity in regard to the death of immediate family members justifies a high level of respect and regard by others, and when that person is seriously emotionally injured by another’s failure to show adequate regard for that interest, a right of redress exists in tort.

A successful claim for outrage and invasion of privacy from Florida aptly illustrates this cluster of cases. Armstrong v. H & C Communications,\textsuperscript{166} like Snyder, involved a father (and mother) who claimed that the defendant’s outrageous conduct interfered with their grieving the loss of a deceased child. Robert and Donna Armstrong’s six-year-old child, Regina Mae, was abducted in June of 1985, and her remains were found by a construction worker two years later.\textsuperscript{167} A memorial service was held on August 22, 1988, in Orlando.\textsuperscript{168} That same day, a reporter for the defendant, which produced Channel 2 news, went to the Oviedo Police Department and videotaped images of the child’s skull.\textsuperscript{169} On the evening of August 22, the Armstrongs were watching Channel 2 news, which showed film footage of the memorial service as well as a videotape of animal remains that were originally believed to be the remains of Regina Mae.\textsuperscript{170} “Then, the cameraman cut directly to the Oviedo Police Chief removing her skull from the box, zoomed in for a frontal close-up of the titled skull facing directly at the camera,”\textsuperscript{171} and the voice-over described the skull as that belonging to

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\textsuperscript{165} Restatement (Third), supra note 138, § 45 cmt. f.
\textsuperscript{167} Id. at 280.
\textsuperscript{168} Id. at 281.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
Regina Mae Armstrong, who was being memorialized that day.\textsuperscript{172} The Florida appellate court had "no difficulty in concluding that reasonable persons in the community could find that the alleged conduct of Channel 2 was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community."\textsuperscript{173} "Indeed," concluded the court, "if the facts as alleged herein do not constitute the tort of outrage, then there is no such tort."\textsuperscript{174}

Similarly, an Illinois appellate court in \textit{Green v. Chicago Tribune Co.}\textsuperscript{175} recognized a mother's cause of action for IIED and invasion of privacy against a defendant who had interfered with her time with her fatally wounded son at a local hospital, both before and after the son died.\textsuperscript{176} "Reasonable people could find that . . . the Tribune's actions . . . suggest an alarming lack of sensitivity and civility, and reasonable people, in essence, a jury, could find the Tribune's behavior extended beyond mere indignities, annoyances, or petty oppressions and constituted extreme and outrageous conduct."\textsuperscript{177} \textit{Green} followed a similar case from California, \textit{Miller v. National Broadcasting Co.},\textsuperscript{178} in which a television crew entered a family home and filmed paramedics making an unsuccessful attempt to rescue the plaintiff's husband and then broadcast the film on television.\textsuperscript{179} Noting that the defendants appeared to imagine that they could act with "impunity," and remarking that the defendants' conduct suggested "an alarming absence of sensitivity and civility," the court recognized a cause of action for IIED in addition to one for trespass and invasion of privacy.\textsuperscript{180}

The past few cases are only a sliver of the plethora of successful IIED cases brought by severely distressed persons in connection with the funerals of their loved ones. Given that tort law proceeds by laying down examples that reflect increasingly straightforward and easy-to-grasp norms of conduct, it would thus be an inversion of reality to see the vagueness, subjectivity, or uncertainty of the IIED tort as a constitutional reason to preclude Snyder's recovery. Our legal system quite plainly understands family deaths as a special time for sensitivity and family funerals as a place to be especially careful not to interfere with what is probably life's greatest emotional vulnerability.

\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id. at} 282.
\textsuperscript{174} \textit{Id.}
\textsuperscript{176} \textit{Id. at} 251.
\textsuperscript{177} \textit{Id. at} 257.
\textsuperscript{179} \textit{Id. at} 670.
\textsuperscript{180} \textit{Id. at} 682.
Tort law's protection of the sensibilities of grieving family members is of course rooted in our culture's respect for the importance and solemnity of familial death. It is therefore no surprise that the same value is also entrenched in the law of privacy—the other tort asserted by Snyder. Strikingly, the most articulate expression of this principle in the law is a unanimous decision issued by the Supreme Court in 2003, *National Archives & Records Administration v. Favish*.\(^{181}\) *Favish* required the Supreme Court to decide the privacy rights of family members of Vincent Foster, Jr., deputy counsel to President Clinton.\(^{182}\) Foster committed suicide by shooting himself, and his body was found in Fort Marcy Park on the outskirts of Washington, D.C.\(^{183}\) Color photographs were taken of the death scene.\(^{184}\) After investigations by the FBI, House and Senate committees, and the Office of Independent Counsel (OIC) all ruled that it was suicide, a skeptical citizen, Allen Favish, made a FOIA request for the materials underlying those investigations, including the photographs.\(^{185}\) The question before the Court concerned the scope of a statutory exemption to FOIA that excuses the government from the need to disclose records that """could reasonably be expected to constitute an unwarranted invasion of personal privacy,""""\(^{186}\) which exemption the OIC had claimed as a ground for declining to turn over the photographs in light of the privacy interests of the Foster family members.\(^{187}\)

In an opinion joined by all members of the Court, Justice Kennedy ruled that the family members' privacy interests were so deeply rooted in our culture and our common law that FOIA must be interpreted as implicitly recognizing interests within the domain of privacy rights.

>[W]e think it proper to conclude from Congress' use of the term """"personal privacy"""" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.

....

Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.\(^{188}\)

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182. See *id.* at 160.
183. *Id.* at 160–61.
184. *Id.* at 161.
185. *Id.*
186. *Id.* at 160 (quoting 5 U.S.C. § 552(b)(7)(C) (2006)).
187. *Id.* at 164.
188. *Id.* at 167–68.
Although *Favish* ultimately addressed a question of statutory interpretation, a crucial premise of the decision was the Court's utterly confident and well-supported assertion that the common law recognizes a right of individuals grieving the loss of a family member against intrusion of those asserting their First Amendment rights.

In short, the perception that the outrageousness criterion invites too much subjectivity is really quite backwards, at least in the context of the facts of *Snyder*; behind the circumstances of the case itself lies a very rich common law and cultural history in the context of which the plaintiff’s claim easily passed the judicial threshold for IIED. In addition, of course, the jury had to find not only that the facts were as the plaintiff alleged but also that the defendants’ conduct within this particular scenario was indeed outrageous, and there is no reason to doubt that the jury found exactly so.

Turning now to the conventionalistic aspect of outrageousness, *Snyder* is again remarkably strong. There is simply no question that the Phelpses were fully aware that the conduct they engaged in is widely considered to be a gross intrusion on family members’ rights to a grieving process free of their intrusion. The Phelpses were quite open about the fact that they settled on their funeral-picketing of fallen soldiers because it generated such extraordinary publicity; it plainly generated publicity because of the shock, outrage, and anger with which ordinary people around the country reacted. Similarly, insofar as the intentionality of IIED is supposed to ensure that defendants do not find themselves unwittingly attributed with responsibility imposed by the state, the strategic cast of the Phelpses’ activities again gives reason to regard them as defendants who have been more than sufficiently provided with notice.

As explained in Part VI, courts evaluating IIED claims require that the plaintiff establishes severe emotional distress and typically demand a substantial evidentiary record to support such a claim. Maryland courts are no exception. In *Harris v. Jones*, the case in which the Court of Appeals of Maryland recognized IIED as actionable within the state, the court not only held that there must be sufficient evidence of severe emotional distress, but actually reversed the intermediate appellate court because it deemed the evidence before it to be insufficient. District Judge Bennett took seriously Maryland’s requirement that there be evidence of severe emotional distress and, in his opinion upholding the verdict in *Snyder*, noted that “[p]laintiff’s

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191. See id. at 616.
experts testified at trial that his depression and diabetes were exacer-
bated after the events of March 10, 2006.  

"While the doctors con-
cluded that it would be nearly impossible for Plaintiff to separate the emotional impact of Defendants’ actions from preexisting conditions and from general grief over the loss of his son, they agreed that De-
fendants’ actions had a significant impact."  

The expert testimony by physicians fortified Snyder’s own testimony regarding the severity of his response to the defendants’ actions, including vomiting and cry-
ing for hours.  

Snyder v. Phelps thus possessed many of the attributes that permit IIED to be consistent with constitutional values of due process, notwith-standing its utilization of an open-textured concept like outrageousness; indeed, outrageousness is in some ways utilized to strengthen the process protections of the tort. It must be said, however, that the district court’s treatment of the case falls short in at least one important respect. District Judge Bennett did not exercise his power to engage in any sort of muscular review of the claim that the conduct was outrageous. He did not appear to make a preliminary finding or post-verdict finding on the question of whether the Phelps’ conduct counted as outrageous. Such a review would have included a survey of relevant IIED case law as well as a review of the jury’s finding on this after the fact. As to the doctrinal issue, the court’s failure was relatively trivial, since, as our analysis revealed, the doctrinal case for an IIED action for intentional interference with a family’s grieving is extremely strong. As to scrutiny of the evidence put forward to the jury on whether the defendants in this case were acting outrageously, the district court’s failure was more questionable. Its review of the jury’s finding in general, and on outrageousness in particular, was very light. To the contrary, Judge Bennett deferred to the jury, permitting it to weigh the value of the defendant’s First Amendment rights and to override those rights if it so chose.  

While there were flaws in the district court’s handling of the case—and flaws that bear on concerns about the constitutionality of IIED torts in this setting—that would not be a sufficient reason to warrant judgment as a matter of law for the defendants. Recall that the flaw I have just indicated was essentially the very same problem for which the Fourth Circuit vacated the jury verdict: instructions that gave the jury too much of the First Amendment question and circumvented the court’s own responsibility to engage in substantial oversight of the   

193. Id.  
194. See id. at 572.
protection due, as applied to the facts of the case. The district court's overempowerment of the jury warranted the Fourth Circuit's vacating of the jury verdict. This is, however, a reason for remand, not reversal.

VIII. Conclusion

It seems intuitively obvious that the concept of "outrageousness" within the tort of intentional infliction of emotional distress is among the vaguest and most highly subjective standards our system ever uses. It seems to follow that the tort of IIED scores too low in process values to withstand the sort of First Amendment scrutiny that a case like Snyder v. Phelps appears to demand. The central goal of this Article was to explain why this superficially appealing line of argument should be rejected. Plainly, the concept of outrageousness does operate as a standard within the law of IIED, and plainly tort law itself is quite standard-driven and open-textured. Greater understanding of the IIED tort is required if one is going to undertake an assessment of how vague the concept of outrageousness is and what sort of constitutional problems, if any, are presented by its open-textured and to some extent subjective nature. More generally, one should not think about the constitutional implications of state tort law and its supposed uncertainties without recognizing that state tort law meshes with constitutional principles in quite a different way than the criminal and regulatory law to which most vagueness analyses are applied.

When one does explore the tort of IIED, one learns much that is comforting from a constitutional point of view. The concept of outrageousness in IIED turns out to be, in important respects, a process safeguard for defendants, not a wild card the state can use to punish whomever it chooses. On one level, outrageousness has served as something of a meta-concept to help courts bring together several different clusters of cases that were actionable, historically: extortion, practical jokes that were sufficiently severe to inflict debilitating injuries, and devastating insensitivity to those mourning the loss of a close family member. On another level, the concept of outrageousness has been used to add a level of second-checking for the jury; the conduct in question must be something that community members so easily and clearly identify as beyond the pale of social decency that it can be fairly assumed that its unacceptability presents no notice problem and is well understood. In this latter sense, the outrageousness requirement is part-and-parcel of what tort law does with intentionality; we

are only willing to impose liability for a variety of non-physical injuries—fraud, intentional interference with economic interest, invasion of privacy—when the scienter level is high enough to rule out the possibility that defendants are innocently or inadvertently engaging in conduct which is categorized as wrongful or tortious.

When Snyder v. Phelps is revisited from within a point of view that takes the state tort law of IIED seriously, it becomes quite an easy case. Interfering with a person’s grieving of a family member is—at the tort of assault—perhaps the oldest pure emotional harm tort there is: the right of family members to be protected from such intrusions is extremely well entrenched in the common law, as a unanimous Supreme Court expressly recognized in a different context only seven years ago. It is no surprise that the jury found the Phelpses’ conduct to be outrageous; the defendants themselves have explained that they choose upsetting conduct for the very reason of attracting as much attention as possible. In essence, the Phelpses were emotionally injuring Snyder because doing so was provocative, and this provocativeness was the best way to make a point. In this context, to suppose that there is an inherent vagueness or subjectivity at the core of Albert Snyder’s personal injury claim is to miss what the defendants themselves see as plain as day.

POSTSCRIPT: THE SUPREME COURT’S DECISION IN SNYDER V. PHELPS

A. The Justices’ Opinions in Snyder

Chief Justice Roberts’s majority opinion begins by declaring that the First Amendment protects an individual’s right to express his view on matters of public concern, indicating that “‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’” Phelps and his followers were expressing views on matters of public concern: war, homosexuality, morality, America’s involvements abroad, and its tolerance of homosexuality, among others; their verbal statements are therefore entitled to a high level of First Amendment protection. The right to picket peacefully on public streets regarding matters of public concern is well established.

After distinguishing cases in which picketing was not fully protected, the Court turned to what it regarded as, potentially, a more pertinent argument: that neutral time, place, and manner restrictions are permissible even for highly protected speech, and that Snyder's claim could be understood to assert that it was the funeral setting, not the content of the speech, that generated liability. Ultimately, however, the Court rejected this argument quite decisively:

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. 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. It was what Westboro said that exposed it to tort damages.

Having reached the view that it was a highly protected speech category and that it was not content-neutral or viewpoint-neutral, the Court then suggested that liability imposition could not be justified on the ground that the defendants caused offense. Such speech cannot be restricted simply because it is upsetting or arouses contempt: "'If 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.'"

Finally, the Chief Justice addressed the argument that the defendants should not be shielded from liability because the picketing was "outrageous." Quoting Falwell, he reasoned that "'[o]utrageousness' . . . is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'" To wrap things up, Chief Justice Roberts easily rejected the privacy and civil conspiracy claims, as well as the captive audience doctrine; a footnote early in the opinion articulates a procedural basis for the Court to limit its attention to the picketing activities and ignore the "Epic" entirely. The opinion of the Court concluded by declaring that this ruling is "narrow" and depends on the particular facts found in the record, which, as a matter of First Amendment doctrine, must be reviewed carefully.

199. Id. at 11–12.
200. Id.
201. Id. at 12–13.
202. Id. at 12 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
203. Id. at 16 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).
204. Id. at 13–14.
205. Id. at 3 n.1.
206. Id. at 14–15.
While Justice Breyer’s concurring opinion simply reiterates the narrowness of the holding and emphasizes that the Internet posting aspect of the case has not been considered, Justice Alito’s dissent takes the opposite tack. On virtually every issue agreed to by eight of the nine Justices, Justice Alito disagreed. While recognizing that some of the Phelpses’ speech was on issues of public concern, he argued that much of it was private and was directed at Snyder and his son; relatedly, he rejected the Court’s procedural argument that there was no need to consider any of the Phelpses’ conduct other than the picketing itself. Justice Alito especially emphasized the inappropriateness of permitting defendants to escape liability when they opportunistically selected this particularly intrusive and damaging method of expressing their point. And he was highly critical of his colleagues for their unwillingness to recognize a distinction between public figures and private figures. Most significantly (for my purposes in this Article), Justice Alito opined that “funerals are unique events at which special protection against emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable.” And, like the argument put forward in the body of this Article, Justice Alito’s dissent argues that the requirements of IIED are difficult to meet and that it is a “very narrow tort.”

B. A Brief Critique of Chief Justice Roberts’s Snyder Opinion

Preliminarily, Chief Justice Roberts’s opinion merits criticism simply as a matter of form; most particularly, the opinion fails to confront expressly the argument that Falwell’s First Amendment shield against IIED claims only applies to public figures, not to private figures. Prior to Snyder, it was beyond dispute in claims based on defamation and related speech torts that “issue of public concern” status was not necessarily enough to put the defendant in the highest tier of First Amendment protection; under Gertz and its progeny, private-figure/public-issue cases were less well protected than public-figure/public-issue cases.
issue cases. To be sure, a majority of the Court did not always take this view of the distinction between cases involving public figures and those involving private figures prior to Gertz, and a dissent in Gertz itself criticized the distinction. Moreover, the opinion of the Court in Hustler Magazine v. Falwell does not foreclose expansion of First Amendment protection to private figures in IIED cases, even if it expressly limits its holding to public figures. However, there is no question that the importance of the public-figure/private-figure distinction was a baseline in Falwell and is now rejected, at least for Snyder and IIED cases of a similar cast involving speech on issues of public concern. It is striking, to put it gently, that such a decision would be made silently, without any reference to the motivation of the public-figure/private-figure distinction in Gertz.

Turning to substance, three aspects of Chief Justice Roberts’s opinion are especially noteworthy in light of the concerns of this Article. First and most obviously, the opinion reasons that the concept of outrageousness is too subjective to be capable of overcoming the First Amendment protection that is afforded to matters of public concern. While not precisely the vagueness argument anticipated above, the Court’s concern is nearly functionally equivalent: it is unacceptable, the Court holds, to restrict speech by reference to a concept that is so malleable that it generates vast discretion in those deciding whether there shall be liability. Because outrageousness in the context of IIED is in fact far more constrained than the Court recognizes (as Part V showed) and because those constraints were respected by the district court on the facts of Snyder (as Part VI showed), the Court’s analysis on this critical point is unsound.

Second, the Court’s failure to grasp how the tort of IIED applied to this case also doomed it to an inadequate analysis of the content-neutrality issue. While Chief Justice Roberts was surely right to say that a “group of parishioners standing at the very spot where Westboro


217. See especially Justice Brennan’s plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47-48 (1971) (rejecting the view that cases involving matters of public concern invoke less defendant protection if the plaintiff is a private individual, rather than a public figure).


219. Falwell, 485 U.S. at 51 (“[P]ublic figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” (quoting Sullivan, 376 U.S. at 270)); Falwell, 485 U.S. at 57 n.5 (noting that the parties did not dispute that Falwell was a public figure).

stood, holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability, the hypothetical does not establish that liability was based on content or viewpoint. A raucous, publicity-seeking group of provocatively clad, multiply-pierced rockers holding provocative signs saying, "Love and Hot Sex, Not War!" might have generated liability, if they had been sufficiently opportunistic and media-seeking and had managed to transform Snyder's time of mourning into a national media circus. To the extent that content and viewpoint matter, it is not because the liability is for the content and viewpoint, or because the common law standard or the jury instruction are in any way framed in terms of content or viewpoint (they are not). It is because the core of the wrongful injuring that constitutes the tort, on facts like these, has to do with an opportunistic creation of a media sensation. It is a contingent fact (assuming the plausibility of Chief Justice Roberts's hypothetical) that "God Bless America" at a soldier's funeral would have triggered a very different (and entirely benign) set of predicate facts. It is not the words or the ideas, the content or the viewpoint, but the willful elimination of privacy and solemnity of the occasion (and the knowing or reckless creation of severe emotional distress) that generates liability. Of course, some words can and some words cannot be used as instruments in bringing about that goal. That does not make the tort content- or viewpoint-based, however.

Finally, a central theme of the critique in this Article is that tort law works very differently from criminal law or regulation. In the latter areas, the state is empowered to impose sanctions for conduct it wishes to prohibit, and it makes choices to prohibit certain conduct on the basis of its potentiality for bringing about harm. Constitutional standards determine both how the state may and must announce those prohibitions and what sorts of harm will be adequate to justify certain types of prohibition or regulation. This is plainly the paradigm of law, specifically constitutional law, that Chief Justice Roberts had in mind when he reasoned that the great distress of someone like Snyder is not a sufficient harm to justify a prohibition of speech like the Phelps'.

As I have argued at length above, the common law of torts does not operate anything like Chief Justice Roberts's paradigm of law. The question is not whether the state can sanction someone or implicitly whether the state can set out prohibitions of conduct enforceable through sanction. Nor is the question whether the right to express certain views may be curtailed when the speech has a certain potenti-

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221. Id. at 11–12.
ality for causing offense or distress. Rather, tort law says that there are certain ways that each of us is entitled not to be mistreated. It allows individuals to come to court and demand redress on the ground that they have been mistreated by the defendant in a manner that courts have regarded as substantial. It tells courts that if the plaintiff can establish that he was so mistreated, then he shall be entitled to hold the mistreater accountable for having wrongfully injured him.

Albert Snyder’s claim was that the Phelpses mistreated him by intentionally wrecking the private mourning of his son with a vulgar media sensation at his son’s funeral. The question is not whether the state may regulate or prohibit this type of speech. It is whether the state may permit accountability and individual recovery when one person has emotionally harmed another under such circumstances. Of course, it is in principle possible for a plaintiff or for the state to abuse the soft-edged standards of tort law in order to conceal what is essentially an effort to prohibit speech or regulate speech, to convert what is first and foremost an offense or disagreement into emotional harm, and then to convert the disfavored speech into outrageous conduct. So there is, as the Supreme Court has known full well since it decided New York Times v. Sullivan almost half a century ago, good reason to be careful in scrutinizing what the state and its law are really trying to do.

Had the Supreme Court really scrutinized the nature of the claim in Snyder, it would have seen that the case is a genuine tort claim for intentional infliction of emotional distress. Had it understood how IIED really works, it would have seen that it is an authentic tort, with all its pluses and minuses. And it would have seen that the “outrageousness” and the other requirements within the IIED tort itself are not there as wild cards to allow unpopular speakers to be sanctioned. On the contrary, these requirements exist to ensure that there will not be liability unless there is a deliberate or reckless injuring; unless the context is one in which it is understood that conduct of this sort is unbearably intrusive and individuals are highly emotionally vulnerable; and unless not only jurors, but judges, courts, and paradigms of precedent indicate that the conduct goes well beyond a socially tolerable way to interact with others. Had it recognized these things, the Court would have seen that tort law has long permitted juries to hold people accountable for breaching their duty to be vigilant of the emotional need to mourn the loss of a close family member.

Our nation's heroic free speech tradition surely does require that our legal system often "bite the bullet" and protect speech that it knows to be harmful. Constitutional rights must have the strength to stand up to arguments of individual or social utility. But the challenge of a rights-based legal tradition like our own is to find a way to define those rights so that they harmonize with the duties we owe to others. One would have thought—and our legal tradition has always thought—that the norm of respect for those who are in mourning would easily find a place in the domain of duties to others. Let us hope that Snyder is not emblematic of things to come in the Roberts Court, that the bright-line lure of free speech rights does not continue to stand in complete and total domination over the softer-edged standards that guide courts in determining the duties that we owe to others.